RULING

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

APPLICATION NO. 2011 HCV 00047

IN THE MATTER of a dispute between Yvette Reid & Mavis Henry and the City of Kingston Co-Operative Credit Union

AND

IN THE MATTER of the Co-Operative Societies Act

BETWEEN	CITY OF KINGSTON CO-OPERATIVE CREDIT UNION LIMITED	APPLICANT
AND	REGISTRAR OF CO-OPERATIVE AND FRIENDLY SOCIETIES	1ST RESPONDENT
AND	YVETTE REID	2ND RESPONDENT

Mr. Kirk Anderson, Mr. William Panton, Mr. Emile Leiba, Ms. TerriAnn Lawson and Ms. Gillian Pottinger instructed by Dunn Cox for the Applicant.

Mr. Curtis Cochrane instructed by the Director of State Proceedings for the 1st Respondent.

Mrs. Marvalyn Taylor-Wright instructed by Taylor Wright & Co. for the 2nd Respondent.

Heard : 27 June, 28 July, and November 8 2011.

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW OF AWARD OF REGISTRAR GRANTED IN 2010 CLAIM-ORDER GRANTING LEAVE SET ASIDE IN 2010 CLAIM – APPLICATION FOR EXTENSION OF

TIME AND ANOTHER APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW NOW MADE- APPLICATION TO STRIKE OUT PRESENT APPLICATION-PART 56 OF THE CPR-RULES 56.3, 56.4, 56.5- and 56.6 - WHETHER PRESENT APPLICATION AN APPLICATION "ONCE MORE" OR WHETHER A RENEWAL-WHETHER ORDER AND APPLICATION FOR LEAVE IN 2010 CLAIM WERE NULL AND VOID- WHETHER PRESENT APPLICATION AMOUNTS TO COLLATERAL ATTACK ON JUDGMENT OF COURT IN 2010 CLAIM-WHETHER APPLICATION AN ABUSE OF PROCESS

Mangatal J. :

THE PARTIES

[1] The applicant City of Kingston Co-Operative Credit Union Limited "COK" is a body corporate duly registered under the laws of Jamaica and is a co-operative society registered under The Co-Operative Societies Act.

[2] The First Respondent is the Registrar of Co-operative Societies for Jamaica "the Registrar". The post of Registrar was established under the Co-Operative Societies Act and amongst other matters, the Registrar has responsibility for settling disputes touching the business of a registered society between a member and the society.

[3] The First Respondent Yvette Reid "Mrs. Reid" was at the material time a member of the COK.

[4] This matter concerns an award made by the Registrar in respect of a dispute between COK and Mrs. Reid which has quite a long and involved history.

THE APPLICATIONS

[5] Two applications came on for hearing before me. The application which was filed first in time was that of COK, which was an amended Notice of Application for Court orders, in its amended form, filed January 20 2011. The original application was filed January 5 2011. The application before me "COK's application" seeks the following relief:

1. That an extension of time until the date of the filing of this application, be granted for the making of an application by COK for leave to apply for judicial review; and

2. The leave of this Honourable Court be granted to COK to apply for an order of certiorari to quash the Registrar's award as dated January 21st, 2010.

[6] Extensive grounds are set out for making COK's application. On the 21st January 2011 the amended application had come on for hearing ex parte before my brother Daye J. On that occasion Daye J. granted one of the reliefs sought by COK, which was that there be a stay of the Registrar's award pending the final determination of the Judicial Review proceedings to be pursued herein. It was also ordered that COK's applications set out above be adjourned to the 27th June and that the Respondents be served with notice of the application.

[7] On June 15 2011 Mrs. Reid filed an application seeking to have COK's application struck out "the striking out application". The grounds stated in the striking out application are as follows:

(a) The (COK's) application is made contrary to the legal principles of res judicata and issue estoppel.

(b) The application is otherwise an abuse of the process of the court.

(c) The applicant has failed to comply with Rules 56.5 and 26.3(2) of the Civil Procedure Rules 2002.

(d) The hearing of the application will be contrary to the overriding objective of dealing with cases justly and allocating to each case a fair share of the court's resources.

[8] Mr. Cochrane, instructed by the Director of State proceedings, on behalf of the Registrar, supported the striking out application filed on behalf of Mrs. Reid. I will deal with the striking out application first, although with the concurrence of the parties, I thought it the best use of the court's resources to hear both applications.

