[2021] JMCA Civ 2

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00055

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA (AG)

BETWEEN	**THE PUBLIC SERVICE COMMISSION**	**1ST APPELLANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**2NDAPPELLANT**
AND	**DEANROY RALSTON BERNARD**	**RESPONDENT**

Carson Hamilton and Louis Jean Hacker instructed by Director of State Proceedings for the appellants

Marc Williams instructed by Williams, McKoy and Palmer for the respondent

8 October 2020 and 15 January 2021

BROOKS JA

[1] I have had the privilege of reading, in draft, the judgment of Simmons JA. Her reasoning and conclusions accurately reflect my own reasons for agreeing to the decision that the court made on 8 October 2020. I also agree with her conclusions in respect of the counter-notice of appeal. Courts exist to resolve disputes between parties and the reasoning of the Caribbean Court of Justice in **Watson v Fernandes** [2007] CCJ 1 (AJ) is apposite in this context. The court stated, in part, at paragraph [39]:

> "…Justice is not served by depriving parties of the ability to have their cases decided on the merits because of a purely technical procedural breach committed by their attorneys…."

SIMMONS JA

[2] On 24 May 2019, having heard an application to strike out the claim filed by Mr Deanroy Ralston Bernard (the respondent), Henry-McKenzie J (Ag) (as she then was) made certain orders including the following:

(i) The notice of application to strike out claim filed on 7 May 7 2019 is refused.

(ii) The fixed date claim form filed on 26 April 26 2019, is to be treated as the application for leave to apply for judicial review.

(iii) The hearing of the application for leave to apply for judicial review is adjourned to 18 July 2019 at 12 noon for one hour.

[3] By notice of appeal filed on 5 June 2019 the Public Service Commission and the Attorney General of Jamaica ("the appellants") seek to challenge those orders. The grounds of appeal are as follows:

> " a. The learned Judge erred in law by finding that the Fixed Date Claim Form filed on April 26, 2019 seeking leave to apply for judicial review is not a nullity.
>
> b. The learned Judge erred in law by finding that although an Application for Leave to Apply for Judicial Review must be by way of Notice of Application for Court Orders pursuant to Rule 56.3 of the Civil Procedure Rules, 2002, the Respondent's Application for Leave

to Apply for Judicial Review by way of Fixed Date Claim Form is not fatal.

c. The learned Judge erred in law by finding that Part 26 of the Civil Procedure Rules, 2002 is applicable at the leave stage of an application for judicial review.

d. The learned Judge erred in law by finding that she has discretion under Rule 26.9 of the Civil Procedure Rules, 2002 to treat the Fixed Date Claim Form filed on April 26, 2019 as the Notice of Application for Leave to Apply for Judicial Review.

e. The learned Judge erred in law by finding that the Fixed Date Claim Form filed on April 26, 2019 is to be treated as a Notice of Application for Leave to Apply for Judicial Review."

[4] On 19 June 2019 the respondent filed a counter notice of appeal largely seeking an affirmation of the orders made in the court below. It states as follows:

"a. That the learned Judge was correct in treating the Fixed Date Claim Form as a Notice of Application for Court Orders pursuant to Part 26 of the Civil Procedure Rules, 2002 and/or in the alternative pursuant to Part 1 of the Civil Procedure Rules, 2002.

b. That the learned Judge was correct in finding that the substance of the application remained unaffected. It was a matter of form versus substance. The matter is one of discretion which is expressly conferred on the court and which discretion must be informed by the overriding objective which enables the Court to deal with cases justly.

c. Rule 56.3 of the Civil Procedure Rules, 2002 describes in detail the method of application for Judicial Review but remains silent on the form which the application of leave to apply for Judicial Review ought to take.

d. The only issue cognizable by or within the jurisdiction of the court was the application for leave for judicial review.

e. In order to obtain leave, the Respondent was obliged to put before the court adequate evidence to support the application.

f. The Respondent [is] obliged upon obtaining the leave of the court to file a fresh fixed date claim form for judicial review, in commencement of the proceedings pursuant to the order granting leave."

[5] On 16 July 2019 the appellants filed a notice of application seeking a stay of execution of the abovementioned orders (ii) and (iii). This application was considered by Sinclair-Haynes JA and was refused.

[6] On 8 October 2020 having heard counsel's submissions, this court made the following orders:

1. "The appeal is refused.

