

IN THE HIGH COURT OF JUSTICE (CIVIL DIVISION)  
**ST. CHRISTOPHER AND NEVIS**  
**(NEVIS CIRCUIT)**

Claim Number: NEVHCV2018/0054

BETWEEN:

ZEPHANIAH LIBURD

Claimant

AND

NEVIS LAND DEVELOPMENT CORPORATION  
MINISTER OF AGRICULTURE AND LANDS

Defendants

Appearances:

Mr. E. Robelto Hector for the Claimant

Mr. Terrence Byron and Ms. Farida Hobson for the Defendants

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2019: 14<sup>th</sup> May, 13<sup>th</sup> June  
20<sup>th</sup> June  
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DECISION

[1] GLASGOW, J.: This decision concerns an application made by the **defendants (“the State”)** for an order striking out the fixed date claim **form filed by the claimant (Mr. Liburd”)**. The application was filed on 18<sup>th</sup> April 2019.

Background

[2] On 5<sup>th</sup> March 2019, Moise J granted leave to Mr. Liburd to file a claim for judicial review of certain decisions made by the State in respect of land leased by Mr. Liburd from the State. The application for leave outlined some 15 or more heads of relief as follows –

- (1) A Declaration that the 1<sup>st</sup> Respondent and/or the 2<sup>nd</sup> Respondent, without duress, agreed to dispose of the Property registered in Book 45 Folio 43 by way of sale to the Applicant and that the offer has never been withdrawn;

- (2) A Declaration that the Applicant has a valid purchase agreement for 2.25 acres lands at Cades Bay, Nevis, Registered in Book 5 Folio 43 and that the agreement has been and continues to be disturbed, in bad faith, by the 1<sup>st</sup> Respondents and/or 2<sup>nd</sup> Respondent;
- (3) An Order of CERTIORARI quashing the decision of the First Respondent to grant a new lease to a developer while the Applicant held a valid agreement of sale.
- (4) **A Declaration that the Applicant's receipt for payment of rent represents a true** representation of balances owed and further that there are no balances owed by the Applicant to the Respondents.
- (5) A Declaration that the continued conduct of the 1<sup>st</sup> **Respondent has hindered the Applicant's** ability to secure additional financing to further develop and renovate the Property.
- (6) A Declaration that at all times any building, addition, alteration or expansion, of the Property, undertaken by the Applicant was with the consent of the Respondents and/or their agents and/or the relevant government departments.
- (7) An injunction restraining the Respondents, whether by themselves, their servants, and/or agents, from continuing to enter or impair the Property in which the Applicant holds an equitable interest.
- (8) An Order of Mandamus requiring the 1<sup>st</sup> Respondent and/or 2<sup>nd</sup> Respondent to forthwith sell the Property to the Applicant, at a reasonable price, pursuant to the 1<sup>st</sup> **Respondent's offer** of sale to the Applicant.
- (9) An order of Mandamus requiring that the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondent, forthwith and in excess of no more than 7 days of this order, compensate that the Applicant for all chattels, fixtures and for any other loss and damage as a result of the 1<sup>st</sup> and/or 2<sup>nd</sup> Respondents impairment and demolition of the said property.
- (10) Exemplary Damages.
- (11) Aggravated Damages.
- (12) Interest pursuant to Section 27 of the Supreme Court Act.
- (13) Interest pursuant to Section 7 of the Judgments Act.
- (14) Costs.
- (15) Such other relief as the Court deems just.

[3] Moise J granted leave to proceed on the heads of relief set out at numbers 7 and 9 to 15 of the application. The permitted heads of relief specify –

- (1) Leave is not granted to seek the relief sought in numbers (1), (2) (4), (5), (6) and (8) of the application.
- (2) As it relates to number (3) under the relief sought, the applicant is granted leave to seek an order of certiorari quashing the decision of the first respondent to grant a new lease to a third party developer.
- (3) The applicant is also granted leave to seek the relief outlined in numbers (7) and (9) to (15) of his application;
- (4) As per previous orders of this court, the status quo is to be maintained until the final determination of the matter;
- (5) The applicant is to file his claim for judicial review within 14 days from the date of this order;
- (6) The first hearing of the claim is fixed for 14th May, 2019;
- (7) There is no order as to costs.

[4] His Lordship also ordered that the grant of leave was subject to the condition that Mr. Liburd file a claim for judicial review within 14 days of the date of the order granting leave.

[5] On 13<sup>th</sup> March 2019, Mr. Liburd filed a fixed date claim form. The fixed date claim form was served on the State on 20<sup>th</sup> March 2019. Noticeably absent from the documents served was an affidavit in support of the fixed date claim form. Mr. Liburd had inserted the following pleading on the fixed date claim form – *“The applicant will rely on his affidavits and exhibits in support of his application for leave on the May 2018.”* **The date of the affidavit was not recited.** On 2<sup>nd</sup> May 2019, an affidavit of Conrad Liburd was **filed which stated that it was filed “in support of my father’s application for judicial review”**.