[9] For ease of understanding, it is necessary to set out some of the background to the applications. The complete contested proceedings between the parties has a long history, but for present purposes I simply set out aspects of the chronology relevant to the applications.

The immediate background

[10] On the 17th of May 2010 Daye J. in Claim No. 2010 HCV 0204 "The 2010 claim" granted leave to COK to apply for judicial review of the Registrar's award of January 21 2010. COK filed its application seeking leave on April 26 2010. COK stated that they only received notice of the Registrar's decision on February 8, 2010. COK's application for leave to apply for judicial review was granted at an ex parte hearing as Rule 56.3(2) of the Civil Procedure Rules 2002 "the CPR" permits .

[11] In September 2010, an application by Mrs. Reid in the 2010 claim came on for hearing before my brother Sykes J. seeking to have the ex parte grant of leave set aside. Under Rule 56.6(1) of the CPR the application for judicial review "must be made promptly and in any event within three months from the date when grounds for the application first arose". Mrs. Taylor-Wright, who also appeared for Mrs. Reid in that application, successfully submitted that the date when grounds first arose for the application was the 21st of January 2010, and not February 8 2010, the date when the decision of the Registrar became known to COK, as contended for on behalf of COK. Sykes J. granted the application to set aside leave on the basis that the application by COK was out of time, and there had been no application for an extension of time for seeking leave. As the grant of leave was made ex parte, Sykes J. set it aside because full disclosure had not been made by COK before Daye J. Sykes J. in his written ruling pointed out that it seemed to him that COK had made an honest mistake when it used February 8 2010 as the relevant date in deciding the date of the decision for the purposes of determining "the date when grounds for the application first arose". However, this nevertheless amounted to COK not making full disclosure and this was a recognised ground for setting aside an ex parte order-paragraph 34. At paragraph 35 of his ruling "the judgment", delivered October 8 2010, Sykes J. stated:

> *35. In this particular case, it does not appear that Daye J. was told that the applicant was actually out of time and needed to have applied for an extension of time within which to apply for judicial review. The application before Daye J. proceeded on the basis that the application was being made promptly, or, at any rate, within the three month period. Now that he matter has been fully*

explored in an inter partes hearing, it is plain that COK is indeed out of time and in the absence of a successful application for extension of time (and there must be an application for extension of time) the leave would not have been granted. The application for leave is therefore set aside.

[12] However, Sykes J. also analyzed the matter as follows:

36. There is another matter that came to light after oral submissions were made. It was brought to the attention of the parties who appeared before me and I have received written submission on the matter from Mr. Emile Leiba and from Mrs. Taylor –Wright. The matter is this: leave was granted by Daye J. on May 17, 2010. Under Rule 56.4(12) which reads:

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

37. In the case before me, the claim was filed on June 1, 2010. Mr. Leiba endeavoured to say that COK filed its claim within time. Regrettably, I cannot agree. A similar situation occurred in ***Golding v. Miller S.C.C.A. 3 of 2008*** *(delivered April 11, 2008). Leave was granted to apply for judicial review on December 13 2007. The claim was not filed. Instead the applicant for judicial review elected, on January 10, 2008, to apply for an extension of time to file the claim. The first instance judge granted the extension. This was reversed by the Court of Appeal. In coming to its decision the court was of the view that the claim should have been filed by December 27, 2007. The Court of Appeal is therefore saying that the expression 'within 14 days' means not later than the fourteenth day beginning on the day following immediately the date the grant of leave was given. In other words, within fourteen days does not mean fourteen clear days (see Rule 3.2). If this is so, then it means that COK's claim form* <u>*is*</u> *out of time. To put it another way,* <u>*the leave granted has now lapsed*</u>*. The Court of Appeal also pointed out that the CPR*

prohibits an extension of time to file the claim form. If this is correct, then this application to set aside the grant of leave has become academic since the entire process has now come to an end for the reasons just stated.

Conclusion

38. The application to set aside the leave for judicial review is granted. If I am wrong on this, then on the authority of the ***Golding*** *case, I declare that the omission of COK to file the claim form within the fourteen days, means that it cannot proceed any further on this current application. The result, in either case, being that the decision of the Registrar still stands. Cost of the application to Mrs. Reid.*

(My emphasis).

[13] COK sought and obtained from Sykes J. permission to appeal from his decision. However, no appeal has been filed.

