[2024] JMCA App 2

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MRS JUSTICE SHELLY-WILLIAMS JA (AG)

APPLICATION NO COA2023APP00279

BETWEEN	**JOY PATRICIA HARRISON**	**APPELLANT**
AND	**THE COUNCIL OF THE CARIBBEAN MARITIME UNIVERSITY**	**RESPONDENT**

Douglas Leys KC instructed by Hay and Johnson for the appellant

Mrs Simone Mayhew KC instructed by Mayhew Law for the respondent

17 January and 12 February 2024

Civil procedure – Application for permission to appeal - Leave to apply for judicial review- Whether the learned judge was correct to order costs against the appellant - Whether the learned judge erred in making orders to transfer the case so that orders could be made under Parts 26 and 27 of the Supreme Court Civil Procedure Rules, 2002 ('CPR')- Whether the learned judge correctly exercised her discretion by refusing the appellant's application for leave to apply for judicial review- CPR rr 56.15(5), 64.6(1) and 56.10

BROOKS P

[1] I have had the privilege of reading, in draft, the judgment of my learned sister Shelly-Williams JA (Ag). I agree with her reasoning and conclusion. I have nothing to add.

F WILLIAMS JA

[2] I too have read the draft judgment of Shelly-Williams JA (Ag) and agree with her reasoning and conclusion.

SHELLY-WILLIAMS JA (AG)

Introduction

[3] On 30 November 2023, the appellant, Ms Joy Patricia Harrison, filed an application in this court asking that leave be granted to appeal the decision of Wint-Blair J ('the learned judge') contained in an order made on 16 November 2023 refusing leave to apply for judicial review of the decision of the President of the respondent, Caribbean Maritime University ('CMU'). The order states as follows:

> "1. The declarations sought by the applicant are refused.
>
> 2. The order for certiorari sought by the applicant is refused.
>
> 3. The application for leave is refused.
>
> 4. The application is ordered to be dealt with as a claim.
>
> 5. A Case Management Conference is to be fixed by the Registrar of the Supreme Court as soon as is practicable.
>
> 6. Costs of the application are awarded to the respondent to be taxed if not agreed."

[4] The appellant had previously sought in the court below permission to appeal the decision but this was refused. This refusal resulted in the filing of the present application in this court for leave to appeal.

[5] The proposed grounds of appeal on which the appellant relies are as follows:

> "(i) The [learned] judge (as at paragraph 121) erred in awarding costs to the Respondent because the Applicant was the unsuccessful party….
>
> (ii) The learned judge erred 9 [sic] (at paragraphs 118 and 119) in making an order, albeit conditional on submissions from Counsel that this matter be referred under section 56.10(3) of the CPR….

(iii) The learned judge erred in finding (at paragraph 118 *supra)* that the decision of the President of the Respondent is not amenable to judicial review as the [Applicant's] post of treasurer with the university was neither regulated [nor] established by statute….

(iv) The learned judge erred in finding (at paragraph 113) that for the purposes of judicial review the Applicant was not the holder of statutory office within the intent of the CMU Act and that her employment was based on an ordinary contract of employment….

(v) The learned judge erred in finding ([at] paragraph 114) that there was no basis for legitimate expectation in this case….

(vi) The learned judge fell into error (at paragraph 116) based on the conclusions at which she arrived….

(vii) The Applicant will contend that the learned judge erred in concluding at (paragraph 116) that the appropriate remedy is in private law for a breach of contract….

(viii) The learned judge misconstrued the facts applicable to this case (as at paragraphs 76 and 77)…."

The parties asked for the application for leave to appeal to be treated as the hearing of the appeal. This request was granted.

Background

[6] The appellant was recruited and appointed on 8 May 2020 as the interim treasurer for the CMU. She was initially engaged on contract for two years and there were continuous subsequent renewals to 31 January 2023. During the period of her employment, she was not paid an annual salary incremental increase or a non-taxable travelling allowance for the period 2022 to 2023. She queried this with the Director of Human Resources and it was conveyed to her that, contrary to existing government policy, the CMU paid increments to temporary staff. The Director also indicated that there was no intention to oppose the CMU's practice unless otherwise advised. Further, she was informed that approval of a compensation plan was needed from the Ministry of

Finance and, also that, inquiries will be made on how to proceed in making submissions for the payment of the increment.

[7] The appellant, thereafter, wrote to the Ministry of Finance but received no reply. She then raised the matter with the President of the CMU and his response created the genesis of the dispute between the parties. He informed the appellant that she was appointed as interim treasurer and not appointed to the established post of treasurer and as such she was not entitled to the incremental increases or travelling allowance attached to that post. He indicated, however, that she was entitled to the payment of an accessory allowance and any government increase in salary for 2022.

