[2015] JMCA App 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 91/2014

APPLICATION NO 9/2015

BEFORE: THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE BROOKSJA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)

BETWEEN EDUARDO ANDERSON APPLICANT

AND NATIONAL WATER COMMISSION RESPONDENT

Hadrian Christie instructed by Hart Muirhead Fatta for the applicant

Kevin Williams and Colin Alcott instructed by Williams, Alcott & Williams for the respondent

2 February, 13 and 27 March 2015

MORRISON JA

Introduction

[1] On 13 March 2015, the court made an order (i) dismissing the applicant's application to set aside Daye J's grant of leave to appeal to the respondent and to strike

out the respondent's notice of appeal; and (ii) granting the applicant's application for an extension of time within which to file written submissions in the appeal, by extending the time for a period of 14 days, or such longer time as the court may subsequently allow. The question of costs was at that time reserved for further consideration by the court.

[2] These are my reasons for concurring in that decision. For the purposes of this judgment, I will refer to the applicant as 'Mr Anderson' and the respondent as 'NWC'.

[3] At all times material to this application, Mr Anderson was an employee of the NWC. By an order made on 10 October 2014, Daye J granted leave to Mr Anderson to apply for judicial review of the decision of the NWC to withhold his salary. Although no representative of the NWC was present before him at the time, the learned judge also gave NWC leave to appeal against the grant of leave to Mr Anderson and notice and grounds of appeal were accordingly filed by NWC on 22 October 2014.

[4] By notice of application for court orders dated 20 January 2015, Mr Anderson applied to this court for orderssetting aside Daye J's grant of leave to appeal to NWC and striking out NWC's notice of appeal. So although this application is in one sense very much a preliminary skirmish between the parties, it does have potentially serious consequences, since a result in Mr Anderson's favour will effectively put an end to the appeal. But, in the event that his primary application does not succeed, Mr Anderson also asks for an extension of time within which to file written submissions in opposition to the appeal.

[5] Mr Anderson relies on the following grounds:

> "(a) The learned judge erred in granting leave to appeal [to] the Appellant in the absence of an application for leave being made.
>
> (b) The decision of the learned judge is not appealable."

[6] In resisting this application, NWC contends that both of these grounds are unmeritorious. Additionally, NWC disputes Mr Anderson's right to seek to impugn Daye J's order granting leave to appeal in this manner. In reliance on the decision of the Privy Council on appeal from this court in **Leymon Strachan v The Gleaner Company Ltd and Another**[1] ('**Leymon Strachan**'), NWC submits that the appropriate route of challenge to the order of a judge of the Supreme Court is by way of an appeal to this court.

[7] The principal issues which arise on this application are therefore (i) whether it was open to Daye J to grant NWC leave to appeal without any application having been made to the court for same; (ii) whether Mr Anderson, by making an application to strike out Daye J's order granting leave to appeal, has adopted the proper procedure; and (iii) whether the judge's decision granting leave to Mr Anderson to apply for judicial review is appealable.

The statutory and regulatory framework

[8] The jurisdiction of the Court of Appeal, which is entirely statutory, derives from the provisions of the Judicature (Appellate Jurisdiction) Act ('the Act'). Section 10 of the

[1] [2005] UKPC 33

Act provides that, "[s]ubject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the Supreme Court in civil proceedings..." However, section 11(1)(a)-(e)excludes the right of appeal in certain cases, which include appeals "from the decision of the Supreme Court or of any Judge thereof where itis provided by any law that the decision is to be final"[2]. In certain other cases, section 11(1)(f) restricts the right of appeal by providing that, save in the exceptional cases listed in the subsection, no appeal shall lie from any interlocutory judgment or any interlocutory order given or made by a judge of the Supreme Court without the leave of the judge giving the judgment or making the order, or of the Court of Appeal.

[9] Relevant rules of court are contained in the Civil Procedure Rules 2002 ('the CPR') and the Court of Appeal Rules 2002 ('the CAR'). Rule 2.2(2) of the CPR defines 'civil proceedings' to include judicial review. Rule 56.3(1) provides that a person wishing to apply for judicial review must first obtain the leave of the court. The application for leave, which may be made without notice[3], is made to a judge, who may grant it with or without hearing the applicant[4]. Where an application for leave is refused by the judge or is granted on certain terms, the applicant may renew it by applying, "(a) in any matter involving the liberty of the subject or in any criminal cause or matter, to a full court; or (b) in anyother case to a single judge sitting in open court"[5].

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[2] Section 11(1)(c)
[3] CPR 56.3(2)
[4] CPR 56.4(1)-(3)
[5] CPR 56.5(1)

[10] Rule 1.1(8)(b) of the CAR, in defining a 'procedural appeal', excludes from the definition "an order granting relief made on an application for judicial review (including an application for leave to make the application)". Rule 1.8(1) provides that, where an appeal may only be made with the permission of the court beloworof this court, "a party wishing to appeal must apply for permission within 14 days of the order against which permission to appeal is sought". Rule 1.8(2) provides that where the application may be made to either court, it must first be made to the court below; rule 1.8(3) provides that an application to the court below (though not to this court) may be made orally;and rule 1.8(4) provides that notice of the application need not be given to any proposed respondent, unless otherwise ordered by the court below or the single judge of this court.And finally, rule 1.13(b) provides that the court may "set aside permission to appeal in whole or part".