[14] In making the present application, COK claim that having not applied for, nor having been granted an extension of time, both the application for leave, and the leave which was granted, are nullities in law. In the circumstances, the submission continues, the initial application for leave in the 2010 claim was a nullity and therefore, this fresh application, is now being made with a view to pursuing judicial review proceedings and COK would require an extension of time if it is to be permitted to do so. They submit that they have provided good reasons for the court to extend the time pursuant to Rule 56.6(2) of the CPR.

[15] There are many issues that arise in these applications, and it has been challenging to put them in a chronological order. The issues which arise for consideration are as follows:-

(A) Even if COK are correct, would COK's application amount to a collateral attack on the judgment of Sykes J.? Would it involve matters which ought to have been dealt with and determined by an appeal to the Court of Appeal in respect of Sykes J.'s decision, rather than being brought in these proceedings before a court of co-ordinate jurisdiction for determination?

(B) In the event that it is not a collateral attack on the judgment of Sykes J.:

i. is COK correct that both the application for Leave and the Leave which was granted in the 2010 claim were nullities in law?
ii. Does this application amount to a renewal as referred to in Rule 56.5 of the CPR?
iii. Does this application amount to an abuse of the court's process?

(A) Even if COK are correct, would COK's application amount to a collateral attack on the judgment of Sykes J? Would it involve matters which ought to have been dealt with and determined by an appeal to the Court of Appeal in respect of Sykes J. 's decision rather than being brought in these proceedings to the Supreme Court for determination?

[16] Mr. Anderson, one of the Counsel appearing for COK, has argued that in seeking the court's leave to apply for an extension of time, COK is in fact trying to comply with and follow Sykes J's judgment, and not to impugn it, in so far as Sykes J. ruled that COK needed to have applied for an extension of time within which to apply for judicial review. Mrs. Taylor-Wright on the other hand, has submitted that COK cannot rely upon its own failure to comply with the rules in aid of its application. She argued that COK is estopped from doing so. She also submitted that the failure to apply for an extension of time when that issue was being deliberated on before Sykes J., and the failure to appeal against his decision, effectively stops COK from pursuing the matter any further.

[17] I am of the view that, albeit COK ought to have applied for an extension of time previously and failed to do so, this does not give rise to an estoppel, nor are COK otherwise estopped from doing so now. Indeed, I do not read Sykes J.'s judgment (see paragraph 35) as so saying either. The fact that they ought to have applied earlier is a consideration in relation to the question whether they can show good reason for the court to extend the time. It is not itself a bar to the making of an application. Thus the aspect of this application that seeks an extension of time within which to seek leave to apply for judicial review is not, in my judgment, a collateral attack on the judgment of Sykes J. However, Rule 56. 6(2) requires the court to extend the time only if

good reason is shown. The court could not find that good reason is shown if the application for leave itself is misconceived or faulty because it would then have been pointless to have granted an extension of time. Courts ought not to act in vain. So, in light of the application made by Mrs. Taylor-Wright, I therefore have to examine what the effect of Sykes J.'s judgment is in relation to the question whether the present application for leave to apply for judicial review may impugn the judgment, directly or indirectly.

[18] It appears to me that Sykes J. did not indicate that the leave in the 2010 claim was a nullity and he certainly did not say that he was setting the order for leave aside because it was a nullity. He expressly set aside the order because of non-disclosure. There are several grounds upon which a court can set aside an ex parte order as being irregular. It would thus be very unsafe, and even invidious, for me to infer grounds for the setting aside that were never argued, mentioned or discussed either by Counsel or in my brother's judgment, in those earlier proceedings. Further, Sykes J. indicated in his alternative ratio (paragraphs 36-38) that, if the law is as stated in the **Golding** case, COK's claim form in the 2010 claim "is out of time", and that the leave granted "has now lapsed." (My emphasis). He stated that if this was correct, "then this application to set aside the grant of leave has become academic since the entire process has now come to an end".(My emphasis). If Sykes J. was treating the order of Daye J. as if it had never been made, as if it was a nullity**,** then it seems unlikely that he would have indicated that the leave "has now lapsed". Something cannot be non-existent and yet lapse at the same time. Logically, it has to be in a state of existence for it to be capable of lapsing.

