

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT LUCIA

IN THE COURT OF APPEAL

HCVAP 2012/006

BETWEEN

[1] GENERAL AVIATION SERVICES LTD.

[2] SILVANUS ERNEST

Appellants

and

[1] THE DIRECTOR GENERAL OF THE EASTERN CARIBBEAN
CIVIL AVIATION AUTHORITY

[2] THE EASTERN CARIBBEAN CIVIL AVIATION AUTHORITY

Respondents

Before:

The Hon. Mr. Don Mitchell

Justice of Appeal [Ag.]

Appearances on paper:

Mr. Alberton Richelieu for the Appellants

Mr. Rene Williams, with him, Mr. Mark Maragh, for the Respondents

2012: September 11.

Civil appeal – Judicial review – Leave to issue neither sought nor obtained – Failure to give one month's notice in writing to public authority before claim issued – Judge striking out claim on application of defendants – Whether judge should have treated failures as mere irregularity which could be cured

A Saint Lucia aviation company had its licence to operate aircraft revoked. The claimants filed a fixed date claim form seeking orders that the respondents had breached the rules of natural justice and an order quashing the decision, in addition to damages for loss of income. The claimants did not give the requisite one month's notice required by the Article 28 of the Code of Civil Procedure of Saint Lucia nor did they seek and obtain leave to commence judicial review proceedings as required by CPR 56.3. On an application by the respondents, the High Court threw out the claim. The appellants obtained leave to appeal and filed a notice of appeal claiming that the High Court should have acted under CPR

26.9 in treating the failure to obtain leave as a mere irregularity which could be corrected. Article 28 did not apply as the respondents had acted ultra vires and the Article only applied where they acted intra vires. Alternatively, CPR 56.6 gives the court a power to convert a claim to an application for leave to commence judicial review proceedings.

Held: dismissing the appeal and awarding costs to the respondents, that:

1. CPR 56.3 requires leave to be obtained prior to beginning a claim for judicial review. The purpose of the requirement for leave is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration.

R v Inland Revenue Commissioners Ex p National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617 applied; rules 56.3 and 56.4 of the **Civil Procedure Rules 2000** considered.

2. CPR 56.6 does not apply to the facts and circumstances in this case. CPR 56.6 applies to a claim in private law where the facts are such that the main relief is an administrative order. This was a claim for judicial review wrongfully commenced by fixed date claim form without leave.

Rule 56.6 of the **Civil Procedure Rules 2000** considered.

3. Article 28 of the Code of Civil Procedure of Saint Lucia requires that a claimant intending to sue a person performing public duties be given one month's notice prior to filing the claim and otherwise comply with the provisions of the Article. The fixed date claim form in this case was issued without the requisite prior notice.

Article 28 of the **Code of Civil Procedure**, Cap. 243 of the Revised Laws of Saint Lucia 1957 applied.

4. CPR 26.9 which gives the court a general power to rectify matters where there has been a procedural error does not assist the appellant since the rule only applies where the consequences of failure have not been specified. Article 28 provides that the consequence of failure to give the necessary notice is that the public officer cannot be sued nor can any judgment be rendered against him. This precondition for the application of the rule cannot be met in this case.

Rule 26.9 of the **Civil Procedure Rules 2000** considered.

JUDGMENT

- [1] **MITCHELL JA [AG.]:** The appellants in this matter claim that the respondents have done them unlawful harm by prohibiting their operating any aircraft within the OECS, thereby effectively shutting down the entire operation of the appellants, causing them considerable financial loss. The respondents, in taking the action they did, acted pursuant to the **Civil Aviation Act**¹ and the Regulations made under it.
- [2] The appellants filed a fixed date claim form supported by a statement of claim in the High Court seeking various administration orders. In particular, they sought a declaration that the respondents had breached the rules of natural justice and they sought an order to quash the decision prohibiting them from operating any aircraft. They also sought damages for loss of income and damages to be assessed. They applied for and obtained *ex parte* injunctive orders against the respondents which were subsequently lifted on the basis of a consent order.
- [3] The respondents applied to discharge the injunctive orders and for a declaration that the Court had no jurisdiction to try the claim and for the claim to be struck out and its service on them set aside. Their grounds included the failure of the claimants to give the necessary one month's notice required by Article 28 of the **Code of Civil Procedure**² and the failure to obtain leave for judicial review before filing the Fixed Date Claim Form as required by rule 56.3 of the **Civil Procedure Rules 2000** ("CPR")³ and CPR 56.4.⁴

¹ Cap. 8.07, Revised Laws of Saint Lucia 2008.

