[2024] JMSC Civ. 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2022CV03019

BETWEEN	**SONIA SMITH**	**1st APPLICANT**
AND	**DONOVAN MCKENZIE**	**2nd APPLICANT**
AND	**JENNIFER WILLIAMS-LIVINGSTONE**	**3rd APPLICANT**
AND	**THE COUNCIL OF THE KINGSTON AND ST ANDREW MUNICIPAL CORPORATION**	**1st RESPONDENT**
AND	**THE KINGSTON AND ST ANDREW MUNICIPAL CORPORATION**	**2nd RESPONDENT**
AND	**THE NATIONAL RESOURCES CORPORATION AUTHORITY**	**3rd RESPONDENT**

Gavin Goffe instructed by Myers, Fletcher and Gordon for Applicants

Rose Bennett-Cooper and Sidia Smith instructed by Bennett, Cooper Smith for 2nd Respondent.

Daniella Gentles-Silvera KC, Shawn Steadman and Kathryn Williams for Interested Party instructed by Livingston, Alexander and Levy

Application for leave to appeal – Relevant Test – Rule 1.8(9) CAR - Judicial Review – Part 56 CPR - Lapse of Time – Whether there can be a second application for judicial review – Is a second application the same as a renewal

Heard: January 23rd, 2024 and February 23rd, 2024

T. HUTCHINSON SHELLY, J

INTRODUCTION

[1] The matter before me is an application for leave to appeal the decision of Smith J (Ag) in which she denied the Applicants' application for leave to apply for judicial review. The application is supported by an affidavit sworn to by Sonia Smith, the 1st Applicant, in which they seek the following orders:

1. *Permission is granted to the Applicants to appeal the order made on the 5th day of December 2022 refusing leave to apply for judicial review.*

2. *Such further relief as the court deems just.*

[2] The grounds on which the Applicant is seeking the orders are as follows:

a. The Applicants have realistic prospects of success on appeal.

b. The Court erred in finding that a 2nd application for leave to apply for judicial review is not permitted under the Rules of Court.

c. The Court's jurisdiction to entertain an originating application, such as for leave for judicial review, is derived from primary legislation, being the Judicature (Supreme Court) Act and not from the Civil Procedure Rules.

d. There is no statute, regulation, or order that deprives the Applicants of the right to access the court and to make a second application for leave where conditional leave had already been granted and lapsed.

e. The Learned Judge failed to consider that a citizen should only be denied his or her right of access to the courts where that right has been extinguished by statute or by order of the court. This applies even in the case of the prerogative claims of certiorari. The court having the jurisdiction to hear the application, it ought to have been considered on its merits.

f. The Learned Judge erred in finding that the renewal of an application for leave to apply for judicial review, made in the same claim, is the same as a new application for leave to apply for judicial review, made in a new claim. No authority has been cited for that statement of principle.

g. Although obiter, the finding that CPR 56.6(2) permits the court to extend time only if an application for an extension of time is made, is not supported by that rule or any other authority. Wherever the rules require an application to be made for a specific order, it is expressly stated.

h. The wording of CPR 56.6 (5) makes it clear that the exercise upon which the Court is embarking is an application for leave where there has been a delay, as opposed to a separate application for an extension of time.

[3] Unsurprisingly, the application is strenuously opposed by the 2nd Respondent as well as the Interested Party, VASS Properties and Logistics Limited, who have described it as an effort by the Applicant to get a 'third bite at the cherry'.

Background

[4] The matter was heard on the 23rd of January 2024. In their respective submissions on the issues, each party referred to the chronology of events which have led them here. This chronology is outlined below for ease of reference:

1. On the 3rd of March 2022, the Applicants filed an application for leave to apply for Judicial Review in suit number **SU2022CV00727**.

2. On the 29th of July 2022, leave was granted after a contested hearing. The leave was conditional on the Applicants filing a Fixed Date Claim Form and Affidavit in Support within fourteen (14) days of the grant of leave. The Fixed Date Claim Form and Affidavit were filed on the 15th of August 2022.

3. On the 8th of September 2022 and 22nd of September 2022, applications were filed by the Interested Parties, Vass Properties and Logistics Ltd and Kingston and St Andrew Municipal Corporation (VASS and KSAMC hereinafter), seeking several orders including an order that the Fixed Date Claim Form was a nullity and should be struck out.

4. The applications were heard on the 23rd of September 2022, 5th of October 2022 and on the 2nd of December 2022, when a written judgment was delivered by the Learned Judge granting the orders sought.

5. On the 3rd of October 2022, while the Interested Party's application was still ongoing, the Applicants filed an application for leave to apply for judicial review. This application had the same Applicants, but the Respondents were different as the Council of the Kingston and St Andrew Municipal Corporation was now named as well. The '*new application*' also seeks orders against Stephon and Shauntelle Henry, whereas the previous application had sought orders against VASS.

6. On the 5th of December 2022, the decision with which the Applicants have taken issue was delivered, refusing leave to apply for judicial review. Written reasons for this decision were also delivered to the Parties.

Applicants Submissions

[5] Mr Goffe submitted that while there are two (2) matters, the ruling with which issue is taken was made in claim number **SU2022CV03019** which was filed on October 3, 2022. He asserted that while that application bears some similarity to **SU2022CV00727**, it is not identical as the parties directly affected by the application are different from those named in the earlier claim. In the previous matter, VASS Properties and Logistics Limited were specifically named as directly affected whereas in this matter, Shauntelle and Stephon Henry are the relevant parties.