[19] I am of the view, that to the extent that COK is now seeking to say in COK's application, something that was never raised before Sykes J.**,** i.e. that the application filed in the 2010 claim upon which leave had been previously granted was a nullity, then that does amount to a collateral attack upon the judgment of Sykes J. At pages 222 -223 of the decision in **Ali v. Mitchell [**1980] A.C. 198, which was cited by Mrs. Taylor-Wright, a decision of the House of Lords, Lord Diplock describes features of the type of adjudication that a court of co-ordinate jurisdiction should not be required to determine since it may bring the administration of justice into disrepute. Whilst the facts

are quite different from the facts in the instant case, I am of the view that principles underlying the pronouncements made are equally applicable here in Jamaica, and in this case. At page 222 F-H Lord Diplock stated:

> *Under the English system of administration of justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against the judgment to a superior court. This is not based solely on technical doctrines of res judicata but upon principles of public policy, which also discourage collateral attack on the correctness of a subsisting judgment of a court of trial upon a contested issue by re-trial of the same issue, either directly or indirectly in a court of co-ordinate jurisdiction.* (My emphasis).

(B)In the event that this application does not amount to a collateral attack on the decision of Sykes J. then :

(i) Is the COK correct that both the application for Leave and the Leave granted in the 2010 claim were nullities in law?

[20] In the event that I am wrong about aspects of the application before me amounting to a collateral attack on the judgment of Sykes J, I have gone on to consider the other issues listed in paragraph 15 (B) (i), (ii) and (iii) above. I wish to make it clear that I have only embarked upon this course because I think the question of whether the application does amount to a collateral attack is not straight-forward. Further, in light of the views that I have formed in relation to the issues, I have felt it appropriate to proceed to deal with these other issues. In the course of his submissions, Mr. Anderson referred to the Court of Appeal decision in S.C.C.A. No. 11/2001 **Attorney-General v. Administrator –General of Jamaica (Administrator of the Estate of Elaine Evans, deceased)** delivered July 29, 2005**.** That case was concerned with sub-section 4(2) of the Fatal Accidents Act which dictates that any action brought under that Act shall be commenced within three years after the death of the particular deceased "or within such longer period as a court may, if satisfied that the interests of justice so require, allow". It was held by the Court of Appeal that where an action is commenced without the leave of the court allowing for a longer period within which to commence proceedings having been obtained, then the action or claim filed is null and void, and is

invalid. The Court of Appeal also recently delivered a decision on the 7th October 2011, along the same lines in respect of the Property Rights of Spouses Act 2004, in S.C.C.A. No. 8/11 **Delkie Allen v. Trevor Mesquita,** where the nullity/invalidity point in relation to the claim form filed was raised for the first time on appeal.

[21] Mr. Anderson also referred to the decision of the Court of Appeal of Saint Christopher and Nevis in **Christenbury Eye Centre v. First Fidelity Trust**, delivered November 19 2008, where at paragraph 5 the Court indicated that if an appeal may be brought only with leave, no appeal exists unless leave has been obtained.

[22] Mr. Anderson referred to the case of **Grafton Isaacs v. Emery Robertson** [1985] 1 A.C. 97, a decision of the Judicial Committee of the Privy Council , where Lord Diplock, in delivering the Judgment of the Board, stated at pages 102 G –H to 103 D-E, :

> *…in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are "void" in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are "voidable" and may be enforced unless and until they are set aside. …..*
>
> *The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which appeal lies.*(My emphasis).

[23] It is important to note that in **Isaacs v. Robertson** the Privy Council agreed that an order ought not to have been made. However, although that was so, an argument that a particular rule applicable to civil procedure in Saint Vincent operated ipso jure to render the order for an interlocutory injunction an "order which the court was obliged to treat as having never been

made", was rejected. Rather, it was held that the rule entitled the defendant to apply for an order setting aside the interlocutory injunction if he elected to make such an application. It was held that the order had to be obeyed by the person against whom it was made unless and until it had been set aside and accordingly the defendant was in contempt of court in disobeying it.

[24] Mrs. Taylor –Wright referred me to the Court of Appeal's decision in procedural appeal S.C.C.A. 120/2007, in **James Wyllie et al v. David West et al** S.C.C.A. 120/2007, a judgment of Morrison J.A. delivered 13 August 2008. In that case the Court of Appeal upheld the decision of Haynes J. dismissing a preliminary objection that a Fixed Date Claim Form as originally filed was a nullity because it was not signed by the respondents or their attorneys-at-law, in breach of Rule 22.1 of the CPR. It is to be noted that this decision did not deal with whether an application or a court order were nullities, it dealt with the claim form itself. Morrison J. A referred to Rule 26.9 of our CPR and cited with approval a passage from **Halsbury's Laws of England** in respect of an earlier English version of the rule as follows(paragraph 9 of the judgment :