2. The order of the learned judge made on 15 May 2019 is affirmed.

3. Costs of the appeal to the respondent to be taxed if not agreed."

[7] We also indicated then that we would provide our reasons in writing. This judgment is a fulfilment of that promise. Our decision on the questions arising for consideration in the counter notice of appeal was reserved.

Background

[8] The dispute between the parties had its genesis in the re-assignment of the respondent from his previously held post of Permanent Secretary in the Ministry of Education, Youth, and Information to that of Director General in the Ministry of Finance and Public Service.

[9] The respondent was informed of this change in his employment by way of letter from the Office of the Services Commission dated 1 March 2019. The letter stated that the re-assignment was being done upon the recommendation of the Honourable Andrew Holness, Prime Minister, ON, MP to the Governor-General and in keeping with section 126(3) of the Constitution of Jamaica. This re-assignment was to take effect from 14 February 2019. The respondent's salary and allowances were unchanged.

[10] On 26 April 2019 the respondent, who was aggrieved by that decision, filed a fixed date claim form in which he sought the following orders:

> "(i) An order granting Leave for Judicial Review into the circumstances under which the Office of Services Commission issued letter dated March 1, 2019 reassigning the Claimant to the Ministry of Finance and the Public Service as Director General Designate;
>
> (ii) An order staying the Execution of the directive of the Public Service Commission for the re-assignment of the Claimant to the Ministry of Finance and the Public Service as Director General Designate;
>
> (iii) An order declaring the re-assignment of the applicant to the Ministry of Finance and the Public Service as Director General Designate unconstitutional and a nullity and of no effect on the applicant's appointment and assignment to the Ministry of Education, Youth and Information;
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> (iv) An order mandating the Public Service Commission to reverse its directive to re-assign the applicant and to give due expressed recognition of the Claimant as the duly appointed Permanent Secretary in the Ministry of Education, Youth and Information;
>
> (v) An order barring the Public Service Commission from appointing any person as Permanent Secretary [in] the

Ministry of Education, Youth and Information until this matter is heard and determined; and

(vi) Such further and other relief as the Court deems just."

[11] The grounds on which the respondent relied are as follows:

"1. The Prime Minister of Jamaica has no authority to recommend to the Governor General that the claimant who holds the office of Permanent Secretary be reassigned to the Director General Designate in the Ministry of Finance and the Public Service;

2. The Public Services Commission had a duty to review the Prime Minister of Jamaica's recommendation and the Governor General's authority to order the re-assignment of the applicant to Director General Designate in the Ministry of Finance and the Public Service;

3. Neither the Constitution of Jamaica nor the Staff Orders contemplated the tool of re-assignment being used to forcibly move a Permanent Secretary from his assigned or appointed position to a lower position or any other position in the public service;

4. Furthermore the Director General (Designate) is not recorded in the Civil Service Establishment Act as appropriated to the Ministry of Finance and the Public Service;

5. There existed no clear responsibilities, subject matter, resources and authority vested in the designation of Director General to make such a designation equivalent to the post of Permanent Secretary, which is to supervise the work of the portfolio assigned to a Minister as per the Minister's instrument of appointment;

6. The claimant's due appointment and assignment of the Education, Youth and Information portfolio cannot be undone by the actions as per Gazetted Notice, OSC Ref# C4835…19 Dated March 1, 2019 as Sections 126(3) gives the Prime Minster of Jamaica no authority to recommend the Claimant's reassignment and vests no authority of reassignment in the

> office of Governor General nor the Public Service Commission of Jamaica; and
>
> 7. The reassignment to the designation of Director General without cause, without due process and tantamount to a demotion given that the Ministry of Finance and the Public Service is headed by a Financial Secretary who for the purposes of the constitution is a Permanent Secretary, vide Sections 93(2) and 126(4)."

[12] The fixed date claim form was supported by the respondent's affidavit of urgency in support filed on 26 April 2019.

[13] The appellants responded by filing a notice of application to strike out the fixed date claim form on 7 May 2019. The application was not supported by any affidavit evidence.

[14] The grounds on which that application was based are as follows:

> (i) "the respondent failed to comply with rule 56.3 (1) of the [Civil Procedure Rules] which requires that leave be obtained before the filing of the fixed date claim form seeking judicial review;
>
> (ii) the respondent ought to have sought such leave by a notice of application and not a fixed date claim form; and
>
> (iii) that the fixed date claim form which was filed is a nullity as it was filed before obtaining leave to do so."