[6] The State did not file an acknowledgment of service. Rather, on 19<sup>th</sup> April 2019, it filed a notice of application to strike out the fixed date claim form. The application is made pursuant to CPR 26.3.(1) (b) and (c) to the effect that the claim does not disclose any reasonable ground for bringing the same and that it amounts **to an abuse of the court’s process. The particulars in aid of these assertions are multiple –**

- (1) The claim form does not follow the prescribed form as the parties are referred to as “applicant” and “respondent” as opposed to “claimant” and “defendant”. The State says that the claim is past the leave stage and as such proceedings must comply with Form 2 of the CPR 2000;
- (2) Mr. Liburd has failed to file evidence with the fixed date claim form in breach of CPR 56.7(3). **The averment that “the applicant will rely on his Affidavits and Exhibits filed in support of his application for leave on ... May 2018” cannot remedy the breach because –**
  - (a) The evidence must be filed with the fixed date claim form. Previously filed evidence will not suffice;
  - (b) The affidavit previously filed in May 2018 was “erroneously captioned “Affidavit in support of leave for Judicial Review” instead of “application for Leave for Judicial Review”;
  - (c) In any event the affidavit previously filed during the leave stage describes the same as “*affidavit in support of my father Zephaniah Liburd’s Application for an Interim Injunction against the Respondents*”;
  - (d) As such there was no affidavit in support of the application for leave and as such none before this court;
  - (e) Mr. Liburd is required to produce evidence in support of claim for judicial review which evidence must be qualitatively as well as procedurally different from his evidence filed in support of an application for leave for judicial review;
  - (f) On principle, the evidence for leave and the evidence for the claim itself are not interchangeable.
- (3) The **fixed date claim form does not include a “Notice” page as stipulated in Form 2 required by CPR 56.7(1)**. This rule precludes Mr. Liburd from serving the fixed date claim form without a notice of the date for first hearing as is mandated by CPR 56.7(7). The fixed date claim form is thereby rendered meaningless as it was issued without a date for hearing;

- (4) CPR 56.7(3)(d) requires that grounds for bringing the claim must be set out in the affidavit. Accordingly, the absence of evidence in support of the claim in this case renders the same incapable of disclosing a reasonable ground for its commencement;
- (5) Practice Directions 1 of 2007 and 1 of 2008 stipulate that headings must be included in the fixed date claim form. Mr. Liburd has not only included erroneous headings in his claim but has included headings that signal his desire to litigate the identical issues that have been decided against him in the leave stage. In particular, the State points out that the headings in the fixed date claim form appear as follows –
- (a) In the matter of an application for leave to apply for judicial review pursuant to Rule 56.1(1) of the CPR 2000. The State complains that the leave stage has been completed;
  - (b) In the matter of an application for certain administrative orders pursuant to Rule 56.1(1)(b) of the CPR 2000. The State complains that CPR 56.1(1)(b) refers to declarations and in this case, Moise J has denied leave for any of the declarations sought by Mr. Liburd at the leave stage;
  - (c) In the matter of the decision of the board of Nevis Land Development Corporation to lease lands that are subject to an agreement to sell. The State laments that it is contemptuous of Mr. Liburd to reiterate on his fixed date claim that the lands are subject to sale when Moise J found that there is no evidence of a contract for sale of land and refused leave for judicial review on this point; and
  - (d) In the matter of the decision of the Minister of Agriculture and Lands to lease lands that are subject to an agreement to sell. The State repeats the charge that the learned judge had already ruled that there is no agreement to sell.

[7] **The State's final ground for its strike out application repeats the complaint that** Mr. Liburd was obligated to comply with the condition of the grant of leave that he file a Fixed Date Claim Form within 14 days of the order (CPR56.4(11)). The failure to file affidavit evidence with the claim is a breach of CPR 56.7(3) which states that the affidavit evidence must be filed with the fixed date claim form. It is further a breach of CPR 56.7(4) (e) in that there is no affidavit stating the facts on which the claim is based.

- [8] On 10<sup>th</sup> May, 2019 Mr. Liburd filed a document with the caption “*application for extension of time to comply with court order dated 5<sup>th</sup> March 2019*”. The document **further reads** “*Take Notice that on this ... day of ..., 2019 at 9 o'clock in the forenoon or at such time as the Registrar may direct the Judge in Chambers will hear the application on the part of the Applicant to wit Zephaniah Liburd (by his attorney CARL LIBURD) for an order that the time for complying with the Court's order dated March 5<sup>th</sup>, 2019 be extended.*” The document then states that a draft order is attached. It also signals that an affidavit in support accompanies the application. The document is undated and unsigned even **though below the signature line it sets out the words** “*HECTOR & NISBETT, barristers –at-law & Solicitors for the Applicant*”. **There are** no grounds set out in the application to identify the matters being raised thereon and the reasons for raising them.
- [9] **The draft order attached to the document states in the section related to the requested order that** “*IT IS HEREBY ORDERED that the time for complying with the Court's order dated 5<sup>th</sup> March 2019 is hereby extended.*”
- [10] Carl Liburd swore to and filed an affidavit attached to the 10<sup>th</sup> May 2019 application in which he explains that his father did file the fixed date claim form in time. However, the affidavit in support of the fixed date claim form was not filed due to the fact that Mr. Liburd had left the jurisdiction to seek medical assistance shortly after the order granting leave was made. Carl Liburd pleads that the late filing would not affect the first hearing of the fixed date claim which was set for 14<sup>th</sup> May 2019.
- [11] I pause here to point out that I have some difficulty with the reason provided by Carl Liburd for the delay in filing the affidavit with the fixed date claim form. I find it to be somewhat implausible having regard to how this entire claim has proceeded thus far. The present litigation started on 7<sup>th</sup> June 2018 when Mr. Liburd filed an application for leave to bring judicial review proceedings. The application was supported by an affidavit sworn to by himself and his son, Carl Liburd. On the same day, Mr. Liburd also filed an application for interim injunction. This application was also filed and served along with affidavits sworn to by himself and his son Carl Liburd.