> *9. This rule makes it plain, it seems to me, that ordinarily speaking non-compliance by a party with rules of court will not be treated by the court as fatal, and that the court has a wide discretion to remedy errors in procedure (significantly, even in respect of a failure to comply with a court order and also of its own motion). As the editors of* ***Halsbury's*** *observance of an earlier English version of the rule (RSC Order 2.r.1(i)):*
>
> *"This is one of the most beneficial rules of the Rules of the Supreme Court. It is expressed in the widest terms possible to cover every kind of non-compliance with the rules, and in both the positive and negative forms, so as to ensure that every non-compliance must be treated as irregularity and must not be treated as a nullity"*
>
> *(4th edition, volume 37 paragraph 36).*

[25] In my judgment, the order made by Daye J. was an irregularity, and not a nullity. The court is not entitled to treat this order as if it had never been made. Rather, it was for an applicant affected by the order to apply to set it

aside. In my judgment, the principles discussed in the cases dealing with the filing of claims for substantive rights outside of statutory time limits, without first securing the leave of the court to make the claim out of time, are not applicable to the application for leave made in the 2010 claim. Nor are they applicable to the resultant court order. This is so even though it is well recognised that in relation to judicial review, as part of the protection afforded public authorities against delay and its potential detrimental effects on good administration, time limits are treated strictly. In any event, in the **AG v. Administrator-General** case, it was a claim filed without permission extending the time for filing that the court treated as a nullity, and not a court order. Similarly, in the **Christianbury Eye Centre** case, it was the **Appeal** which was said not to have existed, and not a court order. In my judgment, the order of Daye J. could not be said to have been a nullity, but rather it was an irregular order that had to be obeyed until set aside -**Isaacs v. Robertson**.

[26] It is the Rules of the CPR that apply to this case, -**Wyllie v. West**, and it is the specific Rules of Part 56 of the CPR under discussion that apply- notably Rules 56.3, 56.4, 56.5 and 56.6 and not the court's general case management powers under Part 26 -**Golding v. Miller**.

[27] Mr. Anderson also argued that in the present case, it is to be inferred that Sykes J. treated the application itself in the 2010 claim as being not validly before Daye J and that it was because the application was an irregularity or nullity, that Sykes J. was able to set it aside. In the course of advancing this argument, Counsel referred to the fact that in paragraph 35 of his judgment Sykes J. stated that "The application for leave is therefore set aside."(My emphasis). I agree with Mrs. Taylor-Wright that Sykes J. did not at all set aside the application for leave. He set aside the order granting leave. This is obvious from the whole tenor of the judgment and when read as a whole. I also agree that it is plain that there was no application before Sykes J. to set aside the application for leave; what was before him was an application to set aside the ex parte order granting leave as he plainly states at paragraph 1. Counsel for COK have not produced a copy of any formal order or minute of order to demonstrate any order striking out the application. Whilst an application may be struck out by the court, it is not set aside. It is therefore not correct that, as COK's Counsel argued at paragraphs 9-11

(inclusive), of their written submissions filed on the 24th June 2011, that "Mr. Justice Sykes struck out the earlier application for leave"(paragraph 11).

(ii)Does this application amount to a renewal as referred to in Rule 56.5 of the CPR?

[28] Rule 56.5 of the CPR reads as follows:

Where leave refused or granted on terms

56.5 (1) Where the application for leave is refused by the judge or is granted on terms (other than under rule 56.4 (12)), 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 any other case to a single judge sitting in open court.

(2) A single judge may refer the application to a full court.

(3) No application not involving the liberty of the subject may be renewed after a hearing.

(4) An applicant may renew his application by lodging in the registry notice of his intention.

(5) The notice under paragraph (4) must be lodged within 10 days of service of the judge's refusal or conditional leave on the applicant.

(6) The court hearing an application for leave may permit the application under rule 56.3 to be amended.

[29] Rule 56.4 (12) of the CPR, which is referred to in Rule 56.5 (1) reads as follows:

Judicial Review-hearing of application for leave

……

56.4(12) Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.

[30] It was Mrs. Taylor-Wright's contention that this present application amounts to a renewed application for leave. She submitted that this was not permissible because COK has already had a hearing, indeed she argues that COK has enjoyed the benefit both of an ex parte hearing, and an inter partes hearing on the issue to do with leave to apply for judicial review. She is also

plainly right in stating that COK's application does not involve the liberty of the subject or a criminal cause or matter.

