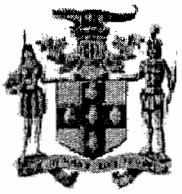

[2013] JMFC FULL 1(A)

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE FULL COURT
CLAIM NO. 2012 HCV 00994

COR: THE HONOURABLE MR JUSTICE CAMPBELL
THE HONOURABLE MR JUSTICE SYKES
THE HONOURABLE MISS JUSTICE STRAW

BETWEEN	**DANVILLE WALKER**	**APPLICANT**
AND	**THE CONTRACTOR GENERAL**	**RESPONDENT**

Raoul Lindo instructed by Bishop and Partners for the applicant

Mrs Jacqueline Samuels Brown QC for the respondent

April 17, 22, 2013 and November 15, 2013

APPLICATION FOR COSTS – JUDICIAL REVIEW – WHETHER COST SHOULD BE AWARDED AGAINST APPLICANT – COSTS GRANTED IN EXCEPTIONAL CIRCUMSTANCES – WHETHER EXCEPTIONAL CIRCUMSTANCES EXIST IN PRESENT CASE

CAMPBELL J

[1] I have had the advantage of reading the judgment of Straw J in draft and I agree with her Ladyship's reasoning and conclusion. There is nothing useful that I could add.

SYKES J

[2] The main issue is whether costs should be awarded to the respondent who appeared at the renewed application for leave and successfully opposed the grant of leave. The sub-issue which arises if the answer to the main issue is yes, whether costs should be awarded for the entire period from the service of the notice of renewal to the dates of hearing.

The facts

[3] The relevant facts for the purpose of this judgment are these. The full facts are detailed in (**Walker v The Contractor-General** [2013] JMFC Full 1). In response to public concern that shipments of scrap-metal from Jamaica occurred while a ban on such exports was in place, the Contractor General (CG) launched an investigation to find out what exactly occurred. In the course of investigations, by way of a letter dated November 18, 2011 (the requisition), the CG required answers from Mr Danville Walker, the then Commissioner of Customs. Initially, Mr Walker did not answer the questions but eventually did so by December 23, 2011. Between November 18 and December 23, letters were exchanged between the parties. During the stand-off, the CG told Mr Walker that should he not supply the answers by a stated date, the matter would be referred to the Director of Public Prosecutions (DPP) for action. By the time the answers came from Mr Walker the matter was indeed referred to the DPP who decided that Mr Walker should be charged with breaches of section 29 of the Contractor General Act. He was summoned to court in February 2012. After he was summoned, Mr Walker sought judicial review of the CG's decision to administer the requisition and the decision to refer the matter to the DPP. He served the application for leave to apply for judicial review on the CG. A contested hearing took place before David Fraser J on February 20 and March 9, 2012. Reasons for judgment refusing the

application were handed down on March 26, 2012 (**Danville Walker v The Contractor-General of Jamaica** [2012] JMSC Civ 31). Mr Walker erroneously appealed to the Court of Appeal despite the fact that the judgment of Fraser J informed him that he may renew his application under rule 56.5 (1) of the Civil Procedure Rules (CPR) (**[67]**). The Court of Appeal redirected him to the Supreme Court and the renewed application was heard in the Full Court of the Supreme Court January 11, 12 and 13, 2013 with judgment delivered on April 10, 2013 (**Walker v The Contractor-General** [2013] JMFC Full 1). Mrs Samuels Brown QC, counsel for the CG, after judgment was delivered, applied for costs. The parties were invited to make submissions in writing and to submit them by Wednesday, April 17, 2013. Both parties supplied submissions in writing.

The law

[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.*

[5] I am not convinced that this is the correct starting point. This rule occurs in rule 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 not apply to the current situation because it speak 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. The decision of

Golding v Simpson-Miller SCCA 3/08 (unreported) (decided April 11, 2008) has to be mentioned. The Court of Appeal decided that Part 56 does not permit the use of any other rule in the CPR when dealing with judicial review unless some rule in Part 56 itself specifically refers to some other rule in the CPR. However, that case was considering the specific question of whether the CPR permitted the court to extend time within which to file a claim for judicial review after leave had been granted. The court held that Part 56 did not permit any extension of time and there was no reference to any other rule in Part 56 that permitted the court to extend time. The court did not consider the issue that has arisen in this case.