[15] The application was heard on 15 and 24 May 2019 by Henry-McKenzie J (Ag) (as she then was) who, having heard submissions from the attorneys-at-law for the appellants and the respondent, made the orders set out in paragraph [1] of this judgment.

[16] The learned judge, in her consideration of the matter, focused on the following issues:

(i) Whether it was appropriate to seek leave for judicial review by way of a fixed date claim form; and

(ii) Whether any procedural error on the part of the respondent could be cured by rule 26.9(3) of the CPR.

[17] In her reasons for judgment the learned judge noted that administrative orders are governed by part 56 of the Civil Procedure Rules, 2002 ("CPR"). She also stated that part 56 was silent on how an application for leave for judicial review should be made. The learned judge also found that the use of the fixed date claim form to apply for leave was an irregularity as a fixed date claim form should only be filed after leave to apply for judicial review has been obtained. The proper procedure, she said, would have been the filing of the application for leave by way of a notice of application for court orders in accordance with part 11 of the CPR.

[18] Henry-McKenzie J (Ag) then addressed the issue of whether rule 26.9(3) of the CPR could be invoked to cure this error in light of the appellants' contention that by virtue of rule 56.13(1), parts 25 to 27 of the CPR only apply at the first hearing of the substantive application for judicial review.

[19] In her consideration of this issue, the learned judge found that the cases of **Lafette Edgehill and Others v Greg Christie** [2012] JMCA Civ 16 (**Edgehill**) and

Orrett Bruce Golding and the Attorney General of Jamaica v Portia Simpson Miller (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 3/2008, judgement delivered on 11 April 2008 (**Golding**), which had been referred to by counsel for the appellants, could be distinguished. She said that in **Edgehill**, the claim was filed before the application for leave was heard unlike the present case where the leave was being sought by way of a fixed date claim form.

[20] Where the issue of whether rule 26.9 of the CPR could be invoked to cure the procedural defect is concerned, she found that **Golding** was inapplicable. The learned judge stated that rule 26.9 was of no assistance as the appellant in that case had breached rule 56.4(12) which provides that a claim should be filed within 14 days of the grant of leave. She stated that in **Golding**, Smith JA had stated that rule 26.9 could only be invoked where no consequence had been stated for the breach of a particular rule and the consequences of non-compliance were clearly set out in rule 56.4(12).

[21] At para [31] of her judgment Henry-McKenzie J stated that:

> "[31] It is evident that it is the intention of the Respondent to make an application for leave for judicial review as seen in paragraph 1 of the Fixed Date Claim Form. In the circumstances, the court can exercise its discretion to make things right and to give effect to the application by treating the Fixed Date Claim Form as the Application for Leave to Apply for Judicial Review. I do not believe that this error in the procedure is fatal."

She also found that in the case before her the consequences of non-compliance had not been specified and as such, the court could invoke its general powers under rule 26.9(3).

[22] Moreover, the learned judge found that her decision would not cause any unfairness or prejudice to the appellants. Rather, she found that to strike out the claim would cause grave prejudice to the respondent. She also correctly pointed out that striking out should only be done as a last resort and in her view, the case did not warrant such action.

[23] The learned judge also opined that the application of the overriding objective requires the movement away from "unnecessary technicalities and formalities which will be a bar to the fair and expeditious hearing of matters"[1] and that the rules of court are to be interpreted in such a way which promotes the overriding objective. The learned judge stated that "where there is an error in procedure which goes to form rather substance, which can be rectified"[2] the rules should be applied to rectify the error.

Discussion and analysis

[24] Based on the grounds of appeal and counter appeal, I have summarized the issues before this court to be as follows:

1. Whether the use of the fixed date claim form to apply for judicial review is irregular? (grounds a, b and e of the notice of appeal and grounds a, b, c and f of the counter notice of appeal)

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[1] Paragraph [35].
[2] Paragraph [35].

2. Whether the inclusion of the substantive reliefs being sought in the fixed date claim form rendered it a nullity? (grounds a, b and e of the notice of appeal and grounds a, b, e and d of the counter notice of appeal)

3. Whether Part 26 of the CPR is applicable at the leave stage of judicial review proceedings? (grounds c and d of the notice of appeal and a and c of the counter notice of appeal)

[25] I will now proceed to consider each issue.