² Cap. 243, Revised Laws of Saint Lucia 1957. Article 28 – No public officer, or other person fulfilling any public duty or function, can be sued for damages by reason of any act done by him in the exercise of his functions, nor can any judgment be rendered against him, unless notice of such suit has been given him at least one month before the issuing of the writ of summons.

Such notice must be in writing, it must specify the grounds of the action, must be served upon him personally, or at his domicile, and must state the name and residence of the plaintiff.

³ CPR 56.3 – Judicial Review – application for leave.

[4] The respondents' applications came before Justice Francis Belle who ruled that the respondents being persons performing public duties are protected by Article 28. He also ruled that leave should have been sought pursuant to CPR 56.3 prior to filing the claim as the matter was clearly one for an administrative order from the outset. He considered whether he could treat this as a mere irregularity which could be corrected by the court pursuant to CPR 26.9.⁵ He was of the view that it was not. He was of the view that seeking leave to proceed was necessary, as it would have given the court an opportunity to do a number of things which could have been done to avoid a lawsuit altogether, in particular, as this was a claim for judicial review along with a claim for interim relief, the application was required to be heard *inter partes*, and that would have given the court an opportunity for resolution when it acted under CPR 56.4(3).⁶ He concluded that the suit must be dismissed with cost to the defendants to be assessed if not agreed.

[5] The appellants sought and obtained leave to appeal this order, and they do so on a variety of grounds. These include:

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

...

⁴ CPR 56.4 – Judicial Review – hearing of application for leave

- (1) An application for leave to make a claim for judicial review must be considered forthwith by a judge of the High Court.
- (2) The judge may give leave without hearing the applicant.

...

⁵ CPR 26.9 – General power of court to rectify matters where there has been a procedural error

- (1) This rule applies only where the consequence of failure to comply with a rule, practice direction, court order or direction 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, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders.
- (3) If 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.

⁶ CPR 56.4(3) – However, if –

- (a) it appears that a hearing is desirable in the interests of justice;
 - (b) the application includes a claim for immediate interim relief; or
 - (c) the judge is minded to refuse the application;
- the judge must direct that a hearing in open court be fixed.

- "(1) that the Learned Judge erred in Law when he failed to treat [the] Applicant's Claim, as an application for leave for judicial review ...;
- (2) that the Learned Trial Judge erred in Law, in failing to appreciate that the facts through [sic] supporting the claim, are for damages, but thereon within lies facts supporting a claim for an administrative order [sic];
- (3) that the Learned Trial Judge erred in failing to appreciate that the appropriate review, notwithstanding that there was a claim for damages which was merely consequential to the claim, and thereby failing to give leave for the matter to proceed as if an application had been made under Rule 56.3 [sic];
- (4) that the Learned Trial Judge fell into errors [sic], when he failed to consider the wide powers of the Court to rectify a procedural error, as provided by [CPR 26.9], and thereby failed to give effect to the overriding objective of the Rules."

And, the grounds of appeal go on in this manner for several pages.

- [6] The appellants have filed a bundle of written submissions and copies of a dozen authorities in support. They rely on **Attorney-General of Trinidad and Tobago and Another v Errol McLeod**⁷ as authority for the power of a court to substitute one procedure for another so that a claim would not fail. They rely on **Chitrekha Adella Gaffar v The Attorney General of Trinidad and Tobago**⁸ where the High Court ruled that the use of an erroneous originating motion procedure by the applicant would be overlooked. They submit that the appellants should have been similarly given an opportunity to prove the several allegations they made against

⁷ [1984] 1 WLR 522.

⁸ Trinidad and Tobago H.C.A. No. 678 of 1999 (delivered 21st July 2005, unreported).

the respondents in this case by the application of CPR 26.9. Alternatively, they argue that Article 28 of the **Code of Civil Procedure** is not applicable and its consideration was premature. Article 28 would only apply if the court were to find that the respondents had acted *intra vires*, and the claim was that the respondents were in violation of the *audi alteram partem* rule and as such, Article 28 would not apply. No authority was offered for that interpretation. Nor do the appellants offer any argument or authority in favour of their position that the High Court has power to soften the absolute language of CPR 56.3. With all due respect to counsel, it is difficult to see how any of these authorities assist the appellants in their contention that the court had power to treat the fixed date claim form as an application for leave to file a claim for judicial review.

[7] The respondents did not file a notice of opposition to the appeal as required by CPR 62.10(3).⁹ Instead, they filed an application supported by an affidavit sworn by a paralegal in the attorney's chambers. They say that the appeal is pointless since the prohibition against the appellants operating their business was lifted as a result of a consent order filed in the High Court matter. They also filed extensive submissions relating to the late service of the Notice of Appeal, the failure of the appellants to comply with CPR 62.10(1) and to serve the appeal bundle and submissions with the notice of appeal. With all due respect to counsel it is hard to see how these submissions assist the Court with the real issue to be determined by the appeal. Fortunately, the **White Book** is always at hand to assist with guidance on procedural matters.