[6] There are no decided cases from the Court of Appeal of Jamaica (so far as I am aware) that has considered costs in the specific circumstance before this court. The closest one gets to any authority on the point in Jamaica is **The Industrial Disputes Tribunal v University of Technology Jamaica** [2012] JMCA Civ 46. In that case the Court of Appeal reversed the decision of Mangatal J and therefore her costs order was set aside. However, that case had progressed beyond the leave stage to a full judicial review hearing. The Industrial Disputes Tribunal prevailed in the Court of Appeal and so the costs order in favour of the University of Technology Jamaica could not stand. The court applied the general rule expressed in rule 56.15 (5). It is important to note that the Court of Appeal did not say that Mangatal J was wrong in principle to award costs. It is possible to argue that had her Ladyship's judgment been upheld her costs order may well have survived.

[7] It is my view that the correct starting point has to be the primary legislation, then the secondary, and then any principle underlying judicial review that may have an impact on the award of costs. The first primary legislation is section 28E of the Judicature (Supreme Court) Act (JSCA). Section 28E of the states:

> *(1) Subject to the provisions of this or any other enactment and to the rules of court, the costs of and incidental to all civil*

proceedings in the Supreme Court shall be in the discretion of the Court.

(2) Without prejudice to any general rule to make rules of court, the Rules Committee of the Supreme Court may make provision for regulating matters relating to the costs of civil proceedings including, in particular prescribing –

(a) scales of costs to be paid –

(i) as between party and party;

(ii) the circumstances in which a person may be ordered to pay the costs of any other person; and

(b) the manner in which the amount of any costs payable to the person or to any attorney shall be determined.

(3) Subject to the rules made under subsection (2), the Court may determine by whom and to what extent the costs are to be paid.

(4) ...

(5) ...

[8] The second primary legislation is the Judicature (Rules of Court) Act (JRCA) which authorises the Rules Committee to make rules regulating civil procedure in the Supreme Court. The CPR was made pursuant to this enabling statute. Rule 2.2 (1) and (2) of the CPR states quite clearly the following:

(1) Subject to paragraph (3), these Rules apply to all civil proceedings in the court.

*(2) "**Civil proceedings**" include Judicial Review and applications to the court under the Constitution under Part 56.*

(3) These Rules to not apply to the following proceedings –

(a) Insolvency (including winding up of Companies);

(b) proceedings when the court acts as a Prize Court; and

(c) any other proceedings in the court instituted under any enactment, in so far as rules made under that enactment regulate those proceedings.(emphasis in original)

[9] The importance of the JSCA is that it makes clear that subject to that Act or any other legislation and any relevant rule of court, costs in civil proceedings are within the discretion of the court. The JSCA does not define civil proceedings and neither does the JRCA. Both legislations have declined any attempt at a definition of civil proceedings to the CPR.

[10] Unfortunately, the CPR does not define civil proceedings but makes the point that (whatever civil proceedings may mean) it includes judicial review. From the CPR the large class is civil proceedings and a species within the genus is judicial review. This means that judicial review, by definition, has some characteristics of civil proceedings to be within that genus but still has enough differentiating features sufficiently different to be a separate species.

[11] The implication of what I have said so far is this: since judicial review is a civil proceeding (judicial review necessarily includes applications for and renewal of

applications for leave), then, in the absence of any rule to the contrary, Part 64 (costs) applies. The general rule under Part 64 is that the unsuccessful party pays the costs of the successful party (rule 64.6 (1)). It seems to me that Part 64 applies generally unless there is some rule or policy that restricts, modified or excludes its operation.