- [12] On 11<sup>th</sup> January 2019, Mr. Liburd filed an application requesting that the court consider the parties' written submissions on the application for leave and renders its decision thereon. In that application he pleaded several matters including the fact that he is of an advanced age and travels overseas very often to receive medical attention. The 11<sup>th</sup> January 2019 application was accompanied by an affidavit sworn by Carl Liburd. A power of attorney from father to son is exhibited with the affidavit. Among other things, Mr. Liburd, via the power of attorney at clause 1(ix), empowers his son Carl Liburd to "*prosecute and continue legal action on my behalf.*"
- [13] Moise J heard the 11<sup>th</sup> January 2019 application on 22<sup>nd</sup> January 2019 and ruled that the application for leave must be heard in open court (CPR 56.4(3)). The hearing was then fixed for and concluded on 31<sup>st</sup> January 2019. Carl Liburd was **present at the hearing on his father's behalf.**
- [14] Except for the affidavit filed by Conrad Liburd on 2<sup>nd</sup> May 2019, Carl Liburd has been solely involved in these proceedings on behalf of his father from the time of the 11<sup>th</sup> January 2019 application to proceed via written submissions. It is therefore difficult for me to accept that Mr. Liburd could not have put evidence before this court through his son in a timely manner. The factual tracing indicates that the younger Liburd has been engaged with this claim from the outset and at the very least he ought to have had sufficient instructions from his senior as to the matters to be presented in aid of **Mr. Liburd's litigation in this** court. I will return a bit later to **Mr. Liburd's** 10<sup>th</sup> May 2019 application to extend time to file the affidavit in support of the fixed date claim form.

## Submissions

- [15] When the fixed date claim came before me for hearing on 14<sup>th</sup> May 2019, the application to strike out was considered. The parties were asked to file written submissions and authorities on the issues raised on the strike out application.

### **Mr. Liburd's submissions**

- [16] In his submissions, Mr. Liburd sets out CPR 56.4(11), 56.7, 56.11 and 26.9 which read -

56.4(11)

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

56.7

*An application for an administrative order must be made by a fixed date claim in Form 2 identifying whether the application is for*

*(a) a declaration;*

*(b) judicial review;*

*(c) relief under the relevant Constitution; or*

*(d) for some other administrative order (naming it); and must identify the nature of any relief sought.*

*(2) The claim form in an application under a relevant Constitution requiring an application to be made **by originating motion should be headed 'Originating Motion'**.*

*(3) The claimant must file with the claim form evidence on affidavit.*

*(4) The affidavit must state –*

*(a) the name, address and description of the claimant and the defendant;*

*(b) the nature of the relief sought identifying –*

*(i) any interim relief sought; and*

*(ii) whether the claimant seeks damages, restitution, recovery of any sum due or alleged to be due or an order for the return of property, setting out the facts on which such claim is based and, where practicable, specifying the amount of any money claimed;*

*(c) in the case of a claim under the relevant Constitution – the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;*

*(d) the grounds on which such relief is sought;*

*(e) the facts on which the claim is based;*

*(f) the **claimant's address for service; and***

*(g) the names and addresses of all defendants to the claim.*

*(5) The general rule is that the affidavit must be made by the claimant or, if the claimant is not an individual, by an appropriate officer of the body making the claim.*

***(6) If the claimant is unable to make the affidavit it may be made by some person on the claimant's behalf but must state why the claimant is unable to do so.***



*(7) On issuing the claim form the court office must fix a date for a first hearing which must be endorsed on the claim form.*

*(8) The general rule is that the first hearing must take place no later than 4 weeks after the date of issue of the claim.*

*(9) Notwithstanding paragraph (8), any party may apply to a judge in chambers for that date to be brought forward or for an early date to be fixed for the hearing of the application for an administrative order.*

*(10) The application may be made without notice but must be supported by evidence on affidavit.*

56.11(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.*

26.9

*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.*

[17] Mr. Liburd relies on the cases of –

(1) Jon Miller et al v the Attorney General et al<sup>1</sup>

(2) The Attorney General et al v Jon Miller<sup>2</sup>

(3) Chester Hamilton v Chief of Police<sup>3</sup>

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<sup>1</sup> MNIHCV2012/0028

<sup>2</sup> MNIHCVAP 2012/0011

<sup>3</sup> [2013] JMCA 35

[18] **These cases form the crux of Mr. Liburd's arguments that –**

- (1) He complied with CPR 56.7 by signalling on the fixed date claim form that he intended to rely on the affidavits previously filed in the leave stage of the proceedings;
- (2) The fixed date claim form was filed within the stipulated 14 day period and as such his claim for judicial review is properly before the court.

[19] In respect of compliance with CPR 56.7, Mr. Liburd relies on the Jon Miller decisions in the High Court and Court of Appeal. In Jon Miller, leave was granted to file judicial review. On the filing of the fixed date claim for judicial review, the defendants brought an application to dismiss the same for several procedural missteps. 3 points of significance were considered –

- (1) **whether the claimant's failure to file the fixed date form within 14 days of the grant of leave was fatal to the claim;**
- (2) whether in any event the claim could proceed further to the defendants' agreement to extend the time to file and serve the same; and
- (3) whether the claimant had in fact complied with the requirement to file affidavit evidence with the fixed date claim form by including a pleading therein to the effect that he relied on the affidavits filed in support of the application for leave.

[20] Astaphan J dismissed the application to strike out the claim and ruled the following –

- (1) Reciting dictum from the case of Richard Frederick and Lucas Frederick v Comptroller of Customs and Attorney General<sup>4</sup>, he noted that claims commenced pursuant to CPR 56 are **not in the strict sense "civil proceedings" commenced under CPR 8. CPR 2000 recognises administrative claims commenced pursuant to CPR 56 as a "peculiar specie" of claims governed by the specific provisions of CPR 56.** His Lordship observed that –

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<sup>4</sup> CLUHC VAP 2008/0037

*Part 56 proceedings are of two types: (a) those for Judicial Review of administrative action against both Private and Public bodies or officers (such as, for example, a claim for Judicial Review against a private organisation such as a Cricket Association, a Club and the like, for actions taken by them which affect a person with locus standi and a claim against a Public Officer, such as the Chief Immigration Officer, or a public body such as the Police Service Commissions by persons who have been affected by their decisions [other than in respect of the person's Constitutional Rights] respectively) and (b) those for relief under a relevant Constitution who claim that their Constitutionally protected Rights were, or are likely to be affected by some act or omission on the part of Public Officer or Body, as distinct from a Private Body or Organization, or an Officer of any of them.*