Whether the use of the fixed date claim form to apply for judicial review is irregular?

For the appellant

[26] Mr Hamilton, on behalf of the appellants, pointed out that rule 56.3 (1) of the CPR provides that a person wishing to apply for judicial review must first obtain leave ("stage one") before filing an application for judicial review by way of fixed date claim form ("stage two"). Reference was made to **Golding**, in which Harris JA described the process in the following terms:

> "Part 56 of the CPR outlines the procedure with respect to applications for administrative orders. It mandates that the judicial process be carried out in 2 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."

[27] He submitted that at the leave stage a party ought properly to seek leave by way of a notice of application. Reference was made to **Edgehill** in which Phillips JA outlined the procedure in part 56. Counsel submitted that the difference between the two processes is not just one of form over substance. He stated that a fixed date claim form and a notice of application for court orders are two distinct documents with different purposes and as such, one cannot be converted into the other.

[28] He submitted that **Eldemire v Eldemire** [1990] UKPC 36 can be distinguished as in that case the issue was whether the use of an originating summons instead of a writ of summons was appropriate where there were facts in dispute. It was further submitted that although part 56 of the CPR does not prescribe the method which ought to be utilized in seeking leave, in **Edgehill,** Phillips JA indicated that a notice of application accompanied by an affidavit is to be filed.

[29] Reference was also made to **Petrojam Limited v The Industrial Disputes Tribunal and the Minister of Labour and Social Security** [2018] JMSC Civ 166 (**Petrojam**) in which Rattray J stated at paragraph [37] that:

> "The CPR in this jurisdiction, does not permit what is termed a 'rolled-up hearing.' In other words, the Court cannot hear the substantive claim for Judicial Review at the same time that leave is being sought from the Court. This point was rightly conceded by the learned Director of State Proceedings. However, such an approach is permissible under the English CPR, while not permissible under the Jamaican CPR. This is so because at the leave stage, there is no claim filed as yet, and so the substantive reliefs that would be sought in the claim, cannot be considered or granted by the Court, even if the parties were to consent to such an Order being made…."

For the respondent

[30] Mr Williams, on behalf of the respondent, agreed that an application for judicial review was a two stage process. He submitted that **Golding** was inapplicable in this case as the court did not address entirely or in part, the procedure to be used by an applicant who seeks leave to apply for judicial review.

[31] Mr Williams submitted that, even if this court agrees that a notice of application ought to have been used to apply for leave, the substance of the application was unaffected by the use of the fixed date claim form. He also submitted that the use of the fixed date claim form did not impact on the fairness of the process as the respondent was not seeking to bypass the requirement for leave.

[32] Counsel stated that the respondent utilized the fixed date claim form to apply for leave and seek practical interim reliefs. He indicated that substantive reliefs were not being sought. It was further contended that the seeking of interim relief in the said fixed date claim form was permissible by rule 56.4(9) of the CPR and was included to assist the court in making its decision as to the grant of leave. He stated that having been granted leave, the respondent filed a fixed date claim form detailing the substantive reliefs being sought.

[33] He submitted that the matter is one in which the court was required to exercise its discretion in keeping with the overriding objective and the use of the fixed date claim form did not undermine the principle of fairness. In this regard he reiterated that the fixed date claim form was used only to apply for leave rather than the substantive relief

of judicial review. In the circumstances, it was submitted that to find that the fixed date claim form was a nullity solely on the basis of a technicality would be unfair to the respondent. Reference was made to **Eldemire v Eldemire** in which Lord Templeman stated:

> "In general, the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification."[3]

Discussion

[34] Applications for judicial review are governed by part 56 of the CPR. Rules 56.3(1) and (2) state:

> "56.3 (1) A person wishing to apply for judicial review must first obtain leave; and
>
> (2) An application for leave may be made without notice."

[35] Of relevance also, is rule 56.9(1) which provides:

> "56.9 (1) An application for an administrative order must be made by a fixed date claim in form 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), and must identify the nature of any relief sought."

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[3] Page 238-239.