[12] In respect of a substantive judicial review hearing the CPR limits the operation of Part 64 by providing in rule 56.15 (4) and (5) that no costs may be awarded against the applicant unless he acted unreasonably. However, rule 56.15 (4) and (5), textually and in the specific area of Part 56 where it appears is obviously restricted to the circumstance where there is a full hearing after leave has been granted and says nothing about applications for leave. This means that rule 56.15 (4) and (5) does not apply to the application for leave stage or the renewal of application for leave. If this is correct and since applications for leave and renewal of applications for leave are undoubtedly civil proceedings, based on rule 2.2, and they are not governed by rule 56.15, then they must be governed by the general rule established by Part 64. In other words, in the circumstances under consideration, whatever is not governed by the specific rule is governed by the general rule.

[13] What this means is that, it matters not what existed under previous procedural rules and so whatever was the position regarding judicial review proceedings under previous procedural rules that has now changed. It has changed because rule 1.1 states that these rules 'are a new procedural code with the overriding objective of enabling the court to deal with cases justly.' If, therefore, any limitation of the effect of Part 64 on applications for leave or renewal of applications for leave is to be established, then it cannot be on the basis of what previous rules said or any previous practice unless the idea supporting the previous practice is still applicable and compatible with the present rules. There is nothing in the present rules (Part 64) that prima facie suggests that the full rigour of that part should not be applied to the present circumstance. That being so, then any limitation on application has to be on the basis that there is something special or unique about judicial review proceedings that would justify the non-application of the full rigour of Part 64.

[14] Are there any unique characteristics of judicial review that can limit costs? I believe that there is. Judicial review exists so that ordinary citizens can question or curb excesses of power exercised by the executive branch of government. It is only available against public bodies. It can also be used to force public bodies to act if they unlawfully refuse to do what is required of them. This is done through mandamus. It has been recognised that judicial review is now an essential accountability mechanism in a constitutional democracy founded on the rule of law. It permits citizens and non-citizens to challenge the decision making process of public authorities. In this respect it differs fundamentally from ordinary litigation between parties in contract or tort cases. It is one of the main tools of holding government accountable. It is a vital tool for persons to question their government and to seek to have, the sometimes overbearing hand of government removed from their backs. It is a tool for ensuring good governance and governance according to law. All this points to the special nature of judicial review. Costs orders may have a crippling effect on the ability of persons, particularly the paupers, to challenge decisions of public authorities.

[15] In developing the law, one must be careful when referring to cases from England and Wales. Under judicial review procedure there, the application procedure is in fact initiated by a claim form, and not a notice of application for court order, which must be served on the defendant. If the defendant wishes to attend the leave hearing in order to oppose the grant of leave (he is not obliged to) he must file an acknowledgment of service. If the defendant successfully opposes the grant of leave then the question has arisen of whether costs are recoverable and if so, for what. One case has held that on the facts and circumstances of that case, the defendant could only recover the costs of filing the acknowledgement of service (**R (Leach) v Commissioner for Local Administration** [2001] EWHC Admin 445 (Collins J)).

[16] Despite the power to award costs in England and Wales, the current Practice Direction on judicial review contains a statement, in paragraphs 8.5 and 8.6, to the effect that whether or not the defendant or any other party attends the leave hearing,

the court will not, as a general rule, awards costs against the claimant (the applicant for leave in that country is called claimant whereas in Jamaican he is called applicant and only becomes a claimant when leave is granted and he files the claim form).

[17] Despite the reservations expressed about the English cases, there is great value in observations made by Auld LJ in **Mount Cook Land Ltd v Westminster City Council** [2004] 2 Costs LR 211; [2003] EWCA Civ 1346. The learned Lord Justice made the important observation that the leave stage is not intended to become a full scale hearing as if it were the full hearing that would take place if leave is granted. The leave stage is intended to be a quick method of determining whether the claim should go forward. This is still the case even if the defendant attends that hearing. His Lordship indicated at **[73]** that:

> *It follows that judges before whom contested permission applications are listed, and in their conduct of them, should discourage long hearings and/or the filing by both parties of voluminous documentary evidence for consideration at them. In short, they should not allow the court to be sucked into lengthy and fully argued oral hearings that transform the process from an inquiry into arguability into that of a rehearsal for, or effectively, an expedited and full hearing of the substantive claim.*

[18] With this in mind and given the importance of judicial review and its special place in our democracy I am in favour of a rule that says that costs should not generally be awarded against an unsuccessful applicant for leave in the absence of exceptional circumstances. Of the factors to be considered when deciding whether exceptional circumstances exist identified by Auld LJ (**[76]**), I would adopt proposition number five which states:

Exceptional circumstances may consist in the presence of one or more of the features in the following non-exhaustive list:

(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 advantage of an early substantive hearing of the claim.