[31] Mr. Anderson argued that Rule 56.5 deals with renewal and that the present application is not an application for renewal. He submitted that in the instant case COK was applying for leave "once more" because the application was not made properly the first time around. He submitted that whether or not there was a hearing before Daye J. was of no moment because Rule 56.5 does not apply. This is not a case, he in my view rightly submitted, where leave had been refused, or where leave had been granted upon any terms other than Rule 56.4(12).

[32] In my judgment, it is clear from a reading of Part 56, that there can be no question of renewing an application for leave where leave has been granted on the sole term or condition (whether specifically referred to in the court's order or not-see the judgment and analysis of Smith J.A. in **Golding v. Miller** at page 21), specified in Rule 56.4(12), that is, on the condition that the applicant makes a claim for judicial review within 14 days of the receipt of the order granting leave. In my view, in those specific circumstances, this is so whether or not there has been a hearing (although Part 56 allows for applications for judicial review to be considered by a judge just on the papers without a hearing, to date, it has been the practice to have a hearing for every application). This is in my judgment capable of being inferred from the judgment of Smith J.A. in **Golding v. Miller** at page 19, the second paragraph. It has also been held in **Barrington Gray v. The Resident Magistrate for the Parish of Hanover** Application No. 148/07 delivered on the 23rd of November 2007 that an application for leave which did not involve the liberty of the subject or a criminal matter and which was refused after a hearing cannot be renewed.-see also per Smith J.A. at pages 18- 19 of **Golding v. Miller**.

[33] It is interesting to note that in the **Barrington Gray** matter there were two applications for leave to apply for judicial review. Learned Counsel for the Appellant had sought to argue that the second application was not a renewal of the first but rather was an indication that the first one had been abandoned because of a procedural problem pointed out by the judge (page 8 of the judgment). However, the Court of Appeal considered the second application

was a renewal. At pages 12-13, Smith J.A. stated that there was no dispute that a previous application had been made by the applicant. This previous application was heard and refused by the judge. The judge's decision was appealed. The appeal was dismissed. The court therefore disagreed that in those circumstances the first application could be said to have been abandoned.

[34] In the instant case there is no dispute that a previous application had been made before Daye J in the 2010 claim. There is no dispute that it was granted, and indeed, by filing the Fixed Date Claim Form on June 1 2010 COK clearly purported to act upon the leave. In those circumstances, it cannot be said that there was no previous grant of leave. As I have indicated, the court cannot treat the matter as if the order of Daye J. had never been made, even though it was ultimately set aside by Sykes J. on the 8th of October 2010. It was extant and effective until set aside. In my judgment, it also cannot be argued that there has not been a hearing previously in respect of an application for leave by COK because Daye J. held a hearing of the matter on the 17th of May 2010. However, it would not really matter whether or not there was a hearing because once the leave is granted solely on the term of Rule 56.4 (12), it cannot be renewed.

[35] In my view, the following situation obtains with regard to applications for leave and renewals:

(A) Leave may be granted without a hearing-Rule 56.4(2).

(B) If leave is granted without a hearing, solely on the condition/term set out in Rule 56.4(12), i.e. the filing of the claim within 14 days, whether or not involving the liberty of the subject or a criminal cause or matter, it cannot be renewed-Rule 56.5 (1) and **Golding v. Miller** at page 19.

(C) Leave cannot without a hearing be refused- Rule 56.4(3).

(D) Leave may be granted after a hearing. If it is granted on terms other than the condition/term set out in Rule 56.4(12), and it involves the liberty of the subject or a criminal cause or matter an application may be renewed and this is to a full court-Rule 56.5(1)(a).

(E) If leave is granted on terms other than the condition/term set out in Rule 56.4(12) and does not involve the liberty of the subject or a

criminal cause or matter, and was granted without a hearing, the applicant may renew the application for leave by application to a single judge who may refer the application to a full court-Rules 56.4(2) and 56.5(1)(b).

(F) If leave is granted on terms other than the condition/term set out in Rule 56.4(12) and does not involve the liberty of the subject or a criminal cause or matter, and it was granted after a hearing it cannot be renewed-Rule 56.5(3) and **Golding v. Miller** pages 18-19.