[6] Mr Goffe argued that in considering the application for permission to appeal, the court is not to re-try the matter, but should '*consider what merit, if any, exists in the proposed appeal, limiting the discussion only to matters that are necessary to*

properly dispose of the application'. Counsel treated with the application under two (2) significant grounds which he stated as follows:

Ground 1- The Learned Judge's finding that once leave for judicial review has lapsed, the Civil Procedure Rules prevent the Applicant from re-applying for leave is not supported by law of the Rules of Court

[7] Mr Goffe contended that in arriving at her finding, the Learned Judge cited no authority for this principle of law, as all the authorities relied on by the Court were in relation to whether an application can be renewed. He insisted that those circumstances are distinguishable from the instant claim. Counsel argued that the Learned Judge seemed to have taken the view that the Civil Procedure Rules establish whether a person may make two (2) such applications to the court seeking the same relief whereas this was not so. Mr Goffe submitted that the Court's jurisdiction is derived from the Judicature (Supreme Court) Act and the Court has jurisdiction to hear applications once there is no statute, regulation or court order that prevents it from doing so. Counsel expanded on this argument by asserting that there is no rule that prevents the court from considering more than one application for leave for judicial review as applications for injunctions, security for costs, appointment of expert witnesses, variation or discharge of a court order, have all been entertained by this Court after first having been refused.

[8] Learned Counsel argued that the question for the previous Court as to whether the application will be successful depends on a variety of factors which include whether the issue has already been decided and res judicata applies, or if the court considers that the application constitutes an abuse of process, or if any party would suffer prejudice from the application not having been made at the appropriate time. He maintained that contrary to the conclusions of the Learned Judge, this was not a jurisdictional issue, which would effectively bar the application from being entertained. Mr Goffe sought to distinguish this application from a renewal and acknowledged that there is a clear reason why a second application for judicial review cannot be made in the same suit after leave has lapsed. He accepted that

the authorities make it clear that once leave lapses, the suit itself is at an end and no further applications can be made in that suit (other than an application to declare the proceeding a nullity). Counsel argued however that this is not what happened in this case, as a new application was filed in separate proceedings which cannot be considered a renewal or rehearing of an application.

[9] Mr Goffe insisted that the authorities considered can be distinguished as no new claim had been filed therein. He argued that in **Barrington Gray v The Resident Magistrate for the Parish of Hanover Application No. 148/07 delivered 23rd of November 2007,** the Court was clearly saying that a new application cannot be filed in the claim that is now a nullity. Counsel asserted that by adopting the approach in the **Barrington Gray** case, the Learned Judge had failed to consider that a citizen should only be denied his or her right of access to the courts where that right has been extinguished by statute or by order of the court. He maintains that the Court had possessed the jurisdiction to hear the application under the CPR and it ought to have been considered on its merits.

Ground 2 - In the absence of clear words in a statute or the rules of court barring the Applicants from making a subsequent application for leave, the Learned Judge ought to have considered the application on its merits and addressed the considerations in Rule 56.6(5) which speak to substantial hardship or prejudice to the rights of any person and whether the delay is detrimental to good administration.

[10] In submissions under this heading, Mr Goffe posited that the Judge had failed to consider the matter on the merits. He relied on the dicta of Scoffield, J. in **Diver's Application for Leave to Apply for Judicial Review** [2021] NIQB 83 where his Lordship stated:

> *"In determining whether or not leave should be granted for a further time, the court's assessment of the merits of the case is unlikely to be different from that which pertained at the time when leave was originally granted (unless there has been some material change of circumstance in the meantime)."*

"In summary, the court will consider the following:

i. *The reason for failure to issue the notice of motion within time and, in particular, the extent to which the party applying is in default both in terms of lateness and culpability (including whether the default is on the part of the Applicant personally, their representatives or, for instance, some third party), with the court expecting a full, honest and plausible explanation to be provided for this purpose;*

ii. *Any prejudice arising to the Respondent, or any relevant interested or notice party, arising from the failure to issue the notice of motion within time;*

iii. *Whether a hearing on the merits will be denied if leave is not re-granted and, in particular, whether there is an issue of public interest or importance which ought to be addressed (bearing in mind that the court had previously seen fit to grant leave); and*

iv. *The overriding objective in RCJ Ord 1, r 1A of enabling the court to deal with cases justly, including by ensuring that the case is dealt with expeditiously and*

"It is likely to be rare that prejudice will arise to a respondent or notice party merely as a result of a failure to issue a notice of motion within time. In such circumstances, an application for leave to apply for judicial review will have been made previously and, in all likelihood, given the practice in this jurisdiction of proposed respondents being put on notice of leave applications and invited to participate, the Respondent will be aware of the proposed application for judicial review and of leave having been granted. The court will be reluctant to allow a respondent to benefit opportunistically from an applicant's failure to issue a notice of motion within time, at least where that has been the result of a good reason or excusable oversight. Prejudice to the Respondent or a notice party for this purpose will not, save exceptionally, be considered to arise simply because the fresh grant of leave will require the Respondent to answer proceedings which they hoped to avoid. The focus on prejudice ought to be on prejudice caused by the delay. Examples may include where the Respondent or notice party justifiably considered that the substantive application for judicial review was not going to be pursued and acted to their detriment in reliance on this; or where there is a significant passage of time during which documents or evidence have been lost."

"In summary, provided the Applicant seeks to rectify the situation expeditiously after the error has been identified and there is a reasonable explanation for the default, the court is likely to be sympathetic to a re-grant of leave made on foot of a further application. Experience also shows that respondents in such circumstances often take

a pragmatic approach, choosing to consent, or at least not to object, in such circumstances"

[11] Mr Goffe argued that the Learned Judge's finding that the judicial review framework in Northern Ireland is "*different from ours*" was an insufficient basis to arrive at the conclusion that this case is of little assistance to the court. He asserted that the fact that the relevant rules in the CPR may be different required an examination of the extent and materiality of the difference, which the Learned Judge failed to do. Counsel also took issue with the Court's finding that because there was no similar practice direction in Jamaica which mirrors that of Northern Ireland on this point, a second application cannot properly and lawfully be granted. Mr Goffe argued that contrary to this conclusion, a practice direction does not create law or rules of civil procedure.