[8] The appellant, aggrieved by that decision, filed an application for leave to apply for judicial review by which the following were sought:

> "*(i)* *'A declaration that the Respondent [sic] is entitled to anniversary increments and pecuniary benefits inclusive of travelling allowance pursuant to the provisions of the CMU Act and her contract of employment;*
>
> *(ii)* *A Declaration that the Respondent is acting ultra vires the provisions of the Act in denying the Claimant [sic] her just entitlements under the provisions of the Act and her contract of employment.*
>
> *(iii)* *An order of Certiorari quashing the decision of the Respondent that the Applicant is not entitled to anniversary increments and other pecuniary benefits by way of email correspondence dated March 6, 2023*
>
> *(iv)* *Costs of this Application to the Applicant*
>
> *(v)* *The Court on the grant of leave will give such other consequential directions as may be deemed appropriate.'"*
>
> (Italics as in the original)

The issues for determination

[9] There are three main issues to be resolved, which are:

I. Whether the learned judge was correct to order costs against the appellant;

II. Whether the learned judge erred in making orders to transfer the application to case management so that orders could be made under Parts 26 and 27 of the Supreme Court Civil Procedure Rules, 2002 ('CPR'); and

III. Whether the learned judge correctly exercised her discretion by refusing the appellant's application for leave to apply for judicial review.

Issue I: Whether the learned judge was correct to order cost against the appellant

Submissions

[10] In written and oral submissions, Mr Leys KC submitted that the learned judge failed to appreciate that in an application for leave to apply for judicial review costs are generally not awarded against an appellant at the leave stage except in exceptional circumstances. He indicated that the appellant was not given the opportunity to address the issue of costs to advance any exceptional circumstances. He also submitted that the learned judge erred in applying the general rule as to costs at rule 64.6(1) of the CPR at the leave stage and as such exercised her discretion in awarding costs against the unsuccessful party improperly. He further stated that she did not consider the principles on which costs are awarded as set out in the case of **Danville Walker v The Contractor General** [2013] JMFC Full 1(A). Reference was also made to the guidance of Auld LJ in **Mount Cook Land Ltd v Westminster City Council** [2003] EWCA Civ 1346 on the exceptional circumstances that may be considered.

[11] On the issue of costs, Mrs Mayhew KC submitted that the learned judge did not exercise her discretion improperly. She argued that in applications for leave to apply for judicial review, rule 64.6(1) of the CPR, which speaks to the principle that costs follow

the event, applies. She also indicated that this application for leave was outside of the consideration of rule 56.15 of the CPR, which enjoins the court not to make costs orders in applications for judicial review. In support of her submission, she cited the case of **Kingsley Chin v Andrews Memorial Hospital Limited** [2022] JMCA Civ 26 which decided that rule 64.6(1) is applicable to the unsuccessful party on an application for leave to apply for judicial review.

Discussion

[12] This issue will be approached under two limbs namely:

a. Was the wrong test applied in awarding costs?

b. Should the appellant have been given an opportunity to be heard prior to the costs order being made?

[13] The CPR address costs orders in relation to different categories of cases. Costs orders in administrative cases are generally governed by rule 56.15(5), which states that:

> "The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

This differs from rule 64.6(1) which addresses the general rule in costs orders. The rule states 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."

[14] The difference between the judicial review cases and other litigation was considered by this court in **The Ministry of Finance and Planning and Public Service and Others v Viralee Bailey Latibeaudiere** [2014] JMCA Civ 22 where Morrison JA (as he then was) opined that judicial review is to be treated as a special species of litigation. At para. [109], Morrison JA stated:

> "It seems to me, with respect, that by importing these general provisions of the CPR into Part 56, the learned judge failed to have sufficient regard to the special nature of judicial review proceedings and the fact that Part 56, as consistently interpreted by the courts, was plainly intended by the framers of the rules to be, save where otherwise indicated, a self contained code for the conduct of such proceedings."

[15] The fact that judicial review claims are a special species of claims, governed by Part 56 of the CPR, may lead to an erroneous assumption that all aspects of the claim are to be addressed under this rule. Procedurally, prior to filing a claim for judicial review, the appellant must first seek leave. Rules 56.3 and 56.4 detail the procedure in applying for leave to apply for judicial review and the orders that are usually made in the event leave is granted. That rule makes no mention of the approach to be adopted in relation to costs if leave is not granted. Rules 56.11 to 56.15 govern the procedure for the hearing of judicial review claims once leave has been granted.

[16] In the case of **Danville Walker v The Contractor General** reference was made by both counsel to rule 56.15(4) and (5) as the approach in relation to costs at the leave stage. This was alluded to at para. [4] of the minority judgment of Sykes J (as he then was) which states as follows:

> "[4] Both counsel referred to rule 56.15 (4) and (5) in CPR which states as follows:
>
> (a) *The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.*
>
> (b) *The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.*"
>
> (Italics as in the original)

[17] Sykes J opined on this reference at para. [5]. He stated that:

> "I am not convinced that this is the correct starting point. This rule occurs in 56.15 which deals with costs at a full judicial review hearing. It would seem to me that rule 56.15(4) and (5) does [sic] not apply to the current situation because it speaks to costs in the context of a full hearing after leave has been granted and the claim has been heard. There is nothing in part 56 dealing with costs at the leave stage…"

[18] Sykes J went on to state that even though rule 56.15 did not apply, his view was that the usual costs considerations should not apply. He stated in para. [19] that:

> "The point being made is that despite the fact that judicial review are civil proceedings and applications for leave are governed by the costs regime in Part 64, I am of the view that the special nature of these proceedings makes them sui generis and not to be thought in the same way as private law civil proceedings between private citizens."