[36] The procedure for such applications has been the subject of much judicial discourse in our courts (see **Petrojam** and **Golding**). It is clear from the CPR and those authorities that the procedure for judicial review is a two stage process which first requires an application for leave to apply for judicial review. If leave is granted the proceedings are to be commenced by way of a fixed date claim form within 14 days of the receipt of the order granting leave.

[37] Rule 56.3 does not state how an application for leave for judicial review should be initiated. It is, however, clear that an application for judicial review cannot be made unless permission is granted. Rule 8.1(5) states that where a remedy is being sought before proceedings have begun it must be done by way of a notice of application. This rule, in my view, would not be applicable in this case as an application for leave is one for permission to pursue the remedy. The applicable rule is rule 11.1 which states that part 11 deals with applications which are made "before, during and after the course of proceedings". An application for leave being the precursor to the commencement proceedings for judicial review would fall within the ambit of part 11.

[38] This court has also indicated that a notice of application is to utilized for such applications. In **Edgehill** Phillips JA said:

> "[66] The general rule is that applications must be made to the registry where the claim was issued, (rule 11.5(1)), but the rules do envisage an application being made before the claim is issued, which must be made to the registry where it is likely that the claim to which the application relates will be made (rule 11.5(3)). **This is relevant to the application for leave to apply for judicial review, as the notice of application is**

> **filed with an accompanying affidavit before the claim is filed.** The rules give details of the specific information which must be stated in the application and which must be verified on affidavit, with a short statement of the facts relied on (rule 56.3). Once leave is obtained, the rules indicate that the court, on the grant of leave, must direct the date for the first hearing of the application for judicial review (rule 56.4 (11)), which could include directions for the efficient disposal of the matter, inclusive of orders relating to witness statements, discovery and service of skeleton submissions (rule 56.3(3)), or in an emergency, when the full hearing of the claim for judicial review will take place. The claim must then be filed, with the date for the hearing (already directed by the court) inserted thereon, duly impressed with the stamp and seal of the court by the registry, and is then issued by the court (rule 56.9). This must be done within 14 days of the order granting leave in order to be effectual, and as the leave is conditional on the making of the claim, if the claim is not filed within the 14 days the leave lapses (rule 56.4 (12))." (Emphasis supplied)

[39] The issue in the above case was whether Rattray J was correct in concluding that he had no jurisdiction to hear the application for judicial review in circumstances where the fixed date claim form was filed contemporaneously with the application for leave. The above statement, with which we agree, was therefore obiter in so far as it relates to the method by which an application for leave is to be made.

[40] In light of the above, the learned judge was correct in her finding that the application for leave by way of a fixed date claim form was an "irregularity".

Whether the inclusion of substantive reliefs in the fixed date claim form rendered it a nullity?

For the appellant

[41] It was submitted by counsel for the appellants that the respondent, by filing a fixed date claim form prior to leave being obtained, violated the established principle which prohibits a "rolled-up hearing" in this jurisdiction. In other words, the respondent was improperly seeking to advance both stage one and stage two of judicial review proceedings at the same time. As such, it was argued that the fixed date claim form was a nullity and should not have been treated as an application for leave.

For the respondent

[42] Mr Williams stated that there was never any intention on the part of the respondent to bypass the requirement for leave and that the reliefs sought in paragraphs 2-5 of the fixed date claim form were all an attempt to comply with rule 56.3(3) which requires an applicant to provide details of the interim and substantive reliefs being sought.

[43] Mr Williams also stated that having obtained leave a new fixed date claim form was filed and when it is compared with the first one the differences are obvious.

Discussion

[44] The fixed date claim form in addition to applying for leave, requested a stay of the execution of the directive of the Public Services Commission and an order barring the appointment of anyone to the post of Permanent Secretary until the matter is determined. The reliefs which have caused some concern are numbers 3 and 4. For ease of reference they are repeated here. They are:

> "3. An order declaring the re-assignment of the [respondent] to the Ministry of Finance and the Public Service as Director General Designate unconstitutional and a nullity

and of no effect on the [respondent's] appointment and assignment to the Ministry of Education, Youth and Information.

4. An order mandating the Public Service Commission to reverse its directive to re-assign the [respondent] and to give due expressed recognition of the [respondent] as the duly appointed Permanent Secretary in the Ministry of Education, Youth and Information."