[12] Learned Counsel asserted that what is important is whether there is any prohibition on a party making a subsequent application and not whether the rules permit one to be made. Counsel also raised questions in respect of the remark by the Learned Judge that an application for an extension of time must be made if the applicant is late in applying for leave and asserted that this is not required by the CPR.

[13] In oral submissions amplifying his written submissions, Mr Goffe sought to challenge the decision of Mangatal J in **COK Sodality Co-operative Credit Union Limited v Intertrade Finance Corporation Limited Consolidated with FSC** [2012] JMSC Civ. 57, specifically the application by the Learned Judge of the reasoning outlined by Smith JA in the ***Orrett Bruce Golding and the Attorney General v Portia Simpson Miller*** *SCCA 3 of 2008* which concerned an application for extension of time to file a Fixed Date Claim Form and only one application for leave to apply for judicial review. Mr Goffe questioned whether the decision from the Court of Appeal had been accurately considered and applied, given these differences and the absence of a rule or statute which specifically prohibits another application.

Interested Party's Submissions

[14] Mrs Gentles-Silvera commenced her submissions by making reference to Rule **1.8(9)** of the Court of Appeal Rules which provides that generally "...*permission to appeal in civil cases will only be given if the Court or the court below considers that an appeal will have a real chance of success.* " She emphasised that the use of the word '*real*' makes it clear that a fanciful prospect or an unrealistic argument is not sufficient and cited the decision of **Humphrey Lee McPherson v Damion Chambers and Smart Technologies Ja.** [2010] JMCA App 7 in support of this statement.

[15] Counsel referred to Part **56** of the CPR with specific reference to Rule **56.4(12)** of the CPR which provides that; *"Leave is conditional on the applicant making a claim for judicial review within fourteen days of receipt of the order granting leave'* and reminded the Court that in the case at Bar, the 14-day period lapsed before the Applicants filed their claim.

[16] Rule **56.5** of the CPR was also highlighted which provides as follows:

> *" (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 an open court.*
>
> *(2) A single judge may refer the application to a full court.*
>
> *(3) No application not involving the liberty of the subject, or a criminal cause or matter 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. "*

[17] Mrs Gentles-Silvera submitted that Rule **56.5** of the CPR has been the subject of judicial interpretation by the Court of Appeal in **Orrett Bruce Golding and the Attorney General of Jamaica v Portia Simpson Miller** SCCA No.3 of 2008 delivered on the 11th April 2018 and **Barrington Gray v The Resident Magistrate for the Parish of Hanover, The Attorney General of Jamaica, Dr. Donald K. Duncan and Robert Hendricks** Application No. 148/07 delivered on the 23rd November, 2007. The rule had also been carefully considered by Mangatal J in **City of Kingston Co-operative Union Ltd. and Registrar of Cooperative and Friendly Society v Yvette Reid** Application No. **2011HCV0047** delivered on the 8th of November, 2011.

[18] Learned King's Counsel highlighted an extract from the judgment of Smith J.A in the matter of **Orrett Bruce Golding** *supra*, where he held as follows:

> *"It is not disputed that there was a hearing before Beckford, J. on the 13th of December 2007. The application does not involve the liberty of the subject or a criminal cause or matter. Accordingly, by virtue of rule 56.5 (3), the Respondent's application may not be renewed. Recently this court (Smith, J.A., Harrison, J.A. and G. Smith, J.A. (Ag.)) in Barrington Gray v the Resident Magistrate for the parish of Hanover, Application No. 148/ 07 delivered on the 23rd of November 2007 held 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 could not be renewed. "*
>
> *(pgs. 18-19) (Emphasis Added)*

[19] A portion of the judgment of Harris JA found at pages 33-34 was also highlighted and reads as follows:

> *"Rule 56.5 (1) excludes the renewal of an application after a hearing has taken place under rule 56.4(12). Rule 56.5(3) does not allow the renewal of an application for judicial review save and except in matters affecting the liberty of the subject or in criminal causes. It is abundantly clear that an applicant who obtains leave to apply for judicial review must comply with the condition laid down in rule 56.4(12) by bringing a claim before the expiration of 14 days from the grant of such leave.*
>
> *If the fanners of rule 56.4 (12) had intended to confer on the court the power to renew an application for the grant of leave for judicial review after a hearing, specific provisions for*

so doing would have been made by Part 56. No such provision had been made. By rule 56.4 (12), when read in conjunction with rules 56.5 (1) and 56.5 (3), it is obvious that an application for judicial review is not renewable after a hearing. According to rule 56.4(12) the grant of leave is dependent upon the respondent filing a Fixed Date Claim Form and supporting affidavit within 14 days of the grant of leave. The pleading having not been filed within the prescribed time, the condition remained unfulfilled, and the leave thereby lapsed."

[20] Mrs Gentles Silvera also made reference to Rule **56.5 (1)** of the CPR which gives an applicant the right to renew an application for leave to apply for Judicial Review which has been refused. King's Counsel emphasised that this right of renewal must relate to circumstances where the application for leave has been dealt with without a hearing, for example, on paper which is permissible under Rule **56.4 (2)** of the CPR. The distinction between Judicial Review applications and other proceedings was also highlighted and King's Counsel made the point that they are treated as distinct and separate proceedings in the CPR. Mrs Gentles-Silvera argued that it would make a mockery of the proceedings if a single Judge of the Supreme Court could refuse an application for leave and the rules permit the same Applicant to simply apply to any other single Judge who has concurrent jurisdiction for a renewal of the same application.