- (2) In respect of the requirement that evidence on affidavit must be filed with the fixed claim form, his Lordship ruminated on CPR 56.7(3)<sup>5</sup> –

*What is the purpose of the requirement that evidence on affidavit must be filed with the claim form? Rule 56.7(4) sets out what the affidavit must contain and when compared to Rules 8.6 and 8.7 the purpose of the requirement is readily apparent. It is to perform a dual function: (a) to apprise the other side of the nature of the claim setting out all relevant facts; and (b) to do so in the form of evidence. The latter aspect is explicable on the basis that the claim form is by way of Fixed Date Claim and pursuant to Rule 27.2(3), the Court may treat the first hearing as a trial.*

At paragraph 52, his Lordship then opined

*[t]he requirement that an affidavit be filed with the Fixed Date Claim Form means that the affidavit must accompany the Claim.*

He later found at paragraph 53 that

*[t]he true requirement is that there must be the requisite evidence in being and filed at the time the Fixed Date Claim Form is served on the Defendant.*

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<sup>5</sup> Jon Miller et al v AG et al MNIHCV 2012/0028 at paragraph 43

- (3) Astaphan J however disagreed with the defendants' view that the failure to file affidavit evidence was fatal to the claim. This was since the claimant had signalled on the fixed date claim form that he intended to rely on the 2 affidavits previously filed at the leave stage. His Lordship ruled that<sup>6</sup> –

*The evidence on affidavit on which the Claimants/Respondents intend to rely on the hearing of the Fixed Date Claim Form is the evidence on the affidavits filed and served on the Defendants/Applicants on June 11<sup>th</sup> 2012. They are fully apprised on the contents thereof. In fact they have filed an affidavit in response to that evidence contained in those affidavits on 27<sup>th</sup> June 2012- this was with respect to the application for leave, not the claim itself. They were fully informed by the Claimants/Respondents in the Fixed Date Claim Form of their intention to rely on the evidence contained in those affidavits.*

*I hold it to be the Law that where, like in this case, a Party who has sought and obtained Leave to make an application for an administrative order under CPR 56, and who has filed in support of that application, and who has served an all Defendants, evidence on affidavit in support of that application for Leave, CPR 56.7(3) is fully complied with if, in lieu of filing and serving the same affidavit[s] again, the Party clearly states in the Fixed Date Claim Form that he intends to rely on the evidence contained in that affidavit in support of that application for Leave filed and served on the Defendants.*

- [21] His Lordship also found that the leave requirement is mandatory. A failure to file the fixed date claim form before the expiration of the stipulated 14 day period is fatal to the claim. He opined that the parties cannot consent to extend the leave period. Equally the court is not empowered to so do. However, he found that having not only agreed to extend the period in that case but filing affidavits in answer and only raising an objection on the morning of trial precluded the defendants from obtaining the relief they sought. In his opinion, the defendants were estopped from lamenting about the procedural breach at that stage of the hearing of the claim.

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<sup>6</sup> Jon Miller at al v AG et al MNIVHC 2012/0028 at paras 51 and 55

[22] **The defendants appealed Astaphan J's ruling.** The appeal was dismissed and the following dictum emerged –

- (1) The CPR 56.4(11) requirement that leave is conditional on the applicant filing a fixed date claim for judicial review within 14 days of the grant of leave is mandatory;
- (2) **However, in this case, it was** “*unfair and contrary to all concepts of justice to permit the appellants to rely on the mandatory rule. The Court agreed with the learned judge that the appellants were estopped from insisting on the application of the mandatory rule.*”<sup>7</sup>
- (3) On the present discourse in respect of CPR 56.7(3) which states that an affidavit must be filed with the fixed date claim form, the court ruled that<sup>8</sup>

*[w]hile evidence on affidavit must be filed with the fixed date claim form, where the affidavits that were going to be relied on were... extensive and consequently expensive to reproduce and the respondents having indicated on the fixed date claim form that they would be relying on the affidavits which were filed with the application for leave, it would be an unnecessary burden to require that these affidavits, in identical or similar form, be refiled with the fixed date claim form.*

*The Court felt it prudent to place on record that where applicants wish to rely on affidavits or pleadings filed earlier in the same matter or in an application which is a precursor to the claim the applicants must seek the leave of the Court to do that.* (Bold emphasis added).

[23] Mr. Liburd also relied on *Chester Hamilton v Commissioner of Police*. In that case, the appellant was likewise granted leave to apply for judicial review. There was equally an order that a fixed date claim should be filed within 14 days of the order granting leave. A date for the first hearing was also fixed. The appellant served with the fixed date claim form, the same affidavits which were filed in

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<sup>7</sup> AG et al v Jon Miller et al MNIHCVAP 2012/0011, Court of Appeal Digest

<sup>8</sup> AG et al v Jon Miller et al MNIHCVAP 2012/0011, Court of Appeal Digest

support of his application for leave. The trial judge ruled that the fact that no affidavit was filed with the fixed date claim form, it was a nullity and dismissed the claim.