Issue (i)- the grant of leave to appeal

Issue (ii) – the application to set aside the grant of leave

[11] It will be convenient to take these two issues together. As has been seen, NWC was not represented at the hearing before Daye J on 10 October 2014, when the order granting leave to Mr Anderson to apply for judicial review was made. Mr Hadrian Christie for Mr Anderson therefore submits that, in the absence of any application for leave to appeal against this order, it was not open to the judge to grant leave to appeal to NWC, in effect of his own motion. For this submission, Mr Christie primarily relies on the statement in rule 1.8(1) of the CAR that an applicant for permission to appeal "must apply for permission". But reliance is also placed on the decision of this court in

Candine Anderson v The Attorney General of Jamaica[6] ('**Candine Anderson**'), in which an appeal was allowed against the order of a judge of the Supreme Court who, acting entirely of his own motion, struck out the appellant's claim for constitutional relief and set aside the judgment on admission which had been entered in her favour against the respondent. And, as regards the exercise of the discretion conferred on this court by rule 1.13(b) of the CAR to set aside an order granting permission to appeal, Mr Christie referred us to the case of **Paulette Bailey & Edward Bailey v The Incorporated Lay Body of the Church in Jamaica and the Cayman Islands in the Province of the West Indies**[7] ('**Paulette Bailey**').

[12] In answer to these submissions, Mr Kevin Williams for NWC contends, with some force, that, Daye J's order granting leave to appeal having been perfected, the appropriate route of challenge to that order was by way of an appeal to this court, and not by way of the current application to set aside the grant of leave. As I have already indicated, Mr Williams relies on **Leymon Strachan** for this submission.

[13] Given that Mr Williams raises a jurisdictional point, it may be appropriate to deal with it first. The issue in **Leymon Strachan** was whether an order made by one judge ('the first judge') of the Supreme Court setting aside a default judgment could itself be set aside by another judge ('the second judge') of that court, on the ground that the first judge's order had been made without jurisdiction and was therefore a nullity. When the application to set aside the first judge's order came on for hearing before the

[6] [2014] JMCA Civ 4
[7] SCCA No 103/2004, Motion No 25/2005, judgment delivered 25 May 2005

second judge, he upheld a preliminary objection that he had no jurisdiction to set aside an order made by a judge of co-ordinate jurisdiction and accordingly declined to make the order sought.The second judge's decision was upheld on appeal to this court, but there was a dissenting judgment and the reasoning of each of the two judges in the majority was not the same.

[14] However, on a further appeal to the Privy Council, the Board had no difficulty in holding that the second judge's decisionto decline jurisdiction was plainly right and that a judge of the Supreme Court, as a judge of co-ordinate jurisdiction, had no power to set aside an order made by another judge of that court. Delivering the judgment of the Board, Lord Millett said this[8]:

> "The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction... But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; not [sic] does a judge of co-ordinate jurisdiction have power to correct it."

[15] The upshot of this is that, had Mr Anderson sought to challenge Daye J's order granting leave to appeal in this case by making an application to another judge of the Supreme Court, the challenge would inevitably have failed. As a judge of co-ordinate jurisdiction, the latter judge, would have had no power to set aside Daye J's order. But

[8]At para. 32

that, of course, is not what has happened in this case, since Mr Anderson's challenge to Daye J's order is by way of an application to this court.Therefore, notwithstanding the attractive manner in which Mr Williams urged its relevance, the decision in **Leymon Strachan** is of no real assistance in resolving this aspect of the application.

[16] However, the issue whether this court has jurisdiction to entertain Mr Anderson's application to set aside the grant of leave to appeal by Daye J remains. As has been seen, rule 1.13(b) of the CAR provides that the court may "set aside permission to appeal in whole or part". Although I had initially entertained some doubt as to the true scope of the power given to this court by rule 1.13(b), I now think that the point has been authoritatively clarified by the decision of the court in **Paulette Bailey**. In that case, the appellants were given leave to appeal by a judge of the Supreme Court. The respondent applied to this courtfor an order under rule 1.13(b) setting aside the grant of leave (Panton JA, as he then was, observing[9] that "…this may well be the first time that an application of this nature is being made before this Court under these Rules"). The ground of the application was that, measured against the standard established by rule 1.8(9) of the CAR for the grant of permission to appeal, the appeal had no "real chance of success". On this basis, it was submitted that leave to appeal had been wrongly granted by the judge below and ought therefore to be set aside. The application succeeded, all three members of a strong court[10] agreeing that the appeal had no real chance of success and that leave to appeal ought not to have been granted.