[45] Rule 56.3 of the CPR which deals with applications for leave states in part:

> "(1) A person wishing to apply for judicial review must first obtain leave.
>
> (2) An application for leave may be made without notice.
>
> (3) The application must state –
>
> (a) the name, address and description of the applicant and respondent;
>
> (b) **the relief, including in particular details of any interim relief, sought**…" (Emphasis supplied).

Whilst the application for a stay of the directive and the appointment of anyone until the matter is determined are interim in nature, the same cannot be said for reliefs 3 and 4.

[46] The appellants have referred to **Petrojam** in which Rattray J found that the proceedings which were being challenged fell within the definition of a "rolled up" hearing. I have however noted that, in that case, the court was being asked to set aside orders made on an application for leave granting orders of certiorari and prohibition. The application was based on the ground that those orders could only have been made on a claim for judicial review.

[47] It is common ground that an application for judicial review is a two stage process and that there is no room for a "rolled up" hearing. However, the facts in **Petrojam** can in my view, be distinguished from those in this appeal. Henry-McKenzie J did not conduct a "rolled-up hearing". She treated the matter as one for an application for leave and nothing more.

[48] The learned judge, at paragraph [34] of her judgment, also bore in mind the overriding objective "to deal with cases justly" in arriving at her decision. Rule 1.1(2) states:

> "Dealing justly with a case includes-
>
> (a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;
>
> (b) saving expense;
>
> (c) dealing with it in ways which take into consideration-
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> (i) the amount of money involved;
>
> (ii) the importance of the case;
>
> (iii) the complexity of the issues; and
>
> (iv) the financial position of each party;
>
> (d) ensuring that it is dealt with expeditiously and fairly; and
>
> (e) allotting to it an appropriate share of the court's recourses, while taking into account the need to allot resources to other cases."

[49] The court is however not at large in applying the overriding objective. The scope of the court's discretion was addressed in **Charmin Blake v Alcoa Minerals of Jamaica Inc** [2010] JMCA Civ 31 at paragraph [19] where Phillips JA stated:

> "[19] …It is accepted though and the court must be mindful, as made clear in the judgment of Kay, L.J in **Totty v Snowden** [2001] 4 All ER 577, that even though the rules require the court to have regard to the overriding objective in interpreting the rules, 'where there are clear express words, as pointed out by Peter Gibson, LJ in Vinos' case, the court cannot use the overriding objective 'to give effect to what it may otherwise consider to be the just way of dealing with the case'.' However, '**Where there are no express words, the court is bound to look at which interpretation would better reflect the overriding objective**'. There is no doubt therefore that the court in interpreting the rules must at all times give effect to the overriding objective, and to that extent in the circumstances of this case, in dealing with the case justly, would include although would not be limited to, being focused on and endeavouring to ensure that the matter was dealt with expeditiously and fairly, while saving expense and not utilizing too much of the court's time." (Emphasis supplied)

[50] In keeping with the overriding objective, the court, unless expressly prohibited should interpret the rules in such a way which gives precedence to fairness, efficiency and unnecessary costs not being incurred. A similar view was expressed by Lord Templeman in **Eldemire v Eldemire** who said:

> "In general the modern practice is to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification."

[51] This is, however, not a licence to flout the rules as was noted by Henry-McKenzie J (Ag) in paragraph [35] of her judgment. The focus on substance over form is permissible depending on the circumstances of the case, especially where to do otherwise may

prejudice a party such as the respondent whose case is extremely time sensitive. In this regard, I have borne in mind that an application for leave is required to be made promptly and "in any event within three months from the date when grounds for the application first arose".[4]

[52] The grant of leave is the first order that was sought in the fixed date claim form. In addition, the affidavit in support of the fixed date claim form states that the "claim" is being made in accordance with rule 56.3 of the CPR which deals with applications for leave.

[53] To require the respondent to restart his case would expose the respondent to the risk of a court finding that he had delayed in making his application. The costs already incurred would also have been wasted.

[54] The learned judge was cognizant of these considerations. She stated:

> "[31] It is evident that it is the intention of the Respondent to make an application for leave for judicial review as seen in paragraph 1 of the Fixed Date Claim Form. In the circumstances, the court can exercise its discretion to make things right and to give effect to the application by treating the Fixed Date Claim Form as the Application for Leave to Apply for Judicial Review. I do not believe that this error in the procedure is fatal.
>
> [32] I am of the view that this posture will not occasion any unfairness to the Applicants, nor cause any undue prejudice to them. In fact, as far as I am concerned, grave prejudice and injustice would be caused to the

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[4] Rule 56.6(1).