[24] The appeal was allowed. The Court reasoned that –

- (1) Part 8 of the Jamaica CPR deals with how proceedings are commenced and in particular that proceedings are commenced pursuant either to claim form (FORM 1) or a fixed date claim form (FORM 2);
- (2) The rules permit a claim to be issued without particulars of claim or an affidavit provided certain conditions are met. Besides precluding the claimant from taking a step in the proceedings, there is no other sanction stated;
- (3) The foregoing does not mean that the proceedings were not commenced and would be deemed a nullity if the conditions were not met;
- (4) In respect of a claim for administrative relief, the Jamaica CPR made it clear that leave must be obtained before a claim for judicial review is commenced. The claim is made once leave is obtained and a fixed date claim form is filed in accordance with FORM 2. Part 8 of the rules apply to the filing of the same;
- (5) Contrary to the views espoused by the respondent, CPR 56.4(12) (which is the equivalent of our ECSC CPR 56.4(11)) makes leave conditional on making a claim;
- (6) The learned judge granting leave did not stipulate that leave was conditional on filing and/or serving an affidavit with the fixed date claim form;
- (7) Accordingly the filing of the fixed date claim form within 14 days of the order granting leave was sufficient compliance with the requisites of the Jamaica CPR 56.4(12);
- (8) While the condition of leave that a claim is made is satisfied when a Fixed Date Claim Form is filed, the claimant is also enjoined to file an affidavit with the fixed Date Claim Form. A failure to do so is a breach of the rules;
- (9) A previously filed affidavit did not meet the requirements of the Jamaica CPR 56.9(2) (which is **the equivalent of the ECSC's CPR 56.7(3)**) which mandated that the affidavit must be filed with the fixed date claim form and was a breach of the rules;
- (10) The breach of the rules could nonetheless be cured by the application of the Jamaica CPR 26.9 (which is the equivalent of the ECSC's CPR 26.9). This rule permits the court to rectify matters where there procedural errors occur. The court utilised this provision to find that the

**failure to meet the requisites of CPR 56.9(2) (ECSC's CPR 56.7(3)) was a procedural irregularity** that did not invalidate the steps taken by the claimant and as such the court was well placed to put matters right;

(11) The court set aside the order of the trial judge and ruled that the appellant refile and reserve the affidavit in support of the fixed date claim for judicial review.

[25] Mr. Liburd submits that the dicta in the above discussed cases support his arguments. In that regard, he asks the court to find that –

- (1) Moise J did not order the filing and/or service of the affidavit in support of the fixed date claim at the same time or within any time frame;
- (2) Mr. Liburd met the requirement to file a fixed date claim form within the 14 day period ordered by Moise J and accordingly the conditional leave granted was made absolute by the filing of the fixed date claim form;
- (3) **Mr. Liburd's failure to file an affidavit with his fixed date claim form was a procedural error which** the court could fix pursuant to CPR 26.9(3);
- (4) The leave in this case has not lapsed. The fact that the fixed date claim form was filed with the note that Mr. Liburd intended to rely on his previously filed affidavits renders the fixed date claim form properly before the court;
- (5) A failure to file the affidavit with the fixed date claim form cannot and did not result in the expiration of the leave granted to file the same.

### **The State's submissions**

[26] **In its answer to Mr. Liburd's submissions, the State observes that –**

- (1) When it was served with the fixed date claim form on 20<sup>th</sup> March 2019, it received no affidavit evidence in support. Searches at the court office did not reveal any filed affidavit in support of the fixed date claim form;
- (2) A perusal of the fixed date claim form revealed the various deficiencies set out in the grounds for the strike out application which are repeated above in this judgment;

- (3) The absence of evidence filed with the fixed claim form is not only a violation of CPR 56.7(3) but it means that the State has no case to answer;
- (4) The fact that Mr. Liburd has pleaded that he relies on his evidence filed at the leave stage does not assist since the leave stage has passed and he can no longer rely on those documents;
- (5) The numerous irregularities attending the fixed date claim form disclose that there is no reasonable ground for bringing the claim.

[27] Learned counsel for the State then sought to distinguish the Montserratian case of Jon Miller and Jamaican case of Chester Hamilton from the present circumstances –

- (1) In respect of Jon Miller, counsel points out that there was an agreement to extend the time to file the fixed date claim form. Astaphan J found that the defendants in that case were estopped from reneging on the agreement;
- (2) Counsel also submits that the court specifically concluded that the affidavit filed in support of the application for leave could be deemed to have been duly filed and served with the fixed date claim form;
- (3) The Court of Appeal agreed with Astaphan J that the defendants could not retreat from their **agreement. The Court nonetheless went on to state that** “*when the affidavits that were going to be relied on were, as in that case, extensive and consequently expensive to reproduce, it would be an unnecessary burden to require that those affidavits IN IDENTICAL OR SIMILAR FORM, be refiled with the Claim Form.*”<sup>9</sup> [Counsel’s emphasis]. Counsel posits that there was no way that Mr. Liburd’s affidavits at the leave stage could be identical or similar to those necessary for the claim for judicial review especially in view of the fact that Moise J had refused leave on much of what was presented as evidence in support of the application for leave;
- (4) Counsel also refers to the Court of Appeal’s admonition that where the claimant wishes to rely on previously filed affidavits, the court’s leave must be obtained. Counsel argues that none of these features are present in this case where –

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<sup>9</sup> Paragraph 78 of the State’s submissions dated 7<sup>th</sup> June 2019.



- (a) No leave was sought to rely on previously filed affidavits and as such no argument has been raised that it would be imprudent or expensive to refile extensive affidavits; and
  - (b) There is every likelihood that the previously filed affidavits would **require “extensive revisions”** if they were to be relied on at this juncture;
- (5) In respect of Chester Hamilton, counsel argues that –
- (a) The court should not resort to CPR 26.9 to extend the time to file the affidavit required by **CPR 56.7(3) since the rule has nothing to do with time. One cannot “put things right by extending the time”.** The rule obligates the claimant to file the affidavit with the claim form and an extension of the time will not permit compliance with this mandatory stipulation; and
  - (b) The Court in that case was correct to find that the fixed date claim form has no independent life of its own and that service would be a breach of the rules.