[19] Brown JA (Ag) (as he then was) in the case of **Kingsley Chin**, having reviewed the decision of **Danville Walker**, stated at para. [114] of his decision that:

> "…The appellant's application for leave to apply for judicial review, having been refused, never transitioned into an application for an administrative order. As I endeavoured to show, it is only that transition that would warrant resort to rule 56.15 of the CPR. To put the matter another way, the appellant tried to place himself in a position to make an application for an administrative order, in which event he would have fallen within the ambit of the self-contained provisions of Part 56, requiring the consideration of costs under rule 56.15, but failed. Consequently, the appellant was not entitled to have the matter of costs considered under the strictures of rule 56.15."

[20] Since the application before the court was for leave to apply for judicial review, the application having been refused, rule 56.15(5) would not apply. The learned judge ordered the usual costs under rule 64.6(1), consequently, there is no basis upon which this court would interfere with the exercise of the judge's discretion.

[21] The second query raised by the appellant in relation to costs is whether they ought to have been heard prior to a costs order being granted.

[22] The submissions made initially by the appellant was that costs orders were made only under exceptional circumstances under rule 56.15. Therefore, prior to the costs order being made against the appellant, she ought to have been given an opportunity to be heard. This was, however, expanded during oral submissions to whether the appellant should have been heard prior to the costs order being made.

[23] The Privy Council has addressed the issue of costs being awarded after the promulgation of Civil Procedure Rules in the Caribbean Islands. In a case from this jurisdiction, **San Souci Limited v VRL Services Limited** [2012] UKPC 6 Lord Sumption stated the principle at para. 22 as follows:

> "22. It is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to be heard. The Court of Appeal included an order for costs in their Judgment of 12 December 2008 without hearing either party upon it. The Practice Direction in Jamaica assumes that submissions on costs, if any, will be made before the Court rises after giving Judgment, a course which it would have been impossible for the Manager's representatives to follow in this case because they had had no advance notice of the contents of the judgment and only one day's notice of the fact that it was to be delivered. This procedure may nevertheless be perfectly acceptable, provided that the order included in the Judgment is provisional, and that parties are given a reasonable opportunity to address the Court on costs later."

[24] In the second case from the Caribbean, **Phyllis Rampersad and another (Appellants) v Deo Ramlal and 3 others (Respondents) (Trinidad and Tobago)** [2022] UKPC 50 ('**Phyllis Rampersad**'), the Privy Council was asked to address the issue of costs orders in civil cases. One ground in the appeal was that the costs order made by the trial judge was unusual, and they had not been given an opportunity to address the court prior to the order being made. Lord Kitchin, in para. 7 of the decision, stated the general approach to be taken in awarding costs:

> "The starting point is entirely conventional. Rule 66.6 provides that if the court, including the Court of Appeal, 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. But the court may make a different order and, as rule 66.6(2) makes clear, may even, in an appropriate case, order a successful party to pay all or part of the costs of the unsuccessful party. In deciding who should be liable to pay costs, the court must have regard to all the circumstances and in particular must have regard to the matters set out in rule 66.6(5) which include the conduct of the parties, whether a party has succeeded on particular issues even if he has not been successful overall, whether it was reasonable for a party to raise or pursue a particular issue and the manner in which the party has pursued the whole or any aspect of his case."

[25] On the point of whether the parties ought to be heard prior to costs orders being made Lord Kitchin, in coming to his decision, stated at para. 38 that:

> "The Board recognises that this order may have been considered out of the norm for proceedings of this kind, subject to the allegations and findings of fraud and dishonesty to which the Board has referred. The Board also accepts that parties should generally be given an opportunity to be heard or make representations before the court makes an order for costs, for fairness and justice demand no less, as the Court of Appeal of Trinidad and Tobago explained in *Pan Trinbago Inc v Simpson* CA Civ App No S-027 of 2013 (23 February 2015) at para 74. The Court of Appeal also explained in *Pan Trinbago,* at para 75, that the court has a discretion to vary costs orders prescribed by Page 12 the CPR, but where the court intends to move away from the CPR guidelines, it is generally appropriate and indeed necessary to give a reason for doing so."

