

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 78/2011

**BEFORE: THE HON MR JUSTICE MORRISON JA
 THE HON MISS JUSTICE PHILLIPS JA
 THE HON MISS JUSTICE MANGATAL JA (Ag)**

**BETWEEN THE MINISTER OF AGRICULTURE APPELLANT
AND DYC FISHING LIMITED RESPONDENT**

Harrington McDermott instructed by the Director of State Proceedings for the appellant

Christopher Dunkley instructed by Phillipson Partners for the respondent

SUPREME COURT CIVIL APPEAL NO 79/2011

**BETWEEN THE MINISTER OF AGRICULTURE 1st APPELLANT
AND B & D TRAWLING/RODERICK FRANCIS 2nd APPELLANT
AND DYC FISHING LIMITED RESPONDENT**

Harrington McDermott instructed by the Director of State Proceedings for the 1st appellant

Abraham Dabdoub and Miss Karen Dabdoub instructed by Dabdoub, Dabdoub & Co for the 2nd appellant

Christopher Dunkley instructed by Phillipson Partners for the respondent

22 July, 19 December 2014 and 27 January 2015

MORRISON JA

[1] On 19 December 2014, the court made the following order in these appeals:

(1) Appeals Nos 78 and 79/2011 are both allowed.

(2) The fixed date claim form filed in Supreme Court action No HCV 04444/2008 on 13 October 2008 is dismissed.

(3) The appellants are to have the costs of both appeals, to be agreed or taxed.

[2] This judgment is written in fulfilment of the court's promise to provide reasons for its decision.

[3] The Minister of Agriculture ('MOA') is the appellant in SCCA No 78/2011, while MOA and B & D Trawling/Roderick Francis ('B & D') are the appellants in SCCA No 79/2011. The respondent to both appeals is DYC Fishing Ltd ('DYC'). In the court below, DYC was the claimant, while MOA and B & D were the defendant and the interested party respectively.

[4] By order dated 29 September 2008, DYC was granted leave to apply for judicial review in terms of an application seeking four declarations in respect of a decision of the Minister of Agriculture made on 20 June 2008. This decision related to a matter affecting B & D.

[5] Purportedly pursuant to the grant of leave, on 13 October 2008 DYC filed a fixed date claim form seeking five orders, viz, an order of certiorari to quash the said decision; three separate orders of mandamus; and an order of prohibition.

[6] When the application for judicial review came on for hearing before G Brown J on 20 June 2011, MOA and B & D raised a number of preliminary objections:

- (a) That DYC had been granted leave to apply for declarations and had failed to apply for same in its fixed date claim form. Instead, it had applied for orders of certiorari, mandamus and prohibition, in respect of none of which leave had been obtained.
- (b) That, no leave having been sought or obtained for the reliefs sought in the fixed date claim form, the said fixed date claim form ought properly to be struck out.
- (c) That the leave obtained by DYC had lapsed, as it had failed to file a fixed date claim form seeking the orders for which leave was granted within 14 days of the grant of leave (as required by rule 56.4(12) of the Civil Procedure Rules).

[7] Before the judge, DYC conceded that it had no leave to apply for the orders asked for in the fixed date claim form. However, it sought leave to file an amended fixed date claim form seeking the reliefs originally claimed in the application for leave to apply for judicial review. On 23 June 2011, the judge granted the application to amend the fixed date claim form, but ordered that DYC should pay MOA and B & D's costs, such costs to be taxed or agreed. MOA and B & D were granted leave to appeal.

[8] When the appeals came on for hearing on 22 July 2014, Mr Dunkley for DYC advised that, as a result of the untimely passing of the principal of the company some months before, he was without instructions to mount any argument on behalf of DYC. However, Mr Dunkley did not seek an adjournment of the matter and it was agreed on both sides that the court should deal with it on the basis of the documentary material before it.

[9] On appeal, MOA and B & D have renewed the objections taken before the judge, arguing as follows. Rule 56.3(1) of the Civil Procedure Rules (CPR) requires an applicant for judicial review to first apply and obtain leave and rule 56.3(3)(b) requires that the application must state the relief being sought. Rule 56.4(12) provides that leave, once obtained, is conditional on the application for judicial review being made within 14 days of the grant of leave. Further, pursuant to rules 56.9(1)(a) and 56.9(2), the application must be made by fixed date claim form supported by affidavit. Rules 56.4(6) and 56.5(6) provide that an application for leave to apply for judicial review may be amended at the hearing of the application, but there is no provision allowing the amendment of the fixed date claim form once leave has been obtained.