[28] The State relied on a number of English and ECSC authorities to buttress their views. The cases provided from the English court were not helpful since none of them involved deliberations on provisions similar to those of our CPR. Among the cases provided by the State is the ECSC case of *Antigua and Barbuda Fisherman Cooperative Society v The Financial Services Regulatory Commission et al*<sup>10</sup> which lent some assistance to resolving the contentions raised by the parties on this application. In that case, as in this case, the claimant was granted leave to file judicial review on the condition that the fixed date claim must be filed within 14 days of the grant of leave to do so. The fixed date claim form was filed outside of the 14 day period. The defendants applied for the same to be struck out. The claimants thereafter made an application seeking an order that time be extended and that the fixed date claim form be deemed to be properly filed and served. The claimant argued that the claim was filed late due to the unavoidable absence of counsel who was obligated to travel overseas on business of the State. The claimant relied on CPR 26.4(2), 26.9(3) and 1.1 to make the point that the court was authorised to extend time and to deem what was done to be properly done.

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<sup>10</sup> ANUHCV2016/0167

[29] In refusing the application, Henry J made a number of observations. Of interest to this ruling is the finding that<sup>11</sup> –

*...there is no authority under the provisions of the CPR relied upon by the claimant to extend the time limit set out in Part 56.4(11). In the court's view the provisions in Part 26 referred to by the claimant are general provisions which are inapplicable to the provision for leave and specifically to extension of time fixed in 56.4(11). Once the claim is filed, Rule 56.11 indicates that the provisions of Parts 15 to 27 apply to directions to be given by the Judge at the first hearing. Without a similar express provision, the general provisions for extension of time cannot be applied to Rule 56.4(11). **Further the fact that the court's order does not contain the word condition cannot change the fact that leave under the Rule 56.4(11) is conditional on the claim being filed within 14 days.** [bold emphasis added].*

[30] Her Ladyship had previously extracted the following guidance from Orrett Bruce Golding and the Attorney General of Jamaica v Portia Simpson Miller<sup>12</sup> –

*There can be no doubt that the grant of leave to proceed to judicial review under rule 56.4(12) is provisional. It is not absolute. It imposes a condition on an applicant to present his or her claim within 14 days of the grant of the leave. To satisfy this condition a Fixed Date Claim Form with an affidavit in support thereof must be filed, in obedience to rule 56.9(1)(a).*

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<sup>11</sup> Antigua and Barbuda Fisherman Cooperative Society v the Financial Services Regulatory Commission et al ANUHCV2016/0167 at paragraph 9

<sup>12</sup> Jamaica Supreme Court Appeal No. 3 of 2008

## Analysis and conclusions

[31] The line of authorities of Jon Miller, Chester Hamilton and Orrett Bruce Golding all articulate the understanding that leave is conditional and that an affidavit must be filed with the fixed date claim form. In Jon Miller, Astaphan J considered the imperative in this manner<sup>13</sup> –

*What is the purpose of the requirement that evidence on affidavit must be filed with the claim form? Rule 56.7(4) sets out what the affidavit must contain and when compared to Rules 8.6 and 8.7 the purpose of the requirement is readily apparent. It is to perform a dual function: (a) to apprise the other side of the nature of the claim setting out all relevant facts; and (b) to do so in the form of evidence. The latter aspect is explicable on the basis that the claim form is by way of Fixed Date Claim and pursuant to Rule 27.2(3), the Court may treat the first hearing as a trial.*

*... **the requirement that an affidavit be filed with the Fixed Date Claim Form means that the affidavit must accompany the Claim.***

*... **the true requirement is that there must be the requisite evidence in being and filed at the time the Fixed Date Claim Form is served on the Defendant.***[Bold emphasis added]

[32] In Chester Hamilton, Phillips JA discussed the impact of non – compliance with the Jamaican CPR 56.9(2) which is the equivalent of our CPR 56.7(3) thusly<sup>14</sup> –

*I would not agree with counsel for the appellant, however, that the wording therefore suggests that the fixed date claim form has an independent life of its own. Service, in my view, without the affidavit would be a breach of rule 8.2 and would be irregular. The question is can the failure to comply with rule 56.9(2) and consequently rule 8.2 be cured.*  
[Bold emphasis added].

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<sup>13</sup> Jon Miller et al v AG et al MNIHCV 2012/0028 at paragraph 43

<sup>14</sup> [2013] JMCA 35 at paragraph 37

[33] Phillips J.A had earlier found that the commencement of proceedings was governed both by the Jamaican CPR 8 and 56. In her analysis, the claim was commenced when the claimant filed the fixed date claim form in compliance with the Jamaican CPR 8.1(2) which is similar to our CPR8.1(2). Her Ladyship concluded that there was nothing in the rules to suggest that the claim was not made in accordance with the Jamaican CPR 56.4(12) if the affidavit was not filed with the fixed date claim form. However, the Jamaican CPR 56.9(2) mandated that the same should be filed with the fixed date claim and as such it was a breach of the rules if it was not filed. Her Ladyship found that since the breach amounts to a violation for which there was no sanction, the irregularity could be cured by applying CPR 26.9.