> Respondent, were I to strike out the application, as this could mean that he may incur significant costs in starting over and may not be able to meet the deadline fixed by the rules in bringing his application.
>
> [33] Striking out should be a last resort exercised by the courts and the cases are replete with this position. This is not a case that warrants striking out.
>
> [34] I come to this decision also, bearing in mind and having regard to the overriding objective as stated at CPR rules 1.1 and 1.2, which is to deal with cases justly, fairly and expeditiously."

[55] In my consideration of this matter I have found the following passage from the judgment of Mummery LJ in **Tombstone Ltd v Raja (representing the Estate of the late Raja) and another** [2008] EWCA Civ 1444 to be of assistance:

> "[74] The relationship between the inherent powers of the court to control proceedings and the Rules of the Supreme Court was considered by Sir Jack Jacob in his Hamlyn lecture "The inherent jurisdiction of the court": Current Legal Problems 1970 p 23, 50-51. He said that the powers of the court under its inherent jurisdiction "are complementary to its powers under Rules of Court; one set of powers supplements and reinforces the other . . . where the usefulness of the powers under the Rules ends, the usefulness of the powers under inherent jurisdiction begins". In an illuminating article entitled 'The inherent jurisdiction to regulate civil proceedings' [1997] LQR 120, the late Professor Martin Dockray said at p 128 that the Rules of the Supreme Court may limit the inherent powers of the court where there is a conflict between them. Thus 'the inherent jurisdiction may supplement but cannot be used to lay down procedure which is contrary to or inconsistent with a valid Rule of the Supreme Court'. In our judgment, this last statement was correct in law, being supported by the authorities cited in the article which included **Moore v Assignment Courier Ltd** [1977] 2 All ER 842, [1977] 1 WLR 638, 644F-645B, 35 P & CR 400 and **Langley v North West Water Authority** [1991] 3 All ER 610, 8 BMLR 75, [1991] 1 WLR 697, 709D."

[56] Whilst this court is not condoning or encouraging the use of the incorrect procedure by the respondent, I am of the view that this is a matter in which the court's inherent jurisdiction can be used to cure the procedural defect as no consequence has been prescribed for making the application by way of a fixed date claim form. I agree with the learned judge that the fixed date claim form was, in substance, an application for leave. In the circumstances, I am of the view that the learned judge had the discretion to treat the fixed date claim form as the application for leave. The fixed date claim form was not a nullity.

Whether part 26 of the CPR is applicable at the leave stage of judicial review proceedings?

For the appellant

[57] Counsel for the appellants submitted that part 26 of the CPR is not applicable at the leave stage of judicial review proceedings and as such cannot be utilized to cure the respondent's procedural error in applying for leave by fixed date claim form. In this regard he relied on **Golding**, in which this court stated that the court's general case management powers in rule 26 are not applicable at the leave stage of judicial review proceedings. In addition, it was submitted that rule 56.13(1), which governs the applications for administrative orders, explicitly restricts the application of parts 25 to 27 of the CPR to the substantive application for judicial review.

[58] It was also submitted that the rules of part 56 are not affected by any other rule unless specifically stated. Therefore, in the absence of specific mention of the applicability

of rule 26.9 at the leave stage, it cannot be relied upon. Specific reference was made to the following passage at page 8 of **Golding**:

> "…..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…..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 litigations would be defeated."

[59] Mr Hamilton submitted that the effect of the learned judge's order was to make a mockery of the CPR by whittling down the specific rules of part 56 as another fixed date claim form would have to be filed in order to commence proceedings for judicial review.

For the respondent

[60] Mr Williams submitted that there was no misstep in applying for leave for judicial review by fixed date claim form rather than an application for court orders. He argued that if the court finds that there was an error, the learned judge was correct in using rule 26.9(3) of the CPR. This rule, he argued, was applicable as part 56 of the CPR did not speak to any consequences of seeking leave by fixed date claim form rather than a notice of application.

[61] He also submitted that **Golding** and **Edgehill** were inapplicable in the circumstances of this case as they did not address the issue of whether it was permissible to apply for leave for judicial review by way of a fixed date claim form. Those cases, it

was submitted, dealt with instances in which the CPR specifically set out the consequences of non-compliance of the rules.