[9] At page 18
[10] Harrison and Panton JJA, McCalla JA (Ag), as they then were

[17] As applied by this court in **Paulette Bailey**, therefore, rule 1.13(b) of the CAR permits the respondent to an appeal in which leave to appeal has been granted in the court below to, in effect, make a pre-emptive strike, by applying to this court for an order setting aside the leave, either in whole or in part. On this basis, it accordingly seems to me that this court clearly has the jurisdiction to hear Mr Anderson's application to set aside the grant of leave to appeal to NWC in this case. (It does strike me, however, that the court's power under rule 1.13(b) is one to be exercised sparingly and in clear cases, as **Paulette Bailey** was. I say this because the court, at what will usually be a very preliminary stage of the appeal, may not have the benefit of full argument on the matter.)

[18] So the question is, did Daye J have the power to grant leave to appeal without an application having been made to him for such an order? If he did not, it follows that leave was wrongly granted and will accordingly fall to be set aside under rule 1.13(b). As regards Mr Christie's starting point on this issue, which is rule 1.8(1) of the CAR, I can say at once that I consider his reliance on this rule to be misplaced, for the simple reason that the CAR regulates the procedure to be followed in this court, and not in the court below, which is regulated by the CPR. It is clear from rules 1.1(10), 1.15 and 1.18(1) of the CAR, which specifically import certain parts and rules of the CPR into the procedure of this court, that the framers of the respective rules did not intend them to crossapply. In order to determine whether Daye J had the power to grant leave to appeal of his own motion in the absence of an application, it is therefore necessary to look to the provisions of the CPR.

[19] Mr Christie was not able to direct us to any specific rule of the CPR which prevented Daye J from making the impugned order in this case. However,he placedheavy reliance onrule 26.2 of the CPR.The general effect of that rule is that the court, in the exercise of its general powers of management, may make an order on its own initiative, provided that any party likely to be affected by the order is given a reasonable opportunity to make representations, whether orally, in writing or telephonically. If the judge proposes to make such an order and to hold a hearing for the purpose of deciding whether to do so, each party likely to be affected must be given at least 7 days' notice of the hearing. As Cooke JA observed in **Grace Kennedy Remittance Services Ltd v Paymaster (Jamaica) Ltd**[11], these preconditions to the exercise by a judge of the court's power to act on its own initiative are "mandatory prerequisites".

[20] The effect of rule 26.2 was considered in **Candine Anderson**. In that case, the appellant filed a claim form against the Crown, claiming damages for negligence and/or breach of statutory duty, and damages pursuant to section 25 of the Constitution of Jamaica. In acknowledging service of the claim form, the respondent indicated that the Crown intended to defend the claim as to quantum, but not as to liability. As a result, the appellant entered judgment on the respondent's admission, for damages, interest and costs, to be assessed. After being ordered to make a substantial interim payment in the appellant's favour, the respondent filed a defence limited to quantum only and the matter was duly set down for assessment of damages.

[11]SCCA No 5/2009, judgment delivered 2 July 2009, para. 14

[21] On the day before the date fixed for the assessment, the respondent filed an application for leave to withdraw the admission of liability and to set aside the judgment on admission. The respondent contended that the admission of liability, in so far as it related to the claim for damages for constitutional breaches, had been made in error. Additionally, the respondent submitted that the judgment on admission was irregularly obtained, in that it failed to satisfy the applicable CPR rule[12]. Sensibly taking the second point first (since it was potentially determinative of the matter), K Anderson J concluded that the judgment had in fact been properly entered in accordance with the rules. However, in his written judgment, without deciding whether the respondent should be allowed to withdraw the admission of liability, the judge proceeded to strike out the appellant's claim for constitutional relief and to set aside the judgment on admission in respect of that aspect of the claim. The ground on which the judge acted was onewhich had not been placed or argued before him by either party.

[22] The appellant's appeal from this decision was not resisted by the respondent (whose counsel told the court that she too had been surprised by the judge's ruling).The appellant successfully relied on rule 26.2 and, in a judgment with which Harris and Dukharan JJA agreed, I observed as follows[13]:

> "It seems to me to be clear that Anderson J ought not to have taken upon himself the task of deciding the matter on a point not raised by the parties without notifying them of his thinking and inviting submissions on the issue from the parties. Had he done so, he might well have been persuaded by the provisions of the rules and the other material placed

[12] Rule 14.8(1)(c)(i)
[13]At para. [27]

> before us by the appellant that the prudent thing for him to do was to confine himself to the substantive application that was before him, that is, the respondent's application to withdraw the admission of liability in the acknowledgment of service. Instead, the respondent got a result that it did not seek, and no result on the issue upon which it had sought the court's determination."