[34] I am not persuaded to reach the conclusion of the Jamaica court in Chester Hamilton. In fact I would agree with the parts of the reasoning in Chester Hamilton and Jon Miller that the filing of the affidavit along with the fixed date claim form is compulsory. Indeed our Court of Appeal in Jon Miller made the point that evidence on affidavit must be filed with the fixed date claim form except in the circumstances and in the manner explained by the court. The quote from Orrett Bruce Golding takes the point a little further and supports the view that I hold. Harris JA opined that<sup>15</sup>

*There can be no doubt that the grant of leave to proceed to judicial review under rule 56.4(12) is provisional. It is not absolute. It imposes a condition on an applicant to present his or her claim within 14 days of the grant of the leave. To satisfy this condition a Fixed Date Claim Form with an affidavit in support thereof must be filed, in obedience to rule 56.9(1)(a).*  
[bold emphasis added]

[35] When one considers the structure of the rules on the filing and conduct of administrative claims for judicial review, the stricture that the claim is made when the fixed date claim form is filed along with the affidavit becomes more readily apparent. In Richard Frederick, although her Ladyship Pereira CJ (then Justice of Appeal) was addressing the distinction between proceedings that fall within the

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<sup>15</sup> Orrett Bruce Golding and the Attorney General of Jamaica v Portia Simpson Miller Jamaica Supreme Court Appeal No. 3 of 2008 at page 33

ambit of the Crown Proceedings Act of Saint Lucia and administrative claims pursuant to our CPR 56, her guidance is apposite to this present discourse<sup>16</sup> –

*In my view, the observation of Lord Bingham in Gairy to the effect that claims for judicial review and claims for constitutional redress may fairly be regarded as “sui generis” is apt as there is no doubt that public law proceedings are a peculiar specie of civil proceedings falling outside the ambit of ordinary types of ‘civil proceedings’ contemplated by the CPA. To my mind, CPR 2000 recognizes this peculiar specie of civil proceedings by providing a regime of rules in Part 56 which are applicable only to proceedings of this kind. For example it sets out, who is to be served; the time within which service must be effected before the first hearing of the claim; and requires the claimant to file an affidavit giving certain particulars as to the defendants and service at least 7 days before the first hearing. When compared with the general rules relating to fixed date claims, one distinction which becomes readily apparent is the mandatory nature of the filing of an affidavit as required by CPR 56.9(4) whereas under the general rules, such an affidavit need only be filed where the defendant has failed to acknowledge service.*

[Bold emphasis added]

[36] The foregoing learning persuades me to depart, in part, from the approach adopted in Chester Hamilton. CPR 56 is a self – containing collection of procedural rules on the commencement and prosecution of administrative claims. It does not seem that the imperatives of the provisions contained in CPR 56 are to be interpreted in any other fashion other than that which furthers the obligations recited therein. In that regard while it can be contended that a claim in the strict sense is commenced when the claim form is filed in the court office (CPR 8.1(1) and it is issued when the date is entered on the claim form by the court office, I am less sanguine that one is correct to apply the provisions of CPR 8.2 which allows the claimant to file a claim form without a statement of claim or affidavit to the body of self-containing rules laid out in CPR 56 on how to initiate and conduct administrative claims.

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<sup>16</sup> Richard Frederick et al v Comptroller of Customs et al SLUHCVAP 2008/0037

- [37] CPR 56.4(11) makes the grant of leave for judicial review provisional on the claimant making an administrative claim for judicial review within 14 days of the grant of leave. CPR 56.7(1) then goes on to say that the claim is made by way of Form 2 (a fixed date claim form). CPR 56.7(2) makes **specific reference to the need to have the claim headed with the words “originating motion” if the claim is seeking constitutional relief.** CPR 56.7(3) then obligates the claimant to file evidence on affidavit. This is a specific provision. It does not bear resemblance to CPR 8.2 which allows a claim form to be issued without the statement of claim in the circumstances and upon the conditions set out in that rule. The affidavit must meet the specific terms of CPR 56.7(4) and it must be made either by the claimant or an officer of the body making the claim if the claimant is not an individual (CPR 56.7(5)) The court office must set a date for the first hearing of the fixed date claim when it is issuing the same. The first hearing must take place not later than 4 weeks after the date of issue (CPR 56.7(8)).
- [38] Importantly, the claimant must serve the affidavit with the claim form (CPR 56.9(1)). CPR 56.11 then delineates what transpires at the first hearing of the fixed date claim. Significantly, this is the provision of the rules where the court is empowered to apply CPR 25 to 27 which include CPR 26.9. As pointed out by Henry J in the Antigua and Barbuda Fisherman Cooperative Society judgment, the rule makers having deliberately made CPR 25 to 27 apply in circumstances where the claim was already filed and issued (56.11), the court could not properly apply CPR 25 to 27 to the interpretation of CPR 56.4(11) which instructed that the claim must be made within a stipulated time.
- [39] These rules together demonstrate it is mandatory that the affidavit is filed with the fixed date claim form. But they also make a further point and in that regard I would venture a step further and attach myself to the views held by Harris JA in Orrett Bruce Golding. Harris JA was of the view that the grant of leave is conditional on the claimant filing both the fixed date claim form and the affidavit. Our Court of Appeal was of the similar view in Jon Miller **where Blenman JA ruled that “evidence on affidavit must be filed with the fixed date claim form.”** I cannot see how the requirements of CPR 56.4(11) can be met and indeed the logic of the rules stated in CPR 56 furthered if the condition set out in CPR 56.4(11) does not include the directive that the claimant is to file affidavit evidence at the time when the fixed date claim form is filed. If administrative claims are governed by a set of rules that, inter alia, underscore the need for urgent or expeditious disposition, it would make sense in all

the circumstances that the rules direct the claimant to issue the proceedings along with evidence presented in a defined format so as **to bring the claimant's full case to the defendant** at the same time as the fixed date claim. That seems to be the entire reason why the claimant is not permitted to file supporting evidence in a delayed fashion as in CPR 8.2. Indeed a mandatory filing of the affidavit along with the fixed date claim form may be further emphasized by the fact that the court may, in a fit case and in exercise of the CPR 27.2 (3), treat the first hearing of the fixed date claim as the trial of the claim.

[40] Another thought weighs on my mind on this issue. CPR 56.4 and CPR 56.7 deal with 2 different stages of the administrative claims process. On the one hand, CPR 56.4 delineates the procedure the judge must follow when he or she hears an application for leave to bring judicial review proceedings. If the judge grants leave, the grant of leave is conditional; the claimant must make an administrative claim for judicial review within 14 days of the order granting the leave.