[26] He, however, concluded that the costs order was still justified despite no opportunity being given to make submissions on costs as there was no prejudice to the appellants. He stated at para. 45 as follows:

> "As it is, however, the Board has no difficulty inferring that the judge's reason for making her order, following her dismissal of the claim, was soundly based upon the nature of the allegations made and the lack of probity with which they

> were pursued. The Board is also satisfied that the order was justified, and further, that this justification was or ought to have been apparent to the appellants at the latest by 25 May 2017, if not a good deal earlier. What is more, although the judge failed to give the appellants any opportunity to make submissions as to the appropriate costs order, the Board has no doubt that they have suffered no prejudice. Indeed, had the appellants made submissions, the Board considers it is highly likely the judge would have ordered them to pay costs to be assessed on the indemnity as opposed to the standard basis for this would have given an opportunity for the respondents and the judge to focus on the misconceived allegations of fraudulent misrepresentation on which the claim depended."

[27] The case of **Williamson and another v Port Authority of Jamaica** [2019] JMCA Civ 8, from this court, also provides guidance on this point. Morrison P stated at paras. [127] – [129] as follows:

> "[127] The principle which Lord Sumption restated in **Sans Souci v VRL**, is a salutary one, often overlooked in the rush of things by counsel and judges alike. As Lord Sumption also pointed out, injustice can generally be avoided by the court making a provisional order for costs at the time of delivery of the judgment, giving either or both of the parties a reasonable opportunity to address the court on costs at some later time.
>
> [128] **While the principle that both parties should be given an opportunity to address the question of costs is clear, it seems to me that each case has to be looked at in the light of its own facts**. It is on this basis that in **Sans Souci v VRL**, as Mr Hylton pointed out, despite what Lord Sumption described as 'a strong sense of discomfort about the rather peremptory procedure which was adopted in this case', the Board ultimately concluded that the party who had been ordered to pay costs below had had a reasonable opportunity to be heard.
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> [129] In this case, it would obviously have been prudent for the judge to have raised the issue of costs in the presence of the parties and their counsel in court on 30 November 2017, at the time when judgment was being delivered. But it seems to me that there can have been no impediment to counsel for

> the appellants raising the issue of costs himself, either at that time, or subsequently before the judgment was perfected. I would therefore reject the contention that, in breach of the principles of natural justice, the appellants were not given a reasonable opportunity to make submissions on costs." (Emphasis supplied)

[28] Therefore, though an opportunity should have been given for the parties to address the court on costs, considering the finding that rule 64.6(1) is the rule that applies in awarding costs for applications for leave to apply for judicial review, there is no prejudice to the appellant by the costs order as she was the unsuccessful party and the learned judge simply applied the general rule.

[29] In addition, we are also guided by the opinion of Lord Kitchin in **Phyllis Rampersad**, at para. 42, that:

> "If no express explanation is available for a costs order, however, the appellate court will approach the material facts on the assumption that the judge will have had a good reason for making the order she did. Indeed, as the Court of Appeal went on to explain in *English v Emery Reimbold & Strick*, at para 30, where there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making it. Further, in practice, it is only in those cases where a costs order is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons."

[30] The application before the learned judge was one for leave to apply for judicial review and as such rule 56.15 did not apply. It is obvious from the decision of the learned judge the basis for awarding costs. In that regard, there is no reason to interfere with the exercise of her discretion. The appellant therefore fails on this issue.

Issue II: Whether the learned judge erred in making orders to transfer the application to case management so that orders could be made under Parts 26 and 27 of the CPR?

Submissions

[31] Mr Leys had submitted that the reference of the matter to case management by the conditional order of the judge under rule 56.10(3) was illusory in the circumstances. He argued that all declarations were refused and as such there was nothing left for further litigation in the Supreme Court by a judge of coordinate jurisdiction unless the orders were set aside.

[32] Mrs Mayhew conceded that this issue may be one with merit. She submitted that there was no basis for the learned judge to have converted the application to continue as a private law claim. She accepted that in refusing the leave to apply for judicial review there was no other relief being sought before the court and as such there was no claim subsisting to convert.

Discussion

[33] The learned judge, after concluding that she would not grant leave to the appellant to apply for judicial review, then proceeded to make orders for the case to be referred to case management under parts 26 and 27 of the CPR. She stated in paras. [116] to [119] of her judgment that:

> "[116] The applicant is alleging a breach of contract which is ordinarily an action brought in contract as a matter of private law. The applicant's case is for loss of remuneration arising out of an alleged breach of the contract brought about by the non-payment of the annual increment. The applicant cannot seek reinstatement, she can only assert, this private law right. The fact that she also seeks, incidentally, to pray in aid the provisions of the Act in support of her position to be entitled to be paid cannot prevent her, in my view, from proceeding by way of an action commenced by ordinary claim. The appropriate remedy is in private law in a claim for breach of contract.