[23] In my view, the decision in **Candine Anderson** bears no analogy to the instant case. That was a case concerned with the circumstances in which, in the context of the exercise of its general powersof management, it is open to a judge to make an order which is likely to affect any party to the proceedings of his own initiative. In the instant case, it seems to me that Daye J, having made the order granting leave to apply for judicial review, was *functus officio* in so far as the application before him was concerned. Therefore, no question of his exercising case management powers in relation to that application could possibly arise thereafter. In granting leave to appeal to NWC, the judge was, in my view, exercising the limited jurisdiction to do so that arises by clear implication from the provisions of section 11(1)(f) of the Act, which require that leave be obtained from the judge or the Court of Appeal in interlocutory matters.

[24] Neither counsel has unearthed any provision in either the Act or the CPR which requires an application as a pre-condition to the grant of leave to appeal. Indeed, in the experience of all members of the court, leave to appeal has long been routinely granted by judges of the Supreme Court without any such application. Any prejudice caused to a respondent by such an order may be redressed by an application to this court under rule 1(13)(b) of the CAR to set aside leave granted in such circumstances. As Lord

Millett pointed out in **Leymon Strachan**[14], the Supreme Court of Jamaica is "a superior court or court of unlimited jurisdiction". It therefore has jurisdiction to determine the limits of its own jurisdiction. In granting leave to appeal to NWC without any application having been made to him for this purpose, Daye J must, it seems to me, to quote Lord Millett again, "be taken implicitly to have decided that he [had] jurisdiction to make it". Therefore, in the absence of any rule of law or practice clearly indicating that Daye J had no power to make an order granting leave to appeal without an application, I do not consider this to be a proper case for the exercise of the court's discretionary power under rule 1.13(b) of the CAR.

Issue (iii) – is an order granting leave to apply for judicial review appealable?

[25] Mr Christie pointed out that the CPR provides no right to a respondent to appeal or ask for a renewal of the application for leave, once leave to apply for judicial review has been granted. Further, Mr Christie observed, a right of appeal to a respondent at this stage would open up the possibility of multiple appeals from the grant of leave, perhaps all the way to the Privy Council, thus causing delays in judicial review proceedings which, by their very nature, ought to be disposed of swiftly. Hence, it was submitted, Daye J's order was not appealable and the application to strike it out should be granted accordingly.

[26] In support of these submissions, Mr Christie placed greatest reliance on the decision of this court in **Minister of Commerce and Technology v Cable &**

[14] See para. [13] above

Wireless Jamaica Ltd[15] ('**Minister of Commerce &Technology**'), a decision made under the provisions of the now repealed Judicature (Civil Procedure Code) Act ('the CPC'). In terms not dissimilar to rule 56.3 of the CPR, the CPC provided that an application for an order of mandamus, prohibition or certiorari could not be made without the leave of a judge on an ex parte application[16]. Importantly for present purposes, section 564B(5) provided as follows:

> "Where an application for leave under this section is refused, the applicant may appeal to a Full Court, but in any such appeal a refusal of leave by the Court shall be final."

[27] Langrin J (as he then was) heard an application for an extension of time within which to apply for an order of certiorari. Having granted the extension, the learned judge made the order granting leave to the applicant to apply for orders of certiorari and prohibition. He refused leave to appeal. The respondent filed an appeal against the judge's order and, on a preliminary objection by the successful applicant in the court below, this court held that there was no right of appeal from the order. Delivering the judgment of the court, Downer JA appears to have based his conclusion on three grounds. Firstly, that there wasno provision in section 564B(5) for an appeal by the respondent; accordingly, the learned judge went on to observe[17], "[w]here the law gives no right of appeal to the Minister or Tribunal, they cannot pray in aid the general provisions of the Judicature (Appellate Jurisdiction) Act so as to give them a right of

[15] Motion No 18/1998, judgment delivered 10 November 1998
[16] Section 564B(1) and (2)
[17] At page 8 of the judgment

appeal to this Court". Secondly[18], that because section 11(1)(c) of the Act provides that no appeal lies from a decision of the court below where it is provided by any law that the decision is to be final, "[h]ad the learned judge refused leave, then the respondent company [sic] could have appealed the learned judge's order, and the decision of the Full Court would have been final". And thirdly, that Langrin J's order was an interlocutory order, from which no appeal could be brought without leave.

[28] Mr Christie also referred us to an extract from Fordham's Judicial Review Handbook[19], in which the author states that, "A grant of permission for judicial review is not appealable". Of the two authorities cited in support of this statement, counsel were only able to provide us with a copy of **R (Kurdistan Workers Party) v Secretary of State for the Home Department**[20], in which Richards J referred[21], without discussion or attribution, to "the absence of any right of appeal against the grant of permission".