[41] On the other hand, and separate to the leave exercise, is the procedural mechanism by which the claimant, armed with the leave order, makes the administrative claim for the judicial review. CPR 56.7 is the rule that is then engaged. This rule identifies the steps that must be taken by the claimant to make an application for an administrative order. Put more expressly, it is to CPR 56.7 that the claimant must resort to ascertain the steps necessary to meet the provisional order made by the judge pursuant to CPR 56.4(11). CPR 56.7(1) does not state that the claim for an administrative order is made when the fixed date claim form (Form 2) is filed or issued. It merely imposes part of the requirement to make the claim for an administrative order, that is to say, that the claim for an administrative order must be made in Form 2. It is to the entirety of CPR 56.7 that one must look to see what steps are required to meet the requirement to make a claim for an administrative order and thereby to comply with the conditional provisions of CPR 56.4(11). There seems to be nothing in that rule that indicates to me that the claim is made merely on the filing of Form 2, the fixed date claim form.

[42] If the foregoing analysis is correct, then one can see that the requirement to make a claim for administrative order within 14 days of the order granting leave will have to include the affidavit required by 56.7(3). The failure to file it is not a mere procedural misstep. Rather, the failure to file

an affidavit in accordance with CPR 56.7(3) along with the fixed date claim form is a failure to meet the condition set in 56.4(11) that the claim must be made within 14 days of the grant of leave.

[43] For all these reasons, I find that leave to bring an administrative claim for judicial review pursuant to CPR 56 is conditional on a claimant filing a fixed date claim form (CPR56.7(1)) and an affidavit in support (CPR 56.7(3)) within 14 days of the grant of leave. The failure to do so means that the **condition stipulated in CPR 56.7(3) and Moise J's order have not been met and the leave** that has been granted for Mr. Liburd to commence an administrative claim for judicial review has expired. There is nothing to put right (CPR 26.9) as there is simply no claim before the court. Further the rule makers having made the case management powers set out in CPR 25 to 27 and the powers to put matters right (26.9) specific to the procedure applicable under CPR 56.11, there is no power in the court to extend the period within which to comply with the requisites of CPR 56.4(11) or CPR 56.7 to file either the fixed date claim form or affidavit beyond the conditional period.

[44] Before leaving this discourse however, I must return to the directions given by the Court of Appeal in Jon Miller. The ruling makes perfect sense. The rules must be interpreted to function logically, efficiently and in a pragmatic manner. Subject to what I say below, in my opinion, it smacks of a quixotic excursion into sophistic and pedantic procedural legalism to demand that a claimant who wishes to rely on a previously filed affidavit must refile and serve the same affidavit to comply with CPR 56.7(3). This is especially made more graphic in cases where, like the Court of Appeal explained, the previously filed affidavits are lengthy and costly to reproduce. In all likelihood the defendant would have already been served with, been in possession of and would be acquainted with contents of the affidavit(s) served at the leave stage. Clearly and logically, if there are different or additional defendants or interested parties joined at the administrative claim stage from those who appeared at the leave stage, if the claimant wishes to rely on previously filed affidavit evidence, the claimant will have to serve those parties with the affidavits previously filed and served. But in cases where the claimant intends to rely on previously filed affidavits it makes no sense to require him or her to serve the same on defendants who have already been served with those very affidavits.

[45] The Court of Appeal in Jon Miller has instructed, however, that where the claimant wishes to rely on previously filed affidavits whether filed before the leave stage or previous to the claim, the leave



of the court must be sought. The claim is always that of the claimant. He or she must meet the requisites of CPR 56.4(11), 56.7(1) and 56.7(3). If he or she wishes to comply with CPR 56.7(3) by relying on previously filed affidavits, while the rule can be interpreted to permit such an approach, it must be done with the sanction of the court.

[46] **The Court of Appeal's instruction that leave** must be obtained from the court before the claimant relies on previously filed affidavits equally makes perfect sense especially in a case of this nature where Moise J refused to permit Mr. Liburd to file a claim to seek judicial review on most of the relief that he sought. If Mr. Liburd was allowed to simply proceed with all the affidavit evidence previously filed with the leave application, the State would be obliged to answer matters already dealt with at the leave stage and refused. Additionally, at the first hearing, the court may be constrained to case manage the issues to ensure the proper case was before it or as in this case, the court may be confronted with an application in which the State laments the reciting of matters already adjudicated upon at the leave stage and refused. This would amount to a perversion of the ethos of expeditiousness underpinning CPR 56.

[47] Mr. Liburd was therefore required to file and serve affidavit evidence with the fixed date claim form or to seek the leave of the court to rely on the previously filed affidavits. He has not done so. He has therefore not complied with the mandatory requirement that he file affidavit evidence with the fixed date claim form. The fixed date claim is therefore struck out for failing to meet the condition that a claim is made within 14 days of the grant of leave. The affidavit of Conrad Liburd which was filed after the fixed date claim form does not assist. The same was not filed with the claim (CPR 56.7(3) and as such does not aid its viability.

[48] The 10<sup>th</sup> May 2019 application to extend the time to file affidavit evidence cannot be countenanced as there is no jurisdiction to extend the period for leave once it has expired. In light of the conclusion that I have drawn on the main contention in this claim, I have not had reason to ponder long and much **on the State's complains about the procedural errors set out on the fixed date claim form**. However, I would conjecture that if I did find that the fixed date claim form was properly filed

and issued, CPR 56.11 may have assisted me to apply CPR 26.9 or any of the other case management powers pursuant to CPR 25 to 27.

[49] Consistent with CPR 56.13(6), I do not make any orders as to costs since in my assessment, Mr. Liburd, the applicant did not act unreasonably in making this claim or in the conduct thereof. I thank counsel for their assistance.

Raulston Glasgow

High Court Judge

BY THE COURT

REGISTRAR