> [117] The court has the discretion to order a claim to continue as if it had not been commenced under part 56 of the CPR. Rule 56.10(3) states:
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> > *'The court may however at any stage – a) direct that any claim for other relief be dealt with separately from the claim for an administrative order, or b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; c) in either case, make any order it considers just as to costs that have been wasted because of the unreasonable use of the procedure under this Part.'*
>
> [118] This court is empowered by rule 56.10(3) of the CPR to direct that a claim for other relief can be dealt with separately from this claim for an administrative order. It is the exercise of a discretion. The power under rule 56.10(3) of the CPR to convert the claim into one in contract was not argued by King's Counsel, therefore the orders below will stand pending further submissions on any proposed variation in terms regarding the exercise of the power granted by the rule.
>
> [119] In my view, it will be a matter for a trial judge at the trial of the claim to say whether expressed or implied terms of the applicant's employment contract were breached and whether she is entitled to additional damages or other civil law remedies." (Italics as in the original)

[34] Based on this conclusion she made two orders namely:

> "4. The application is ordered to be dealt with as a claim.
>
> 5. A Case Management Conference is to be fixed by the Registrar of the Supreme Court as soon as is practicable."

[35] There are two areas to be addressed in relation to the orders of the learned judge to refer the application for leave to apply for judicial review to case management, which are:

a. Can an application for leave to apply for judicial review be converted to a claim in private law?

b. If it can be converted, based on the orders made by the learned judge, can this claim be so converted?

A. Conversion of application for leave to apply for judicial review to private law claim

[36] The learned judge sought to convert the application to case management based on rule 56.10 of the CPR. There are occasions where a claim which seeks administrative redress, is combined with other claims such as for damages and restitution. Rule 56.10(3) speaks to the directions that may be given with regards to these joined claims. It states that:

> "The court may however at any stage –
>
> (a) direct that any claim for other relief be dealt with separately from the claim for an administrative order; or
>
> (b) direct that the whole application be dealt with as a claim and give appropriate directions under Parts 26 and 27; and
>
> (c) in either case, make any order it considers just as to costs that have been wasted because of the unreasonable use of the procedure under this Part."

[37] Rule 56.10 does not create a new claim, it merely dictates the manner in which an application for administrative orders is joined with claims for private law relief. In the case of **Michael Levy v Attorney-General of Jamaica** [2013] JMCA App 11, which is a decision on a motion to appeal to Her Majesty in Council, Morrison JA (as he then was), in examining rule 56.10, referred to Supperstone and Goudie's 'Judicial Review' by Michael Supperstone QC and James Goudie QC, 1997, at page 14.35, in which the learned authors considered the Rules of the Supreme Court (RSC) Order 53, which bore a resemblance to rule 56.10(2). At para. [21] Morrison JA stated thus as it relates to RSC Order 53:

> "[21] In this connection, Miss Larmond referred us to Supperstone and Goudie's 'Judicial Review' (by Michael

> Supperstone QC and James Goudie QC, 1997), in which the learned authors state (at page 14.35) that RSC Order 53 –
>
> > '...creates no new cause of action. It enables a claim for damages for breach of a private law duty resulting from unlawful conduct by a public authority to be joined with a public law application to establish the unlawfulness rather than being claimable only in an action begun by writ. This is of value because it avoids the instigation of duplicate proceedings.'"

[38] Morrison JA, therefore, accepted that, like its English predecessor, rule 56.10 creates no new cause of action. The rationale detailed by Morrison JA at para. [22] was that:

> "[22] …rule 56.10(2) falls to be regarded as facilitative only, in the sense of permitting an applicant for judicial review to join an action for damages in the same proceedings, provided that at the time of the filing of the judicial review application the claimant could have filed a claim for such a remedy…"

[39] In the case of **The Attorney General of Jamaica and another v Machel Smith** [2020] JMCA Civ 67 Edwards JA, in discussing whether case management can be ordered in relation to damages in a claim for judicial review, at para. [80] of the judgment stated that:

> "Rule 56.10(3) gives the court the power at any stage to direct that the claim for other relief, in this case damages, be dealt with separately from the claim for administrative orders. This rule is on the basis that the claim for other relief was wrongly joined in the first place (so that the court may order wasted costs 'because of the unreasonable use of the procedure') (rule 56.10 (3)(c)). This is not what the judge purported to do in this case."

[40] Judicial review claims are unique in that they require leave to be granted before a claim can be filed. Once leave is refused, that concludes the matter before the court. That being the case, there would be no claim to convert, or remaining claim to be referred to case management under Parts 26 and 27. The use of the word "claim" in rule 56(10),

would specifically exclude applications for leave to apply for judicial review. Therefore, the learned judge erred in this regard.

B. Effect of the orders of the learned judge on the conversion of the application

[41] Regarding, the second point, it is worth noting that the application for leave to apply for judicial review, included two declarations. It is well-known that no leave is required to file a claim seeking declarations. This was stated in several cases, including the case of **The Office of Utilities Regulation v Contractor General** [2016] JMSC Civ 27, where Fraser J (as he then was) stated at paras. [86] to [89] that:

> "[86] On the basis of that analysis there is therefore now no need for leave to be applied for in respect of 'public law' declarations. I go further. I find attractive the position advanced by Ms. Larmond. Not only is there no need, there is no basis on which the court can properly consider the question of leave in relation to declarations. It is not, as advanced by counsel for the applicant, that there are now parallel approaches (with or without leave) which can be taken with regard to pursuing declarations as a relief.
>
> [87] The fact that judicial review is defined to include the prerogative remedies, suggesting that other remedies may fall under its aegis, does not mean that a declaration is contemplated as one such remedy, given that the relief of a declaration is specifically provided for as a separate administrative order in the same rule. There has, it seems, been a complete break with the past in the scheme of the CPR, where declarations involving public bodies are concerned.
>
> [88] It follows that I also do not accept that though there is no need for leave to be sought to obtain declarations, if they are included in an application for leave to apply for judicial review, the applicant has to satisfy the leave test in relation to the declarations.
>
> [89] I take this position being aware that in several cases since the new CPR declarations have been included in applications for leave to seek judicial review. Such matters have also come before this court including in the case of ***Gorstew Limited and Hon. Gordon Stewart O.J. v The***

> ***Contractor General*** [2013] JMSC Civ 10 cited in this matter. However this point has not to my knowledge been taken or considered before in this fashion."

[42] The case of **Honourable Attorney General and another v Isaac (Antigua and Barbuda)** [2018] UKPC 11 concerns an appeal which dealt with the question as to whether leave to apply for judicial review is required prior to seeking a declaration. Lady Black, at paras. 44 and 45, of the decision indicated among other things, that there was no requirement to make an application for leave to apply for judicial review when the issues canvassed before the court concerned declarations and damages. Paras 44 and 45 stated that:

> "44. Accordingly, it cannot be said that Ms Isaac is, in reality, seeking remedies of a judicial review nature. And even looking more widely than the nature of the remedies sought, there is nothing about her application which dictates that it be treated as a judicial review application within CPR 56.1(1)(c) rather than an application within CPR 56.1(1)(b). True it is that, as the appellants point out, her claim is concerned with the legality of events and the procedure by which decisions were reached in the public law sphere, but, given the structure of CPR 56, allowing as it does for the making of public law applications in four different ways, including merely by seeking declarations rather than judicial review, that is not sufficient to channel the application into CPR 56.1(1)(c) rather than CPR 56.1(1)(b).
>
> 45. In short, therefore, the Board shares the view of the courts below that Ms Isaac's fixed date claim was, in reality as in form, merely for declarations and damages, and was not an application for judicial review for which leave was required…"

[43] The declarations sought concerned the increments and travel allowance, that the learned judge concluded ought to be pursued in private law, and as such they were refused. The judge having refused the declarations, leave to apply for judicial review, and the application for *certiorari*, there was nothing left before the court to be referred to case management. In the circumstances, the appellant would succeed on this issue.

Issue III: Whether the learned judge correctly exercised her discretion by refusing the appellant's application for leave to apply for judicial review

Submissions

[44] The appellant had based her application for leave to apply for judicial review on grounds of illegality, irrationality, legitimate expectation, and procedural impropriety. The gravamen of Mr Leys submission was that the appellant had occupied the position of treasurer, despite the contract labelling her as an interim treasurer. He submitted that the position of interim treasurer did not exist. Mr Leys concluded that the learned judge erred when she found that the appellant was not a public servant. In these circumstances, Mr Leys submitted that the learned judge's decision was wrong.

[45] Mr Leys contended that the learned judge erred in law in finding that the post of treasurer was neither regulated nor established by statute and thus not amenable to judicial review. He argued that the post of treasurer is, in fact, a statutory post established by the CMU Act and as such has a clear statutory underpinning. He also argued that the appellant was appointed to this statutory post and that the respondent cannot, by the terms and conditions of the contract, seek to subvert the statutory intent and deprive the appellant of the benefits associated with the office. He went on to further state that any action of the CMU, failing to recognize that position, is *ultra vires* the CMU Act.

[46] Mr Leys' position was that it was not a requirement that the appellant be deemed a public officer for the decision of the President of the CMU to be amenable to judicial review. He submitted that by virtue of the appellant exercising powers derived from the statute, she will be seen as performing a public function and therefore the decision of the President of the CMU is amenable to judicial review.

[47] He further contended that the appellant's case, though closely connected to the claims for breach of contract, is based on the provisions of the CMU Act, which include a public law element. Therefore, the matter falls within the exception of cases that must be adjudicated by way of judicial review. Mr Leys relied on the case of **The Chairman,**

Penwood High School's Board of Management v The Attorney General and Loana Carty [2013] JMCA Civ 30 in support of his position.

[48] As it relates to the proposed ground on legitimate expectation, Mr Leys submitted that the learned judge misconstrued the concept. He stated that there was a representation made to the appellant through the Director for Human Resources that there was a practice of increments being paid to temporary staff contrary to government policy and there was no intention to oppose this practice. He argued that fairness dictates that the appellant be consulted before a decision opposing this practice be taken, and this fundamental element was breached.

[49] Mr Leys further submitted that the learned judge wrongly construed that the appellant, before claiming incremental increases, would need to demonstrate that she was in a similar position to the former Director of Finance or employed within the Civil Service. He argued that the CMU Act effectively abolished the post of Director of Finance and created a new post of treasurer to which the former Director was appointed and subsequently the appellant. There was, therefore, no transition of the Director to the post of treasurer. He found the learned judge's comments in this regard to be entirely irrelevant to the application for leave to apply for judicial review.