[29] In response to these submissions, Mr Williams submitted that –

> (i) the specific exclusion by the drafters of the CAR of applications for leave to apply for judicial review from the definition of 'procedural appeal' in rule 1.1(8)(b) of the CAR presupposes that the Court of Appeal has jurisdiction to entertain an appeal from an order granting leave to apply for judicial review;

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[18] At page 9
[19] 6th edn, by Michael Fordham QC, para. 23.1
[20] [2002] EWHC 644 (Admin)
[21] At para. 99

(ii) section 10 of the Act vests jurisdiction in the Court of Appeal to hear appeals from judgments or orders in 'civil proceedings', which, as defined in the Act, include proceedings for judicial review;

(iii) a right of appeal granted by statute can only be excluded by clear and express words or by necessary intendment or implication;

(iv) the exclusionary or limiting provisions of section 11 of the Act do not affect appeals against orders granting leave to apply for judicial review;

(v) the provisions in rule 56.5 of the CPR for the renewal of a refused application for leave to apply for judicial review have no bearing on an appeal against an order granting leave;

(vi) **Ministry of Commerce & Technology** is distinguishable, on the ground that there is nothing in rule 56.5 of the CPR which is analogous to section 564B(5) of the CPC, upon which the decision in that case was based; and

(vii) reliance on case law from England and Wales on this question is "flawed", given the express provision in the CPR of that jurisdiction prohibiting either the defendant or anyone served with the claim form in judicial review proceedings from applying to "set aside an order giving permission to proceed"[22].

[22] CPR rule 54.13

[30] For these submissions, Mr Williams placed great reliance on the decision of the Privy Council on appeal from the Court of Appeal of Bermuda in **Kemper Reinsurance Company v The Minister of Finance and Others**[23] ('**Kemper**'). In that case, a judge of the Supreme Court of Bermuda made an *ex parte* order granting leave to the appellant to apply for an order of certiorari. An application to discharge the judge's order was then heard *inter partes* by Wade J, and granted. When the appellant sought to appeal against this order (with the leave of Wade J), the respondent raised a preliminary objection that the court had no jurisdiction to hear appeals from the grant or refusal of leave to apply for certiorari. This objection was upheld by the Court of Appeal, the appeal was dismissed and the appellant appealed to the Privy Council. Because the issues in the appeal bear some obvious similarities to the issue now under consideration, I must consider the case in some detail.

[31] Section 12 of the Bermudian Court of Appeal Act 1964, from which the Court of Appeal derived its jurisdiction, provided as follows:

> "(1) Subject to the provisions of subsections (2) and (3) and any Rules, any person aggrieved by a judgment of the Supreme Court in any civil cause or matter, (including matrimonial causes), whether final or interlocutory, or whether in its original or appellate jurisdiction, may appeal to the Court of Appeal; and any such appeal is hereinafter referred to as a 'civil appeal'.
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> (2) No appeal shall lie to the Court of Appeal –
>
> (a) against the decision in respect of any interlocutory matter;
>
> (b) or against an order for costs,

[23] [1998] UKPC 22

except with the leave of the Supreme Court or the Court of Appeal.

(3)..."

[32] Section 1 defined the word 'judgment' in section 12(1) to include "any decree, order or decision", leading Lord Hoffmann, delivering the judgment of the Board, to observe[24] that, "[t]his language appears *prima facie* wide enough to include the order of Wade J". However, the Court of Appeal felt itself bound to decline jurisdiction on the basis of the longstanding decision of the House of Lords in **Lane v Esdaile**[25]. As explained by Lord Hoffmann in **Kemper**[26], the principle in **Lane v Esdaile –**

> "...is that a provision requiring the leave of a court to appeal will by necessary intendment exclude an appeal against the grant or refusal of leave, notwithstanding the general language of a statutory right of appeal against decisions of that court. This construction is based upon the 'nature of the thing' and the absurdity of allowing an appeal against a decision under a provision designed to limit the right of appeal."

[33] But, given that the requirement for leave to apply for certiorari was a creature of rules of court[27], not of statute, Lord Hoffmann went on to explain[28], it did not follow that an order for leave to apply for certiorari necessarily fell into the same category: "[a]n order **made or refused** under the Rules can only be excluded from the general right of appeal in section 12 by express words or a necessary implication from the Rules themselves" (my emphasis).Then, in a passage which I cannot help quoting in full, Lord

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[24]At para. 9
[25] [1891] AC 210
[26]At para. 15
[27] Rule 5(1) of the Administration of Justice (Prerogative Writs) Rules 1978 (BR 28/78)
[28]At para. 16

Hoffmann explored[29] the differences between the requirement for leave to apply for an order of certiorari and the requirement of leave to appeal:

> "17. The question is therefore whether the requirement of leave to issue a summons for an order of certiorari is sufficiently analogous to a requirement of leave to appeal to attract the reasoning in *Lane v. Esdaile* and *Stevenson's* case and enable a court to say that **an appeal from the grant or refusal of such leave** would so frustrate the policy of requiring leave as to show, by necessary intendment and 'the nature of the thing', that such orders were excluded from the general right of appeal in section 12 of the Court of Appeal Act 1964. For this purpose it is necessary for their Lordships to consider what the policy of the leave requirement is.
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> In *O'Reilly v. Mackman* [1983] 2 A.C. 237, 280 Lord Diplock explained that the purpose of the leave requirement was to protect the public administration against false, frivolous or tardy challenges to official action. This policy has something in common with the policy of requiring leave to appeal, namely to act as a filter against frivolous or unmeritorious proceedings. It is also true that some types of judicial review, for example, on the ground of error of law by an inferior tribunal, are in practice indistinguishable from appeals.
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> 18. In principle, however, judicial review is quite different from an appeal. It is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and the fairness of the decision-making process rather than whether the decision was correct. In the case of a restriction on the right of appeal, the policy is to limit the number of times which a litigant may require the same question to be decided. The court is specifically given power to decide that a decision on a particular question should be final. There is obviously a strong case for saying that in the absence of express contrary language, such a decision should itself be final. But judicial review seldom involves deciding a question which someone else has already decided. In many cases, the decision-maker will not have addressed his mind to the question at all. The application for

[29] At paras 17-19

> leave may be the first time that the issue of the legality of the decision is raised and their Lordships think it is by no means obvious that a refusal of leave to challenge its legality should be final. The law reports reveal a number of important points of administrative law which have been decided by the Court of Appeal or House of Lords in cases in which leave was refused at first instance.
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> 19. In principle, therefore, their Lordships do not think it possible to say that the very nature of the leave requirement for an order of certiorari excludes, or makes absurd, the possibility of an appeal. But unless such a conclusion can be drawn, their Lordships consider it very difficult to find the necessary intendment restricting the general right of appeal conferred by section 12. It may be appropriate, as a matter of policy, to restrict that right of appeal, but their Lordships consider that this is a matter for legislation rather than judicial interpretation." (My emphasis)

[34] Lord Hoffmann next went on to consider the position in England. While it is not necessary to rehearse the details for present purposes, the authorities cited by Lord Hoffmann do reveal some lack of clarity as to the extent to which **Lane v Esdaile** is applicable to judicial review proceedings[30]. Lord Hoffmann also observed[31] that "appeals from the discharge of leave after an *interpartes* hearing and from a refusal to discharge such leave...are regularly entertained and their existence is inconsistent with the application of the principle in *Lane v Esdaile*...to appeals from the refusal of leave to apply for judicial review".

[30]Cf **Dhillon v Secretary of State for the Home Department** (1988) 86 Crim App R 14, 16 and **Rickards v Rickards** [1990] Fam. 194, 201

[31]At para. 30

[35] And finally, Lord Hoffmann referred to the decision of the House of Lords in **In re Poh**[32]. In that case, it was held that the House of Lords had no jurisdiction to hear an appeal from a decision of the Court of Appeal refusing a renewed application for leave to apply for judicial review, Lord Diplock considering[33] that, "this case is clearly covered by the rule in *Lane v Esdaile*". However, as Lord Hoffmann observed[34], Lord Diplock "expressly disclaimed any expression of view upon the nature of the procedure whereby this appeal moved from the Divisional Court to the Court of Appeal'". Accordingly, Lord Hoffmann concluded that –

> "...the limited nature of the ratio decidendi of *Lane v Esdaile*..., the important differences between applications for leave to appeal and applications for leave to apply for judicial review and the long-standing practice of the English Court of Appeal to entertain such appeals have persuaded their Lordships that whatever may have been the reasoning in *In re Poh*, it is not applicable to this case."

[36] In the result, the Board concluded that the Court of Appeal had the jurisdiction to hear the appeal from Wade J's decision and the appeal was accordingly allowed. As will have been seen, in point of decision, what the Board actually sanctioned in this case was an appeal from Wade J's refusal of appellant's application for leave to apply for judicial review. However, it seems clear from the general tenor of Lord Hoffmann's analysis that the decision also provides an authoritative indication that, unless excluded from the general right of appeal granted by statute, an order granting leave to apply is equally appealable.

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[32] [1983] 1 WLR 2
[33] At page 3
[34]At para. 33

[37] (As a footnote to **Kemper**, I should add that **In re Poh** was subsequently applied by the House of Lords in **R v Secretary of State for Trade and Industry, ex parte Eastaway**[35]. But, it is clear from the leading judgment delivered by Lord Bingham[36] that the court was particularly concerned that, in its role as a supreme court, the House of Lords "must necessarily concentrate its attention on a relatively small number of cases recognised as raising legal questions of general public importance". As with **In re Poh**, the case does not therefore lay down any general rule with regard to access to the Court of Appeal.)

[38] There are, in my view, some clear similarities between the legal contexts in **Kemper** and in the instant case. First, as in Bermuda, the right of appeal to this court is wholly statutory. Second, section 10 of the Act vests jurisdiction in this court, subject to the statutory provisions and rules of court, to hear and determine appeals from "any judgment or order of the Supreme Court in all civil proceedings". Third, save for the requirement for leave, the right of appeal under consideration in this case is neither excluded nor restricted by the provisions of section 11(1) of the Act. Fourth, leave to appeal was granted in this case. Fifth, the requirement for leave to apply for judicial review is a creature of the CPR, not of the Act.