[8] The courts have long distinguished between public law and private law procedure, and it is established that the judicial review procedure has special provisions designed to protect public bodies, most notably, a short time limit and the need to obtain leave. The courts have had to consider the extent to which a declaration or injunction against a public body may be sought by way of an ordinary claim when

⁹ CPR 62.10(3) – A respondent who intends to oppose the notice of appeal must within 7 days of receipt of the appeal file and serve a notice of opposition.

the claim raises public law issues that could have been brought by way of a claim for judicial review. The House of Lords has held that, as a general rule, it is contrary to public policy and as such an abuse of process for a person seeking to establish that a decision or action of a body infringes rights which are entitled to protection under public law, to proceed by way of an ordinary claim rather than the judicial review procedure, thereby evading the provisions intended to protect public authorities.¹⁰ In light of the discretion given to the court by CPR 56.6, the rule is not inflexible and private law proceedings should only be struck out if they are an abuse of the process of the court.¹¹ CPR 56.6 provides¹² that where a claimant issues a claim in private law, e.g., for damages, but the facts are such that the main relief is an administrative order, the court may direct that it is to proceed by way of an application for an administrative order and give the necessary directions to enable the claim to proceed. This case was not a claim in private law but was clearly a claim in public law being as it was a claim for judicial review. As such, the provisions of CPR 56.6 do not apply.

[9] Leave has long been required from the court to commence a claim for judicial review. The previous rule is repeated in CPR 56.3. The application for leave must be filed prior to the filing of the claim form. The application must state the various matters set out in CPR 56.3(3), and by CPR 56.3(4) must be verified by evidence on affidavit. The application will normally be dealt with by the judge on paper without hearing the applicant. It is only if one of the conditions set out in CPR 56.4 applies that the judge must direct that a hearing in open court be fixed. The judge may refuse leave in the circumstances set out in CPR 56.5, e.g., where there has

¹⁰ O'Reilly and Others v Mackman and Others [1983] 2 AC 237.

¹¹ Mercury Communications Ltd. v Director General of Telecommunications and Another [1996] 1 WLR 48.

¹² CPR 56.6 – Proceedings by way of claim which should be application for administrative order

- (1) This rule applies where a claimant issues a claim for damages or other relief other than an administrative order but where the facts supporting the claim are such that the only or main relief is an administrative order.
- (2) The court may at any stage direct that the claim is to proceed by way of an application for an administrative order.
- (3) If the appropriate administrative order would be for judicial review, the court may give leave for the matter to proceed as if an application had been made under rule 56.3.
- (4) If the court makes an order under paragraph (2), it must give such directions as are necessary to enable the claim to proceed under this Part.

been unreasonable delay, if the judge considers the grant of leave will be detrimental to good administration, or will cause substantial hardship to or substantially prejudice the rights of any person. Where, as in this case there is an application for interim relief, the application for leave must be dealt with in open court after service on the other side. The purpose of the requirement for leave is to eliminate at an early stage claims which are hopeless, frivolous or vexatious and to ensure that a claim only proceeds to a substantive hearing if the court is satisfied that there is a case fit for further consideration.¹³ Permission will only be granted where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all the parties and all the relevant evidence. In addition, the court will normally refuse permission if there has been delay in filing a claim,¹⁴ and where the applicant has an adequate alternative remedy available.¹⁵

[10] In the circumstances, the learned trial judge was correct to have struck out the claim. Parliament has provided for the protection of public officers a mandatory requirement that a party intending to issue a claim in court against a public authority must give one month's notice and otherwise comply with the requirements of Article 28 of the **Code of Civil Procedure**. This claim was wrongfully brought without compliance with Article 28. CPR 26.9 which gives the court a general power to rectify matters where there has been a procedural error does not assist the appellant since the rule only applies where the consequences of failure have not been specified. Article 28 provides that the consequence of failure to give the necessary notice is that the public officer cannot be sued nor can any judgment be rendered against him. This precondition for the application of the rule cannot be met. The claim was further wrongfully brought in that it was a claim for judicial review brought without the requisite leave of the court being

¹³ R v Inland Revenue Commissioners Ex p National Federation of Self-Employed and Small Businesses Ltd. [1982] AC 617.

¹⁴ CPR 56.5.

¹⁵ R v Legal Aid Board Ex p Hughes (1992) 5 Admin LR 623.

obtained prior to the filing of the claim form. It was not a proper case for saving through the application of CPR 56.6. The appeal will be dismissed with costs to the respondents pursuant to CPR 65.13.

Don Mitchell
Justice of Appeal [Ag.]