[50] The respondent's position was that this was a claim in private law, namely contract, and as such the leave to apply for judicial review was correctly refused. Mrs Mayhew in her response submitted that the learned judge's reasoning for the refusal of leave to apply for judicial review was unassailable and as such there was no merit in this ground of appeal. It was her contention that the appellant was not employed to the post of treasurer but instead was appointed as interim treasurer with no mention of any entitlements to anniversary increments and travelling allowance in her contract of employment. Mrs Mayhew indicated that the appellant, admittedly, recognized this by her own evidence, and as such there was no basis for the learned judge to consider any statutory underpinning of the post of treasurer.

[51] Kings' Counsel also submitted that even if the appellant is employed in the post of treasurer and as such was a public officer, this being essentially a claim concerning matters relating to the terms and conditions of her employment contract and remunerations, these are not matters appropriate for judicial review, but for private law. She relied on the decisions of **Sykes v The Minister of National Security and Justice and the Attorney General** (1993) 30 JLR 76 (CA); **Sykes v The Minister of National Security and Justice and another** (2000) 59 WIR 411; and **Swann v Attorney General of the Turks & Caicos Islands** [2009] UKPC 22 in support of her submission. Reference was also made to the dicta of Morrison P in the more recent case of **Minister of National Security & Attorney General v Herbert Hamilton** [2015] JMCA Civ 54 where this principle was again approved.

[52] Mrs Mayhew indicated that the learned judge recognized that **Swann** makes it clear that there are exceptional circumstances where, though a case raises a private law claim, public law can be used. She, however, submitted that there were no such exceptional circumstances in the present case.

Discussion

[53] The question that arises is whether the claim is one to be dealt with in private law or public law?

[54] The learned judge in para. [90] of her decision indicated the basis on which she deemed that the contract of the appellant was not susceptible to judicial review. She stated that:

> "The University undoubtedly performs a public function. How it exercises its functions is not necessarily so. There has to be some evidence to demonstrate that the act or function being complained of warrants the supervisory jurisdiction of the court, as the feature or combination of features of the act that bring it under the rubric of an act which is public in character. The conflation of the actions of the public body with actions of the office of Treasurer does not assist to determine this question. There is simply no evidence before the court that

the functions of the Treasurer have a feature or a combination of features which give rise to this public element. In other words, there is no material presented by the applicant upon which the court can make such a finding. The applicant did not distinguish whether she was appointed by the Minister to sit on several committees as a result of her expertise in the field of accounting or whether it was a function of the role of interim Treasurer. She did not state what were the objects and purposes of these committees. The court cannot speculate as to the purpose of these appointments. It is concluded then, that the test for determining whether a function involving a contract is susceptible to judicial review has not been passed."

[55] There are several cases that provide guidance as to whether a case ought to be treated as a private law claim or it is to be dealt with by means of judicial review. The judgment of **Swann** concerned the complaint of unlawful reduction in the remuneration of the appellant. In para. 14 of the judgment, Lord Nueberger of Abbotsbury was unequivocal that such claims are not to be brought by means of judicial review. Para. 14 states:

> "In those circumstances, it seems clear that the appellant should not have sought to bring his claim by way of judicial review, and should have issued a writ. That is primarily because his claim is, on analysis, a classic private law claim based on breach of contract (or, conceivably, estoppel). Furthermore, proceeding by writ would in any event be the more convenient course, given that a properly particularised pleaded case would be appropriate, and discovery and oral evidence will probably be required."

[56] The case of **McLaren v The Home Office** [1990] IRLR 338 clarifies the position as to whether payments related to personal claims are to be initiated by means of private claims. Woolf LJ indicated at page 342 that:

> "(1) In relation to his personal claims against an employer, an employee of a public body is normally in exactly the same situation as other employees. If he has a cause of action and he wishes to assert or establish his rights in relation to his employment he can bring proceedings for damages, a

> declaration or an injunction (except in relation to the Crown) in the High Court or the County Court in the ordinary way. The fact that a person is employed by the Crown may limit his rights against the Crown but otherwise his position is very much the same as any other employee. However, he may, instead of having an ordinary master and servant relationship with the Crown, hold office under the Crown and may have been appointed to that office as a result of the Crown exercising a prerogative power or, as in this case, a statutory power. If he holds such an appointment then it will almost invariably be terminable at will and may be subject to other limitations but whatever rights the employee has will be enforceable normally by an ordinary action. Not only will it not be necessary for him to seek relief by way of judicial review, it will normally be inappropriate for him to do so …
>
> (2) There can however be situations where an employee of a public body can seek judicial review and obtain a remedy which would not be available to an employee in the private sector. This will arise where there exists some disciplinary or other body established under the prerogative or by statute to which the employer or the employee is entitled or required to refer disputes affecting their relationship. The procedure of judicial review can then be appropriate because it has always been part of the role of the court in public law proceedings to supervise inferior tribunals and the court in reviewing disciplinary proceedings is performing a similar role. As long as the 'tribunal' or other body has a sufficient public law element, which it almost invariably will have if the employer is the Crown, and it is not domestic or wholly informal its proceedings and determination can be an appropriate subject for judicial review…"

[57] Woolf LJ went to opine at page 343 that what Mr McLean was claiming were declarations concerning the terms of his employment and as such:

> "They are private law claims which require private rights to support them ... Whether or not he is an employee of the Crown or has a contract of service, or holds an office under the Crown, he is entitled to bring private law proceedings if he has reasonable grounds for contending that his private law rights have been infringed."