[21] The Court was invited to consider the Rules of the Supreme Court ("RSC") 1982 in English Law (in the English jurisdiction) which Counsel described as similar to Rule **56.5** of the CPR. Order 53 Rule 3 of the RSC provides that:

"(*4) where the application for leave is refused by the judge, or is granted on terms, the applicant may renew it by applying —*

a. in any criminal cause or matter, to a Divisional Court of the Queen's Bench Division.

b. in any other cause, to a single judge sitting in open court or, if the Court so directs, to a Divisional Court of the Queen's Bench Division: Provided that no application or leave may be renewed in a <u>non-criminal cause or matter in which the judge has refused leave under paragraph (3) after a hearing.</u>

> *(5) In order to renew his application for leave the applicant must, within 10 days of being served with notice of the judge's refusal, lodge in the Crown Office notice of his intention in Form No. 86B. " (Emphasis ours)*

[22] Mrs Gentles-Silvera commended to the Court the interpretation of Order 53 Rule 3 (4) and (5) in the White Book the Supreme Court Practice 1982 Volume 1 as support for the Interested Party's submission that an application for leave cannot be renewed for a non-criminal cause or matter after a hearing. On page 874-875 of the White Book, the Supreme Court Practice 1982 Volume 1, it is stated that:

> *"If the applicant requests a hearing of his initial application, or perhaps even if a hearing of the application takes place because the Judge deems it appropriate, and the Judge refuses leave or grants it on terms after such hearing, the application for leave may not be renewed in a non-criminal cause-or matter (see proviso to r 3(4)) though in a criminal cause or matter, the application may be renewed by applying to the Divisional Court of the Q.B.D)"*

[23] The Court was also invited to consider the decision in **City of Kingston Co-operative Credit Union Limited** ("**COK**") *supra*, where Daye J on 17 May 2010, in suit number **2010HCV0204** granted ex- parte leave for COK to apply for Judicial Review. On the 1st of June 2010, a claim was filed. In September 2010, the leave was set aside due to non-disclosure and failure to make full disclosure. Additionally, the claim was affected by a lapse of time as it was not filed within (fourteen) 14 days after leave had been granted. On the 5th of January 2011, COK filed a fresh application for leave to apply for Judicial Review in a new suit number and asked for an extension of time for the said application. They claimed that the first claim filed was a nullity. One of the issues which the Court dealt with was whether the second application amounted to a renewal. COK's Attorney argued that the current application was not a renewal as COK was applying for leave "*once more*" because the application was not properly made the first time around. Mangatal J, relied on the **Barrington Gray** case and held that the rules do not allow for a new application to be filed, if a previous grant had lapsed. The remarks

of the Learned Judge in respect of the provisions of Part **56** of the CPR were commended to the Court with areas highlighted and stated thus:

> [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 terms 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. Leamed 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 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 1819.*

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 JA. in Golding v Miller page 19 "*

[24] King's Counsel argued that applying these legal principles to the instant claim, the Court had no jurisdiction to entertain another application for leave to apply for Judicial Review in circumstances where the same application was filed previously in Claim No. **SU2022CV00727** and the leave granted had lapsed. It was also asserted that the Applicant's Application for Leave to Apply for Judicial Review filed on the 3rd of October 2022 is a renewal, regardless of what it is called and it cannot be renewed as the matter does not involve the liberty of the subject nor is it a criminal matter. King's Counsel argued further that the Court ought to reject the Applicants' attempt to suggest that by including the names - Stephon Henry and Shauntelle Henry, who are Directors of VASS Properties, this renders the application a different one. Mrs Gentles-Silvera asked the Court to examine both applications as a close comparison of them clearly reveals that they relate to the same development, challenge the same permissions granted and are based on the same grounds.

[25] In respect of **Re: Diver's Application for Leave to Apply for Judicial Review** [2021] NIQB83, Mrs Gentles-Silvera contended that contrary to the Applicants' assertion, that decision was carefully scrutinised by the Judge who painstakingly went through this case and found that:

i. The matter concerned a criminal case or matter in which under our CPR, an application for leave is allowed to be renewed.

ii. The rules are different from the CPR and the Judge in the case relied on several texts which examined the Judicial Review framework in Northern Ireland which is different from Jamaica.

iii. The applicant in that case also relied on the Judicial Review Practice Direction which is different from ours as it allows for an extension of time where leave has lapsed or a re-grant for leave. We have no similar law, rule, or practice direction. The Judge then said:

> *"[38] I cannot agree with counsel for the applicants that our rules, while referring to a renewal, do not address a new, a fresh or a re-grant of leave. Rule 56.5 (1) reads:*
>
> > *"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.*
>
> *Rule 56.5 (3) then goes on to qualify Rule 56.5 (1) by stating*
>
> > "*No application not involving the liberty of the subject or a criminal cause or matter may be renewed after a hearing."*
>
> *There was a hearing in this case and Rule 56.4 (12) orders were made. Having failed to file the Claim Form and affidavit within the required time the leave lapsed and cannot be renewed. Andrew Willis v The Commissioner of Taxpayer Audit and Assessment Department/Commissioner of Inland Revenue Application No. 190/09 and Golding v Simpson were also considered*.