[39] As in **Kemper**, the language of section 10 appears to me on the face of it to be plainly wide enough to include Daye J's order granting leave to Mr Anderson to apply for judicial review in this case. To the extent that that order was interlocutory and

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[35] [2001] 1 All ER 27
[36] At page 33

therefore required leave to appeal from the judge or from this court (and no issue has been joined by the parties on this question in this case), Daye J granted leave. As a matter of general principle, therefore, reinforced by the highly persuasive authority provided by **Kemper**,it seems to me that an order made by a judge acting pursuant to the provisions of rule 56.3(1) of the CPR, "can only be excluded from the general right of appeal in section [10] by express words or a necessary implication from the Rules themselves". No such express words are to be found in section 10 itself. While rule 56.5 of the CPR does provide a mechanism for the renewal of an application for leave by an applicant who is dissatisfied by either the refusalof leave or the terms upon which leave has been granted, the rule is completely silent on the question of an appeal. In these circumstances, it appears to me to be impossible to conclude that an intention to exclude a right of appeal from an order granting leave to apply for judicial review appears by"necessary implication" from the provisions of the CPR.

[40] For completeness, I should add that, as Mr Williams also pointed out, rule 1.1(8)(b) of the CAR excludes an appeal from "an order granting relief made on an application for judicial review (including an application for leave to make the application)" from the definition of a procedural appeal under the rules. On one view, this rule does appear to proceed on the premise that an order granting relief on an application for leave to apply for judicial review is appealable. However, I do not regard this as conclusive, since it is to the Act itself that one must look to ascertain the true limits of the rights of appeal conferred by it.

[41] As for the decision in **Ministry of Commerce & Technology**, I would distinguish the circumstances of that case on three bases: (i) the differently worded provision of section 564B(5) of the CPC, which in terms provided for an appeal against an order refusing leave to apply for a prerogative order to the Full Court (whose decision was stated to be final), was plainly capable of giving rise to an implication that a right of appeal against an order granting leave was necessarily excluded; (ii) unlike the CPC, which was itself an Act of Parliament, the CPR is subsidiary legislation and therefore subject to the well-established rule applied in **Kemper** that an order made or refused under the rules can only be excluded from the general right of appeal in the Act by express words or necessary implication; and (iii) unlike in **Ministry of Commerce & Technology**, NWC's appeal in this case was with the leave of the judge in the court below.

[42] By way of qualifying the view expressed in Fordham's Judicial Review Handbookthat a grant of permission for judicial review is not appealable, Mr Williams drew our attention to rule 54.13 of the English CPR. That rule provides that, "[n]either the defendant nor any other person served with the claim form may apply to set aside an order giving permission to proceed". Mr Williams argued that this rule (which has no counterpart in the CPR) had by necessary intendment excluded a right of appeal from the grant of permission to appeal in England. It is not, I think, a wholly implausible argument. But it does raise the question why did the framers of the rules, if this is what was intended, opt for this oblique method of excluding the right of appeal in these circumstances when it would have been far easier (and simpler) to achieve the same

result by saying so in so manywords. However this may be, and whatever may be the true provenance of the English position, it is not in my view necessary to come to a concluded position on the point, given my clear view that the right of appeal from an order granting leave to apply for judicial review arises from the language of section 10 of the Act.

[43] As Lord Hoffmann observed in **Kemper**, while it may be appropriate, as a matter of policy, to restrict the general right of appeal conferred by the equivalent in the Bermuda statute of section 10 of the Act, "this is a matter for legislation rather than judicial interpretation"[37]. My conclusion on this issue, therefore, is that, despite the sustained vigour of Mr Christie's argument on the point, his contention that Daye J's order granting leave to apply for judicial review to NWC is not appealable has not been made good.

Disposal of the application

[44] These are therefore my reasons for concurring in the order made by the court on 13 March 2015. On that date, the court granted Mr Christie's request that it should revisit the order for costs which it had then proposed to make and both parties were therefore asked to file written submissions on costs for our consideration.

[45] In submissions filed on 23 March 2015, Mr Christie directed us to rule 56.15(5) of the CPR, which states the general rule that an order for costs "may not be made against an applicant for an administrative order unless the court considers that the

[37] For the full quotation, see para. [31] above

applicant acted unreasonably in making the application or in the conduct of the application". In this regard, Mr Christie pointed out that (i) in making the application to set aside the grant of leave to appeal, Mr Anderson acted in reliance on the authority of a decision of this court; and (ii) the particular issue raised by the application, that is, whether an order granting leave to apply for judicial review was appealable, was a novel one and the court's decision on it in this case will provide guidance for the future to the parties and the public at large. In these circumstances, it was submitted, Mr Anderson cannot be said to have acted unreasonably in making the application and he should not therefore be ordered to pay costs. Finally, in relation to the application for an extension of time, it was submitted that the need for an extension was necessitated by circumstances beyond Mr Anderson's control, in that, due to a change in his legal representation, it was not possible to file his submissions in response to the appeal in time. In any event, it was urged, NWC did not oppose this application in its oral submissions to the court.