[19] 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.

APPLICATION TO THIS CASE

[20] In the instant case, Mr Walker served the application for leave on the CG. The rules do not compel the attendance of the respondent and so it could not be argued

that the CG was forced to attend. Even if he were compelled to attend, that without more does not necessarily mean that the CG should be awarded costs. The CG's attendance was purely voluntary; a free choice he exercised. However it cannot be overlooked that the exercise of that choice has in fact resulted in one of the main objectives of the CPR being met: identifying good reasons why the claim should not proceed on the ground that it has no prospect of success.

[21] It is true that the CG successfully opposed the grant of leave before Fraser J and before the Full Court on the renewal application but these in and of themselves are not exceptional circumstances. Mr Walker had the right to approach the court for leave which he did and his application was disposed of by Fraser J. He also had the right to renew his application before the Full Court which he did.

[22] Mrs Samuel Brown in her written submissions said that Mr Walker took an unnecessary detour to the Court of Appeal before he renewed his application before the Full Court. The costs incurred in the Court of Appeal cannot be addressed here because the costs there are for that court to decide. When the matter came back to the Supreme Court it was merely conforming to the CPR.

[23] The strongest point in favour of the CG is that the reasons of Fraser J demonstrated that there were alternate remedies open to Mr Walker. Not only that; it was also shown, on the facts known to Mr Walker, that seeking to quash the decision of the CG to administer the questions and the CG's decision to refer the matter to the DPP was an impossibility because by the time of the application for leave Mr Walker had already answered the questions and the DPP had already preferred criminal charges against Mr Walker so that in real and practical terms certiorari was not an available remedy because there was nothing to quash. Fraser J had also indicated that the law had developed to the point where the challenge to the legality of the CG's conduct could be accommodated during the criminal process. In other words Mr Walker's application was destined for failure.

[24] It appears, then, that learned Queen's Counsel submission is that the weakness of the application was pointed out to the applicant by Fraser. The approach to these matters when there is alternate redress is no longer in doubt. There is no reasonable argument that could be made that somehow the law in this area is unclear or in a state of flux. Fraser J referred to the most relevant and current authorities that have been in existence for at least half a decade. To persist in the application after Fraser J, in a clear and comprehensive judgment, had convincingly demonstrated that there simply no arguable case with a real prospect of success was unreasonable and should be sanctioned by costs.

[25] Mrs Samuels Brown is saying that Mr Walker persisted even after the facts were laid bare and the law was expounded. His case was hopeless factually and legally. There is great force in these points made by learned counsel. I am mindful of the sui generis nature of judicial review proceedings and its role in our democracy. I am also quite aware that costs orders may have a chilling effect on judicial review proceedings. However, I am also aware that the CG, at the hearing before Fraser J, showed the hopelessness of the Mr Walker's case and demonstrated why it should not proceed to full hearing. The CG also reduced costs by not filing any affidavit or relying on any material other than that relied on by Mr Walker. The response of the CG also saved additional costs by eliminating the first hearing and other preparatory steps that would have been required had leave been granted. The hopelessness arose from facts that were known to Mr Walker. No new fact was put forward by the CG. He simply, through his counsel, analysed the evidence and showed the severe weakness of the case.

[26] This case was not a borderline case. Fraser J produced a full written judgment running to some twenty eight pages and sixty seven paragraphs in which the learned judge endeavoured to explain why the application could not succeed. Campbell J in the renewed application dealt extensively with certiorari and why it could not possibly be granted on the facts.

[27] In light of all this, I am not able to accept the view that no costs should be ordered in this case. It falls within the exceptional circumstances indicated by Auld LJ. I accept that in Jamaica there is no pre-action protocol requiring the applicant to alert the respondent to his claim and so giving the respondent an opportunity to convince the applicant of his folly and so it may be said that until the hearing before Fraser J, he would not have had an opportunity to hear the respondent's views. That is a good point but after Fraser J's judgment no such excuse can persist.