[26] Mrs Gentles-Silvera acknowledged that the CPR does not use the word '*re-grant*' but refers to a renewal and make it clear that it is only permissible in certain limited circumstances. King's Counsel submitted that the CPR only permits a re-hearing where the matter involves the liberty of the subject and is a criminal matter and/or where there has not been a hearing. The Court was invited to consider the evidence and to find that the Applicant has no real prospect of success. King's Counsel also asked that the application be refused with costs to the Interested Party as the application is tantamount to an abuse of process. King's Counsel submitted further that the Court should be mindful that the decisions for which

leave is sought were made in November and December 2021, over 19 months ago and even if a fresh application were allowed, the application in October 2022 would not have been filed within the three months' period specified by the Rules.

2nd Respondents' Submissions

[27] Mrs Bennett-Cooper elected to address Grounds 1, 2 and 6 together. She agreed with Mrs Gentles-Silvera that an applicant's ability to apply for judicial review is governed by Part **56** of the CPR. Counsel acknowledged that Rule **56.5** outlines the basis on which the Applicant may re-apply for leave to apply for judicial review. Mrs Bennett-Cooper also agreed that Rule **56.5(3)** prohibits the renewal of an application after a hearing. Learned Counsel relied on the principles of law expounded in the **Golding v Miller** and **Barrington Gray** decisions. It was also asserted that there had been a previous hearing before K. Anderson J which concerned the same subject matter and the same parties albeit on a different claim number. Learned Counsel contended that this matter did not involve the liberty of the subject matter, neither was it a criminal matter and as such, there was no basis for a renewal of the application for leave.

[28] Mrs Bennett-Cooper took issue with the Applicants' assertion that the applications were different and insisted that the application for leave against the 2nd Defendant is identical in both the March 2022 application and the present one. Counsel asserted that the Applicant's '*attempt to circumvent the CPR*' having failed to file within fourteen (14) days is an abuse of the Court's process. She relied on the authority, **Johnson v Gore Wood and Co (A Firm)** [2002] 2 AC 1**,** in support of this position. Mrs Bennett-Cooper submitted that in the present case, the re-application for leave was inconsistent with the literal interpretation of the CPR, specifically rule **56.5(3)**.

[29] In the alternative, Mrs Bennett-Cooper submitted that even if the Court found that the re-application was permissible, the subject matter is so identical to the previous

application that this application would amount to an abuse of process and make a mockery of Rule **56.4(12)**.

[30] In addressing the fact that the current application included '*the Council of the KSAMC*', Mrs Bennett-Cooper acknowledged that while this issue was not explored before the Learned Judge, this inclusion would not have assisted the Applicant as the Council is not an entity with a legal personality capable of being sued in its own name. In support of this assertion, Counsel made reference to the sections **10(1)** and **5** of the Town and Country Planning Act and Development Order respectively and section **6** of the Confirmed Development Order which speak to the '*local planning authority*.'

[31] Section **2** of the Planning Act was also referred to by Counsel as providing the definition of local planning authority as the Council of the Kingston and St Andrew Corporation, now known as the Kingston and St Andrew Municipal Corporation pursuant to Section **5** of the Local Governance Act. Mrs Bennett-Cooper asserted that there is nothing in the Town and Country Planning Act or Local Governance Act which gives the Council a legal personality capable of being sued. Counsel argued that to the contrary, Section **28** of the Interpretation Act makes it clear that the KSAMC must be sued in its corporate name. She argued further that the individual members are exempt from liability for the actions of the organisation and it would be improper to seek to hold the Council liable for the actions of KSAMC.

[32] In submissions in respect of ground 3, Mrs Bennett Cooper argued that Section **28** of the Judicature (Supreme Court) Act (hereinafter referred to as 'the Act") provides that the jurisdiction of the Court may be exercised as provided under the Act or Civil Procedure Rules. Counsel submitted further that Part **56** of the CPR sets out how the jurisdiction of the Court is to be exercised in respect of judicial review applications. Counsel argued that nothing in the Act is contrary to the provision in these rules.

[33] Before concluding her submission, Mrs Bennett-Cooper addressed the obiter comments of the Court on whether an application for an extension should have been filed. In reviewing this subject matter, Counsel made reference to Rule **56.6(1)** and **(2)** of the CPR which outline the requirement for the application to be filed within three (3) months from the date on which the grounds arose. The provision also states that the Court may extend the time if good reason for doing so is shown. In applying these provisions to the instant claim, Mrs Bennett-Cooper indicated that there was nothing in the supporting affidavit which offered an explanation as to why this application was filed almost ten (10) months after the 2nd Respondents' decision on December 15th, 2021. She submitted that in those circumstances, there was no basis on which the Court could have exercised its discretion in this regard. Counsel also argued that the delay in proceeding with the application would have occasioned great prejudice to the 2nd Respondent as well as the Interested Party.

Issues

[34] While the Applicant has sought the orders outlined above and stated the several grounds which are relied upon as underpinning same, the central issue for the Court to determine at this stage of the proceedings is whether this Appeal has a real prospect of success. Although the Applicants have argued that they do, the opposite view is held by the Interested Party and Respondents. In order to properly address the issue, a number of sub-headings have been identified as being of relevant consideration and these are as follows:

1. Whether the Learned Judge's finding that once leave for judicial review has lapsed, the Civil Procedure Rules prevent the Applicant from re-applying for leave was contrary to the law as interpreted in decided cases?

2. Whether the Learned Judge's finding that the provision of Rule **56.5(3)** was applicable to the second application was unsupported by law?

3. Whether the Learned Judge ought to have considered the application on its merits and addressed the considerations in Rule **56.6(5)**?