[58] **Sykes v Ministry of National Security and Other** [1993] 30 JLR 76, was a claim for *certiorari* to quash a decision to withhold salaries of legal officers in the civil service during the period they were involved in industrial action. Downer JA, at page 82 of the report, indicated that this is a claim in private law and went on to state that:

> "…To seek the public law remedies of certiorari and prohibition was an abuse or to use polite language, a misuse of the process of the court…"

[59] The case of **Ministry of National Security and Attorney General v Herbert Hamilton** was a procedural appeal concerning to a fixed date claim form filed by the respondent for remuneration for 15 months and interest. The affidavit evidence of the respondent contended that he had been wrongfully terminated. The appellants had sought an order to strike out the fixed date claim form as they contended that the issue to be decided was whether the Minister was wrong to terminate the respondent's contract and as such the respondent ought to have sought leave to apply for judicial review. Morrison P (Ag) (as he then was), in para. [33] of his judgment, stated that:

> "… But, for present purposes at any rate, it seems to me that an important dimension of the problem has been clarified by the decisions of the Court of Appeal in **McLaren** and of the House of Lords in **Roy**. In my view, both cases provide clear authority for saying that, firstly, if a case turns exclusively on a purely public law right, then the only remedy will in general be by way of judicial review, pursuant to Part 56 of the CPR; and secondly, if the case involves the assertion of a private law right, the fact that the existence of that right might incidentally involve the examination of a public law issue does not prevent a claimant from proceeding by way of ordinary action outside of Part 56. In this regard, it will not matter whether the claimant is asserting a private law right based on contract or derived from statute."

[60] The application for leave that had been heard by the learned judge concerned the payments of increments and travelling allowances. The learned judge concluded that this case did not fall under any of the exceptions and as such ought to be pursued by way of private law. Based on the authorities, it is apparent that the learned judge properly

exercised her discretion, therefore, there is no reason to interfere with her decision that the matter is to be dealt with in private law.

Legitimate expectation

[61] The ground as to the legitimate expectation of the appellant would also fail. The legitimate expectation was based on correspondence between the Director of Human Resources and the appellant, where it was indicated that the travelling allowance was predicated on approval from the Ministry of Finance. The President of the CMU later refuted the contention that the appellant was eligible for these payments. Based on the correspondence between the parties, this dispute is part of the foundation on which a claim could be pursued in private law. The approach to be adopted in relation to a claim of legitimate expectation in private law cases was indicated by Lord Nueberger in the case of **Swann,** at para. 15, where he stated:

> "The Board accepts that the appellant may conceivably be able to mount an argument on the public law ground of legitimate expectation, but this would be very much of a fallback contention. In any event, it is a contention which would be based on the same evidence, and indeed much of the same argument, as his possible estoppel ground, which itself would be an alternative to his primary argument, namely the claim in contract. Consequently, the possibility of such a contention being advanced can scarcely justify the claim being brought by way of judicial review. Even if this contention could justify the appellant's claim being brought by way of judicial review, determining whether to permit it to proceed as such is a case management decision, with which an appellate court should be slow to interfere. In this case, the Chief Justice's decision is unassailable, in the light of the need for a full particularised document identifying the claim and the probable need for discovery and cross-examination (which can be ordered in judicial review cases, but are normally more appropriate in actions begun by writ)."

[62] This is a dispute concerning the increments and travelling allowance of the appellant, which amounts to a breach of contract. The learned judge was correct in holding that the appellant's remedy was in the realm of private law and not public law.

[63] Considering the outcome, the respondents had a reasonable basis to resist the appeal and should not be liable for the full costs of the appeal. I would consider it just and reasonable to award costs of 50% to the appellant.

BROOKS P

ORDER

1. The application for leave to appeal is granted.

2. The hearing of the application is treated as the hearing of the appeal.

3. The appeal is allowed in part.

4. Orders 4 and 5 made by the learned judge in the court below are set aside.

5. The other orders made by the learned judge are affirmed.

6. The appellant is awarded 50% of its costs of the appeal.

7. If any party is of the view that a different order should be made concerning costs, that party shall, within 14 days of the date of this order, file and serve written submissions in that regard. The other parties shall be at liberty to file and serve submissions in response within seven days of the receipt of the submissions concerning a different order.

8. The court will consider the submissions on paper and rule thereon.