[46] In submissions filed on the same date, Mr Williams submitted that, as a natural and just consequence of the court's refusal to strike out the notice of appeal and the grant of an extension of time to Mr Anderson to file written submissions on the appeal, NWC is entitled to the costs of the application. Mr Williams pointed out that rule 1.18(1) of the CAR makes Parts 64 and 65 of the CPR applicable to the award and quantification of the costs of an appeal, subject to any necessary modifications and the amendments set out in the rule. Rule 64.6(1) of the CPR provides that, if the court decides to make an order about the costs of any proceedings, the general rule is that it must order the

unsuccessful party to pay the costs of the successful party; while rule 65.8(3)(b) directs that, where the application under review is "…to extend the time specified for doing any act under these Rules or an order or direction of the court, the court must order the applicant to pay the costs of the respondent unless there are special circumstances". In this case, it was submitted, no special circumstances have been made out by Mr Anderson so as to take the matter outside the direct mandate of rule 65.8(3)(b): the notice of appeal and NWC's bundle of submissions and authorities were served on Mr Anderson in good time (on 5 November 2014) and he allowed approximately two months to elapse without filing his submissions as required by the CAR. Accordingly, the need for extension of time was occasioned by Mr Anderson's own dilatory conduct.

[47] It is indeed the case, as was recently pointed out in **Jamaicans for Justice v Police Service Commission and the Attorney General**[38], that rule 56.15(5) of the CPR is not one of the rules that are made applicable to appeals to this court by virtue of rule 1.1(10) of the CAR. Notwithstanding this, in that case, a judicial review appeal, this court felt able, in the exercise of its undoubted discretion, to make an order for costs reflective of the spirit of rule 56.15(5). But that was a case in which, although the appellant's challenge to the refusal of a judge in the court below to make an order for certiorari its favour failed on appeal, it nevertheless succeeded in its contention, which had been hotly contested by the respondent, that it had the necessary standing to make the application in the firstplace.

[38] [2015] JMCA Civ 12, per Morrison JA at para. [139]

[48] Putting rule 56.15(5) on one side, once an order for costs is contemplated by the court, the starting point must be that prescribed by rule 64.6(1), that is, that the successful party's costs must usually be paid by the unsuccessful party. Despite the general rule, however, rule 64.6(2) provides that "[t]he court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs". Rule 64.6(3) provides that, in deciding who should be liable to pay costs,"the court must have regard to all the circumstances", and rule 64.6(4) sets out the relevant factors to which, in particular, the court must have regard to:

> "(a) the conduct of the parties both before and during the proceedings;
>
> (b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;
>
> (c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);
>
> (d) whether it was reasonable for a party -
>
> (i) to pursue a particular allegation; and/or
>
> (ii) to raise a particular issue;
>
> (e) the manner in which a party has pursued -
>
> (i) that party's case;
>
> (ii) a particular allegation; or
>
> (iii) a particular issue;
>
> (f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and
>
> (g) whether the claimant gave reasonable notice of intention to issue a claim."

[49] In my view, none of these factors applies in the instant case. While I accept that, as Mr Christie submitted, it might have been reasonable for Mr Anderson to have brought the application, I do not think that that factor by itself can suffice to displace the general rule. Were that so, all that would be required for an unsuccessful party to litigation to avoid having to pay costs would be to demonstrate the 'reasonableness' of it having taken the very stance in respect of which it has lost. Further, I am not aware of any consideration of principle that would disentitle a successful party to an order for costs on the basis that the point taken by the unsuccessful party was one of great, or even exceptional, importance. I therefore consider that, in relation to Mr Anderson's unsuccessful application to set aside the judge's grant of leave to appeal and to strike out the notice of appeal, the usual rule that costs follow the event should apply and NWC must have its costs.

[50] The position is, I think, even clearer in respect of the application for extension of time. While I am also prepared to accept that Mr Anderson's late change of attorneys may have caused some delay in the preparation of written submissions to be filed in this court on his behalf, I cannot regard this as a special circumstance for the purposes of displacing the general rule in rule 65.8(3)(b) that, on an application to extend time, the court must order the applicant to pay the costs of the respondent. NWC had nothing to do with Mr Anderson's arrangements for representation and it would therefore be wholly unfair for it to be deprived of its costs on the basis of matters over which it had absolutely no control.

[51] I would therefore order that NWC should have the costs of the application, to be agreed or taxed.

BROOKS JA

[52] I have read, in draft, the judgment of my learned brother, Morrison JA. I agree with his reasoning and conclusion and have nothing to add.

McDONALD-BISHOP JA (AG)

[53] I have had the pleasure of reading in draft the comprehensive judgment of my brother Morrison JA and agree with his reasoning and conclusion. I have nothing useful to add.