DISCUSSION AND ANALYSIS

Real prospect of success – Relevant Legal Principles

[35] It is uncontroversial that this Application is being made pursuant to **Rule 1.8** of the Court of Appeal Rules, 2002 (hereinafter referred to as 'the CAR"). **Rule 1.8(9)** states the basis on which permission will be given and provides as follows:

> *The general rule is that permission to appeal in civil cases will only be given if the court or the court below considers that an appeal will have a real chance of success." (emphasis added)*

[36] Practical assistance on the interpretation and application of **rule 1.8(9**) is provided in ***Garbage Disposal v Noel Green*** **etal** [2017] JMCA App 2. In that case, the Court of Appeal considered an application for leave to appeal orders made by Campbell J. In the judgment delivered, Williams JA articulated the relevant considerations at paragraphs 28 and 29 of the judgment as follows:

> *"28. The terms 'real' and 'realistic' were defined in Swain v Hillman and another [2001] 1 All ER 9, per Lord Woolf, at page 92 where he addressed the meaning of the phrase 'no real prospect' in the context of an application for a summary judgement. He opined that:*
>
> *"The words 'no real prospect of succeeding' do not need any amplification, they speak for themselves. The word 'real' distinguishes fanciful prospects of success…they direct the court to the need to see whether there is a 'realistic' as opposed to a 'fanciful' prospect of success."*
>
> *29. Morrison JA (as he then was) in Duke St John-Paul Foote v University of Technology Jamaica (UTECH) and Wallace [2015] JMCA App 27A, observed at paragraph [21] of that judgment that this court has long accepted that the words "real chance of success" in rule 1.8(9) of the CAR were synonymous with the words "realistic prospect of success" used by Lord Woolf in the case of Swain v Hillman and so Lord Woolf's formulation was therefore applicable to the said rule 1.8(9)." (emphasis added)*

[37] Additional guidance on the relevant test is found in the ratio of Harrison JA in **Gordon Stewart et al v Merrick Samuels** SCCA no. 2/2005, where he stated:

> *"The prime test being "no real prospect of success" requires that the learned trial judge do an assessment of the party's case to determine its probable ultimate success or failure. Hence it must be a real prospect not a "fanciful one". The judge's focus is therefore in effect directed to the ultimate result of the action as distinct from the initial contention of each party. "Real prospect of success" is a straightforward term that needs no refinement of meaning." (emphasis added)*

[38] The importance of the Applicant achieving this benchmark was also emphasised by the Court in **Humphrey Lee McPherson v Damion Chambers and Smart Technologies Ja** [2010] JMCA App 7**,** a decision which was cited by Counsel for the Interested Party.

Whether the Learned Judge's finding that once leave for judicial review has lapsed, the Civil Procedure Rules prevent the Applicant from re-applying for leave was contrary to the law as interpreted in decided cases?

Whether the Learned Judge's finding that the provision of Rule 56.5(3) was applicable to the second application was unsupported by law?

[39] Although these issues had been stated separately above, a careful review of both questions, as well as the evidence, reveals that there is sufficient overlapping between these areas that they can be dealt with together. It is a fact that the Judicature (Supreme Court) Act outlines the jurisdiction of the Court. Section **28** of the Act addresses the manner in which the jurisdiction is to be exercised and provides as follows:

> *Such jurisdiction shall be exercised so far as regards procedure and practice, in manner provided by this Act, and the Civil Procedure Rules and the law regulating criminal procedure, and by such rules and orders of court as may be made under this Act; and where no special provision is contained in this Act, or in such Rules or law, or in such rules or orders of court, with reference thereto, it shall be exercised as nearly as may be in the same manner as it might have been exercised by the respective Courts from which it is*

transferred or by any such Courts or Judges, or by the Governor as Chancellor or Ordinary (emphasis added).

[40] The reference in this provision to the Civil Procedure Rules makes it clear that insofar as proceedings which concern matters arising within the civil jurisdiction, the Rules are applicable to procedure in circumstances where the Act itself is silent. Part **56** of the CPR deals with the area of Administrative Law, and specifically addresses the Court's power to judicially review the decisions of a public body. It is accepted by the parties that rule **56.4(12)** provides that the grant of leave is dependent upon the respondent filing a Fixed Date Claim Form and supporting affidavit within fourteen (14) days of the grant of leave. The fact that this exercise of the Court's discretion is governed strictly by this provision has been the subject of much discussion in the authorities cited by respective Counsel. The grant of leave being worded in such specific terms, it is evident that the Applicants were placed under a duty to comply with the provisions of this rule and file the documents within the 14-day period.

[41] It is well established that the consequences of failing to file within the specified time would render any claim filed thereafter a nullity. The issue which was before the Learned Judge was whether there was a bar to '*new applications for leave,*' once the leave previously granted had lapsed. It is the Applicant's argument, as I understand it, that the application was new and not a renewal as it would impact parties who had not previously been named, that is, the Henrys'. It also involved a '*new decision-making body*' namely the Council of the KSAMC. Mr Goffe did not however address the observations of the Respondents' that the subject matter, grounds and orders sought on the '*new application*' were the same. The similarities did not escape the previous Tribunal which described it as being '*remarkably similar to the* previous *application'*. This Court also observed that there was nothing advanced in terms of any decision made by the 1st Respondent and my examinations of the grounds do not disclose that there was any such action on the part of that specific body. In my examination of the approach of the Learned Judge

on this issue, it was noted by this Court that careful consideration was given by her to the provisions of Rule **56.5** which is quoted in full at paragraph 17 above.