(G) If leave is refused, (and it must only be refused after a hearing-Rule 56.4 (3)(a)), and it does not involve the liberty of the subject or a criminal cause or matter, it cannot be renewed-Rule 56.5(3) and the **Barrington Gray** matter.

(H) Where a claimant who is granted leave, after a hearing, solely on the term/condition set out in paragraph 56.4(12) fails to file the claim within the 14 days of receipt of the order granting leave, in other words, who fails to comply with the condition, the leave lapses and it cannot be renewed. The time for filing the claim form also cannot be extended –**Golding v. Miller**. The same would appear to be true when there is no hearing.

[36] It follows therefore from the foregoing, Daye J. having granted leave on the 17th May 2010, COK were obliged to comply with that order which had not yet been set aside as an irregularity. On the authority of **Golding v. Miller**, COK failed to file the claim within the period required by Rule 56.4(12) and the leave would therefore have lapsed. This application does amount to an application to renew and Rule 56.5 (1) does not permit the renewal of an application in those circumstances. This is so despite the wording of the **Practice Direction on Judicial Review** which took effect on June 1, 2006-see per Smith J.A. in **Golding v. Miller** page 19.

[37] Before leaving this point, I wish to state that it seems to me that if there is anything that could arguably have been a nullity, it would have been the Fixed Date Claim Form filed by COK. However, this has not been argued before me and was not argued before Sykes J. and so I make no finding upon this matter. However, if even it was the Claim Form that could have been a nullity, that would not avail COK in this application because it would still mean

that leave had been granted and that the "within fourteen days" period had been allowed to expire without a valid claim form being filed.

(iii) Does this application amount to an abuse of the court's process?

[38] This is in some ways a tough case, and it was not easily resolved. The contentions between the parties go back a long way, and its history has been traced by my brother Sykes J. in his judgment in the 2010 claim –see paragraphs 3-8. At paragraph 25 of his judgment, Sykes J. acknowledged that numerous judicial decisions which he had reviewed (which came from various parts of the Commonwealth), indicate that the mistaken view taken by Counsel for COK as to the date when grounds for the application first arose, is one that has been shared by others. Indeed, Sykes J. even described Counsel whose submissions failed before him, as being "in illustrious company". In COK's application, it was argued that COK, in making this application, having taken the view which they took previously, and which they only became aware was mistaken after the decision of Sykes J., was now trying to remedy the situation. COK claims to have a case which Mrs. Velma Brown-Hamilton, Legal Advisor to COK, described in paragraph 30 of her First Affidavit sworn to on the 17th of January 2011, as one that "would have a very high prospect of success". This application, whilst misconceived, is certainly not frivolous or vexatious. In my judgment, in making COK's application, whatever the errors may be, COK genuinely held the view that they have serious and sustainable grounds for complaint against the Registrar's decision. Indeed, one of the complaints that COK makes is that (see paragraphs 8-17 and 21 of Mrs. Velma Brown-Hamilton's First Affidavit), the Registrar in making his January 21st 2010 award, has departed from the guidance provided by the Supreme Court in judicial review proceedings before R. Anderson J. as well as that of the Court of Appeal in upholding Anderson J.'s judgment. Those court decisions arose out of an earlier judicial review application in respect of the Registrar's award of March 31 2006 in respect of the same substantive dispute between the parties. Anderson J. had made an order of certiorari quashing the award of March 31 2006 on the basis that there had been an error of law and had remitted the matter to the Registrar for proper determination.

[39] I note that in the **Barrington Gray** matter, (see page 8), it had been submitted that the second application was made in breach of the Rules and amounted to an abuse of process. The Court of Appeal's judgment does not reveal any pronouncement upon that aspect of the matter. As stated by Sir John Donaldson M.R. in **R v. East Berkshire Health Authority, ex parte Walsh** [1984] 3 All E.R. 425, at page 429a, in a matter where the remedy of judicial review was found to be inappropriate, the term "abuse", has offensive overtones, and a more appropriate term to use may be "misuse". In the circumstances, I find that this application represents a "misuse" of the court's process rather than an abuse.

[40] The striking out application is therefore granted on the ground that COK's application represents a collateral attack on the judgment of Sykes J., and alternatively, if it is not, it is a renewed application for leave to apply for judicial review after a hearing, which is not permissible in the circumstances. Further, the application is misconceived and is a misuse of the court's processes. The Amended Notice of Application, filed January 20th 2011, is therefore struck out, with costs to the Respondents to be taxed if not agreed .