[28] The only remaining question is for what should costs be recoverable? This has been the most difficult aspect of the case. The arguments were essentially the same as those advanced before Fraser J. To that extent no further effort was required other than to see whether there were any new developments between the appearance before Fraser J and the hearing before the Full Court. Counsel would also have had to review her submissions before appearing in court and apply her mind to decide the most effective manner of presenting her client's case. She would also have had to be in court during the submissions of counsel for Mr Walker and to respond to those submissions. These costs can be significant and if not kept in check can have a deleterious effect on judicial review applications. But no applicant can have a right to pursue hopeless cases thereby engaging the resources of the public authority on a pointless exercise. I think that the balance should be that the CG can recover the costs for the time Mrs Samuels Brown made oral submissions at the renewed hearing of this matter. The costs leading up to the renewal of the application should be bourne by each party. Why an order in these terms? It is my view that Mr Walker even up to the end of his submission had the opportunity to pause and reflect on whether he should continue thereby obliging the CG to respond. There is a strong policy of not stifling judicial review because of fear that huge costs orders may be made against the applicant but there is also the equally important policy that applicants must recognise when they have a hopeless case and not persist in wasting public resources (court time and resources of the public body being challenged) on undeserving cases. In this case there were written submissions filed on behalf of the CG which demonstrated the grounds on which the application was opposed. Most of those grounds were upheld on the renewal application. Mr Walker

thus had not only the judgment of Fraser J but also written submissions from the CG. It is expected that in these circumstances careful thought should be given whether the application is worth pursuing.

Summary and disposition of case

[29] Judicial review is civil proceedings under the CPR and thus, prima facie, is subject to the costs regime set out in the CPR. However, given the unique nature of judicial review, there is good reason for not awarding costs against the applicant unless there are exceptional circumstances. Even if exceptional circumstances exist, the court should still examine the matter carefully to determine whether costs should be awarded and if so, for what. Exceptional circumstances exist in this case. These circumstances are that factually and legally Mr Walker's case was hopeless. The weakness of the case was brought home to him by the judgment of Fraser J. He renewed his application as was his right. The written submissions of the CG further emphasised the absence of merit. He therefore had a good opportunity to think about his position but persisted nonetheless. While it is true that the CG was not compelled to attend the initial hearing and the renewal hearing the fact is that he did so and was successful at both stages. Fraser J did not award costs for the initial hearing. This application is concerned solely with costs of the renewal hearing. Costs should be awarded for the time the CG's counsel made oral submissions to the court.

STRAW J

[30] I am in agreement with my brother Sykes J that costs on a limited basis should be granted to the respondent in this matter. The rational for this is clearly set out in paragraphs 20 to 28 of his judgment and I see no reason for repetition. I am, however, not convinced as to the path that my brother took to arrive at his conclusion.

[31] I appreciate that Part 56 15(4) and (5) which speaks to costs are encapsulated within the context of a full hearing and not the leave stage. However, the rationale for costs in Part 56 is indicative of the jurisprudential appreciation of the distinct species of civil proceedings known as judicial review. In short, judicial review is a simple avenue for the individual with a legitimate complaint against state action to have access to the courts. It is for this reason that the courts have always taken care to ensure that is does not discourage parties by the threat of costs orders if they are unsuccessful in their application.

[32] The general rule under Part 56.15 (5) is that no order should 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. It is my opinion that costs for the application at the leave stage can be determined with in parameters of the above-mentioned sections.

[33] At any rate, I agree with Sykes J that the principle of 'exceptional circumstances' as enunciated in **Mount Cook Land v Westminster City Council** [2004] 2 Costs LR 211 which have been set out in his judgment (paragraph 18) can be considered as helpful in the determination as to what may be unreasonable conduct of an applicant.

[34] Costs are therefore granted to the respondent in relation to the oral submission of counsel made before the Full Court at the renewal hearing of this matter.