[62] It was further submitted that part 56.13(1) of the CPR creates no limitation on the use of rules 25 to 27 at the leave stage of judicial review proceedings. He stated that the learned judge was correct in finding that rule 26 could be utilized to cure the procedural error. In concluding, he submitted that to strike out the respondent's fixed date claim form would have been unfair and unduly prejudicial to the respondent who would have had to incur additional costs to re-start the process.

Discussion

[63] Rule 56.13 provides that:

> "(1) 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 the provisions of Parts 25 to 27 of these Rules apply."

[64] Parts 25 to 27 deal with the court's general case management powers and provide the court with wide powers to manage cases effectively in keeping with the overriding objective to "deal with cases justly". Rule 1.2 states that the court must give effect to the overriding objective in its interpretation of the rules and the exercise of its powers under rules. Dealing with cases justly includes:

> "(a) ensuring, as far as is practicable, that the parties are on equal footing and are not prejudiced by their financial position;
>
> (b) saving expense;
>
> (c) dealing with it in ways which take into consideration-

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues; and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[65] The learned trial judge concluded that 26.9(3) could be utilized to rectify the procedural error as no consequence for non-compliance had been specified. Rule 26.9 provides as follows:

> "26.9 (1) **This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order**.
>
> (2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) 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 matters right.
>
> (4) The court may make such an order on or without an application by a party." (Emphasis supplied)

[66] Rules 26.9 only applies where the consequence of a failure to comply with a rule, practice direction or court order has not been specified. Counsel for the appellants relied on **Petrojam** and **Golding**. However, in both cases part 26 would have offered no relief to the parties as the consequences of their non-compliance had been clearly set out in the rules.

[67] In **Golding** the respondent failed to file proceedings for judicial review within the 14 days of the receipt of the order granting leave and rule 56.4(12) provides that leave is conditional on the applicant commencing proceedings within that period. The consequence of non-compliance would be the lapse of leave. The court stated:

> "In my judgement, 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 on 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 leave. One such particular rule is 56.6 (2) which empowers the court to extend the time for making the application for leave…"

[68] Similarly, in **Petrojam** the court concluded that the failure of the appellant to make a claim for judicial review within 14 days of obtaining leave could not be remedied in the absence of a specific rule allowing same.

[69] These cases are in stark contrast with the present appeal. This is so as part 56 does not prescribe any consequence for a party's failure to use a notice of application for court orders to make its application for leave. It is, however clear, that leave is required before proceedings for judicial review can be commenced.

[70] Notwithstanding, as stated by the court in **Golding**, the rules in part 56 are to be applied strictly. In the absence of any specific rule which permits the application of rules 25 to 27 at the leave stage they are inapplicable. The draftsmen of the CPR were very

clear as to when those rules would apply. Had this not been the intention, specific reference would not have been made to them in rule 56.13 of the CPR.

[71] The learned judge was therefore incorrect when she concluded that rule 26.9 was applicable in this case.

[72] However, she was clearly cognizant of the need to deal with the matter in accordance with the overriding objective (see paragraphs [34] and [35] of her judgment). The application, albeit irregular, was already before the court and additional costs would have been incurred if the applicant was required to refile his application. The striking out of the application for which time was already allotted would have not have been the best use of the court's resources.

Conclusion

[73] Based on the above, as the fixed date claim form was not a nullity, but merely irregular, I am of the view that the learned judge was correct in exercising her discretion to treat it as the application for leave. To do otherwise would have been a waste of time and resources. However, part 26.9(3) is inapplicable to these proceedings for the reasons stated in paragraph [70] above. In the absence of a specific rule which prescribes how an application for leave is to be made and the consequences for non-compliance this is a case in which the court's inherent jurisdiction could be invoked in the interests of justice to make things right. These are the reasons why I agreed with the other members of the court to grant the orders set out in paragraph [6] herein. I would also allow the counter

notice of appeal in part. In light of the costs order on the appeal, there should be no order as to costs on the counter-notice of appeal.

DUNBAR GREEN JA (AG)

[74] I have read in draft the reasons for judgment of my sister Simmons JA. I agree with her reasoning and conclusion and I have nothing to add.

BROOKS JA

ORDER

1. Counter-notice of appeal allowed in part.

2. No order as to costs on the counter-notice of appeal.