[42] The Judge was also mindful that this specific provision was considered in the **Orrett Bruce Golding** and **Barrington Gray** cases and guidance as to the interpretation and application of same was provided. Although it is correct that the **Golding** case was discussed within the context of an appeal against an extension of time to file the claim form; whereas the **Gray** decision concerned a re-application within the same claim, the observations of the Court in those matters are no less relevant to the instant claim as they specified the factors which had to exist for such an application to be permitted. This is seen in the extracts from both decisions at paragraphs 18, 19 and 23 above. It is also noteworthy that in submissions made on behalf of the Appellant in the **Barrington Gray** decision, Counsel sought to persuade the Court that the application for leave was new as the first application had been abandoned and thus not a renewal. In this matter, the Appellant had previously filed a Fixed Date Claim Form and Notice of Application seeking orders in respect of a magisterial recount of votes before the Resident Magistrate for the parish of Hanover. This application had been dismissed and Barrington Gray, the Applicant was unsuccessful on appeal. Leave to apply for judicial review was then sought in respect of the very same decisions of the Magistrate along with a number of other orders.

[43] The Learned Judge of Appeal reviewed Rule **56.5(3)** and stated:

> *It is not disputed that a previous application was made by the Applicant. The previous application was heard and refused by the Learned Judge. The Judge's decision was appealed and dismissed. We cannot agree with Mr Vassell QC that in those circumstances the first application could be said to have been abandoned.*

It is evident from this statement that the Court rejected the '*description*' which Counsel had sought to apply to distinguish both applications and chose instead to review both applications to determine if the matter before them was in fact new.

[44] In the COK decision, which was also carefully reviewed by Smith J (Ag), Mangatal J found the reasoning of the Learned Judge of Appeal to be both relevant and applicable to the circumstances before her, which like the instant matter, involved applications which were filed as two (2) separate suits. The 2nd application in the COK decision was in respect of the same subject matter and sought the same orders. Those circumstances are replicated in the instant application. While it is true that the Directors of VASS are now named in the 2nd application filed by the Applicants, there is no evidence which speaks to any change in the nature of the application which has been brought about by their inclusion in the matter. The orders sought do not appear to be based on their individual standing/actions but as Directors for VASS to whom the impugned grants had been made. In respect of the inclusion of the Council of the KSAMC, a similar observation is made as the grants which are being challenged are the same which had been attributed to the 2nd Respondent in the previous iteration of this application.

[45] In light of the foregoing discussion and findings, it is evident that the ruling made by the Learned Judge was solidly supported by law. Not only was it in keeping with the rules as provided at **56.5**, but the judicial interpretation and guidance provided in decided cases was carefully considered and applied. Although the Applicants sought to describe this as a new application, it is evident that the Learned Judge adopted the approach outlined in the **Barrington Gray** and **COK** matters in order to arrive at her decision. In respect of the **Re Diver's** decision this was also carefully examined by the Learned Judge as seen in the extracts at paragraph 25 above. The Judge was able to identify that those proceedings related to a criminal matter, which is specifically provided for in that jurisdiction just as it is here. Additionally, the statutory provisions and Practice Direction which addressed the practical outworking of the relevant provisions in Northern Ireland are not reflective of the provisions in the CPR. These observations, while sufficient to support the accuracy of the Judge's decision, are examined in more detail below.

Whether the Learned Judge ought to have considered the application on its merits and addressed the considerations in Rule 56.6(5)?

[46] The Applicant also takes issue with the accuracy of the approach adopted by the Court on the basis that the application was not considered on its merits. Mr Goffe made reference to the provisions of Rule **56.6** which addresses the filing of the application as follows:

> *56.6 (1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose*
>
> ***(2) However the court may extend the time if good reason for doing so is shown.***
>
> *(3) Where leave is sought to apply for an order of certiorari in respect of any judgment, order, conviction or other proceeding, the date on which grounds for the application first arose shall be taken to be the date of that judgment, order, conviction or proceedings.*
>
> *(4) Paragraphs (1) to (3) are without prejudice to any time limits imposed by any enactment.*
>
> *(5)* ***When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to - (a) cause substantial hardship to or substantially prejudice the rights of any person; or (b) be detrimental to good administration. (emphasis added)***

[47] Mr Goffe argued that the Learned Judge had failed to give due consideration to **56.6(5)** and in doing so, had failed to consider the hardship and prejudice that the Applicants would suffer as a result of her decision. As stated earlier, reliance was also placed on the **Re Diver's** decision and the relevant statutory framework and Practice Direction in Northern Ireland which are laid out below:

> *The Rules of the Supreme Court (Northern Ireland) 1980*
>
> *Delay in applying for relief*
>
> *4. Without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made, where leave to apply for relief by way of judicial review has not been sought within three months after the date of the proceeding,*

act or omission complained of, the Court shall not grant such leave unless it is satisfied that the granting of the relief sought would not unfairly prejudice the rights of any person.

Judicial Review Practice Direction 3/2018

(24) Where leave has been granted an originating motion must be issued in 14 days or leave lapses [RCC Order 53, R5(5)]. Where leave has lapsed an application for extension of time or for a further grant of leave must be made by summons and an affidavit explaining the failure to issue and serve the notice of motion in time. The Court may order costs against the party who has failed to comply with the time limits.

[48] The Rules from Northern Ireland (hereinafter referred to as 'the RNC") address the considerations for a grant of leave following some delay in the application process. These rules are supplemented by the Practice Direction which outlines the specific process which would have to be followed in that jurisdiction in order to apply for an extension of time. While the Learned Judge acknowledged that there were some similarities in the language used in the RNC, it is a fact that it does not address new applications, neither is there a similar Practice Direction in this jurisdiction. In the circumstances where there were these marked differences, the Court could not be faulted in its decision to seek guidance from the decided cases within this jurisdiction. It should also be noted that although Mr Goffe made the complaint that the Judge failed to contemplate a possible extension of time as well as the issue of prejudice to the Applicants, the judgment points to the contrary as the Learned Judge stated as follows:

[38] *The notice and affidavit filed by the applicant do not include the date that the act occurred that ground the application. More importantly, it is not in compliance with rule 56.6, which provides that;*

"(1) An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose."