[10] In addition to the provisions of the rules themselves, MOA and B & D rely on the decision of this court in **Orrett Bruce Golding and the Attorney General of Jamaica v Portia Simpson Miller** (SCCA No 3/2008, judgment delivered 11 April 2008), in which it was held that the result of a failure to file a fixed date claim form within 14 days of the grant of leave was that the leave lapsed. On this basis, MOA and B & D submitted that, once DYC failed to file a fixed date claim form claiming the reliefs for which leave had been granted within 14 days, the leave lapsed. Thereafter, the court had no power to allow an amendment of the fixed date claim form to claim the reliefs in respect of which leave was originally granted.

[11] In the leading case of **Orrett Bruce Golding and the Attorney General of Jamaica v Portia Simpson Miller**, Harris JA said this (at page 33):

“It is a cardinal rule of construction that words must be given their ordinary and natural meaning. The words of the rules are plain. There can be no doubt that the grant of leave to proceed to judicial review under rule 56.4 (12) is provisional. It is not absolute. It imposes a condition on an applicant to present his or her claim within 14 days of the grant of the leave. To satisfy this condition a Fixed Date Claim Form with an affidavit in support thereof must be filed, in obedience to rule 56.9 (1)(a) and 56.9 (2). It follows therefore that it would be obligatory on the part of the applicant to present the requisite documents within the time specified.”

[12] And, in **Andrew Willis v The Commissioner of Taxpayer Audit and Assessment Department/Commissioner of Inland Revenue** (App No 190/2009, judgment delivered 19 January 2010, para. 13), Phillips JA said that:

“There are 2 stages to the application to obtain an order for judicial review. Firstly, one must obtain leave in order to file the claim. Pursuant to the rules, once that leave is obtained, it must be acted on and if the claim is not filed within 14 days of obtaining the leave, it lapses. That leave is conditional on filing the claim within the time stated in the rules, which is 14 days of receipt of the grant of leave. If the condition is not satisfied, then the leave is no longer valid. Any claim filed outside of that period is invalid.”

[13] And, most recently, in my judgment in **Ministry of Finance and others v Viralee Bailey-Latibeaudiere** [2014] JMCA Civ 22, after referring to the two statements above, among others, I summarised the position in this way (at para. [100]):

“These cases therefore establish that (i) under the CPR, judicial review proceedings are in a different category from ordinary civil proceedings; (ii) save where otherwise specifically indicated in the rules themselves, Part 56 of the CPR provides a specific procedure for the conduct of judicial review proceedings which should be adhered to; (iii) leave to apply for judicial review is conditional on a claim for judicial review being filed within 14 days of the grant of leave; and (iv) if this condition is not satisfied, the leave lapses and any claim filed outside of that period is invalid.”

[14] While the rules do not in so many words provide that the fixed date claim form filed pursuant to the grant of leave must claim reliefs in the same terms as the reliefs foreshadowed in the application for leave, such a requirement must in my view be plainly implicit in the regime established by Part 56 of the CPR. Were it otherwise, it seems to me, the whole object of the requirement of leave as a precondition to an application for judicial review could be sidestepped by an applicant for judicial review seeking and obtaining leave to apply for a particular relief and then proceeding to seek

and obtain a different relief in the substantive proceedings. So in this case, for example, it would surely have been relevant for the judge from whom leave was sought to have been aware when considering the matter that DYC was also asking for such wholly different orders as certiorari, mandamus and prohibition.

[15] I therefore consider that DYC, having obtained leave on a particular basis on 29 September 2008, was obliged to file a fixed date claim form within 14 days making a claim for judicial review in the same terms indicated in the application for leave. It having failed to do so, the effect of rule 56.4(12) was that the leave lapsed upon the expiration of the 14 day period. Or, put the other way, the fixed date claim form which was in fact filed on 13 October 2008, claiming different reliefs from those which had grounded the grant of leave in the first place, was itself filed without leave. On either basis, it was not open to G Brown J to, by amendment, resuscitate proceedings which were on any view invalid and of no effect.

[16] However, I would wish to reserve my position on Mr McDermott's more far-reaching submission that there is no power of amendment of a fixed date claim form filed pursuant to the grant of leave in judicial review proceedings. There is in fact no such express limitation in either Part 56 or Part 20 (dealing with amendments to statements of case generally) and I would accordingly refrain from making any pronouncement on the point without full argument.

[17] These are my reasons for concurring in the order of the court made on 19 December 2014 and set out at paragraph [1] above.

PHILLIPS JA

[18] I agree with Morrison JA's reasons for the court's decision on 19 December 2014.

MANGATAL JA (Ag)

[19] I also agree.