Rule 56.6 (2) permits the court to extend time but only if an application is made.

"However the court may extend the time if good reason for doing so is shown "

> ***No such application has been made in this case. It was not one of the orders sought in the application. The mere mention of the word delay in the last paragraph of the applicant's affidavit is, to my mind, inadequate. Counsel attempted to remedy this in his submissions but the Court can hardly act on submissions (emphasis added).***

[49] Although the Learned Judge indicated that there was no application for extension, which Mr Goffe contends is not required, what follows after is just as significant as it was also observed that the only '*explanation*' or good reason provided was the reference in the affidavit of the 1st Applicant to '*any delay (not being deliberate)*". The Judge's comment that the mere mention of the word delay is inadequate, is a clear indicator that this remark was assessed in the context of whether it provided a good explanation and the Court did not believe that it did. Given the requirement that Rule **56.6(2)** had to be satisfied to move the Court to act, it is evident that although this remark was '*obiter*', the Judge's mind was properly attuned to all relevant legal considerations and the absence of any examination of **56.6(5)** was not fatal to the Court's decision.

[50] In light of the foregoing discussion, I am unable to agree that the Applicants' have a real prospect of succeeding on appeal if granted leave. Accordingly, the application is refused.

Costs

[51] The Respondents have asked for an award of costs to be made against the Applicants. They urged the Court to depart from the usual approach to costs in administrative proceedings, wherein orders for costs are not ordinarily made against an applicant, save for in exceptional circumstances. Examples of these circumstances include where the Court considers that the applicant has acted unreasonably in making the application, or in the conduct of the application (**rule 56.15 (5)** of the CPR). See also **Gorstew Ltd v Her Hon Lorna Shelly Williams and Ors.** [2016] JMCA Civ. 17, where the Full Court denied a renewal of an application for leave to apply for judicial review. In handing down the decision of the Court, Thompson-James J considered the issue of whether costs ought to lie

against the applicant. The Learned Judge examined the provisions of rule **56.15(5)** which states:

> *"(5) The general rule is that no orders as to 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'.*

[52] Thompson-James J then applied the dictum of Auld, J in the **Mount Cook**[1] decision in determining what is unreasonable conduct, and opined as follows:

> "*All judges however unanimously agreed that the formulation by Auld J in Mount Cook [2014] 2 Costs LR 211 as to what would amount to exceptional circumstances could be considered as helpful in determining what may be unreasonable conduct of an applicant" [para. 33]. These are:*
>
> a. *The hopelessness of the claim;*
>
> b. *The persistence in it by the claimant after having been alerted to facts and/or of the law demonstrating its hopelessness;*
>
> c. *The extent to which the court considers that the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends — a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and*
>
> d. *Whether, as a result of the deployment of full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful claimant has had, in effect, the*

[1] [2014] 2 Costs LR 211

> *advantage of an early substantive hearing of the claim."*

[53] This distinction in respect of administrative proceedings was also recognised in **Branch Developments Ltd t/a Iberostar v Industrial Disputes Tribunal and the University and Allied Workers' Union** [2016] JMCA Civ. 26, where at paragraph 143 of the judgment, the Court of Appeal observed as follows:

> *[143] The matter of the award of costs is within the discretion of the learned judge. As this is a judicial review hearing, she should have been guided by rule 56.15(5) of the CPR, (see Fritz Pinnock and Ruel Reid v Financial Investigations Division, paragraph [47]; National Commercial Bank Jamaica Ltd v The Industrial Disputes Tribunal and Peter Jennings and the full court decision of Danville Walker v The Contractor-General). Rule 56.15(5) provides:*
>
> > *"(5) The general rule is that no orders as to 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. (Part 64 deals with the court's general discretion as to the award of costs, rules 64.13 and 64.14 deal with wasted costs orders.)"*

[54] In my review of this issue, I found that the factors outlined at paragraphs (a) to (c) of the **Mount Cook** decision are of great significance. It is not in dispute that this application was a '*second application*' by the Claimant in which the same orders were being sought. The Applicants having failed to act within the 14-day window of the original application, the Court found that the Fixed Date Claim Form was a nullity. The '*second application*' was also refused as the Court found that based on the rules and decided cases, this amounted to a '*renewal'* of the application despite the description by the Applicants. In the face of existing precedents and the relevant rules which specifically address when renewals can be sought, the Applicants ought to have been fully aware that this further attempt to obtain leave was doomed to failure. The timing of the second application during the currency of the hearing into whether the Fixed Date Claim Form was a nullity also raised serious questions for the Court as this approach appears to have been taken to evade the consequences of the earlier failure. The persistence of the Applicants in

pursuing this matter by seeking leave to appeal the later decision, in spite of the weight of the authorities against them, combined with the seemingly surreptitious approach to filing the '*second application'* are actions which the Court finds are tantamount to acting unreasonably and could conceivably fall within the category of an abuse of process.

[55] Having carefully considered the evidence, the submissions and relevant law, the Court finds that the Applicants acted unreasonably in bringing this application. They were fully aware of the rules and decided cases on the area and that there is no real prospect of success. Accordingly, there is sufficient basis to depart from the general rule and award costs against them.

DISPOSITION

[56] In keeping with the foregoing discussion and findings, the Court makes the following orders:

1. The Application for leave to appeal the decision of Smith J (Ag) is refused.

2. Costs are awarded to the 2nd Respondent and Interested Party to be taxed if not agreed.

3. Applicants' Attorney to prepare, file and serve the Formal Order herein.