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JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO. 190/09

BETWEEN	ANDREW WILLIS	APPLICANT
AND	THE COMMISSIONER OF TAXPAYER AUDIT AND ASSESSMENT DEPARTMENT/ COMMISSIONER OF INLAND REVENUE	RESPONDENT

Lawrence Philpotts-Brown, instructed by Gentles and Willis for the Applicant

Mrs Trudy-Anne Dixon-Frith, Ms Cecelia Chapman and Ms. Sophia Preston, instructed by the Director of State Proceedings for the Respondent

IN CHAMBERS

12 & 19 JANUARY, 2010

PHILLIPS, JA

1. This is an application for permission to appeal the order of Mr. Frank Williams, J (Ag) made on 29 January, 2009, whereby he upheld a preliminary objection taken by the respondent to the effect that leave having been granted to the applicant to apply for judicial review, the condition under the rules for the applicant to make a claim within 14 days not having been satisfied, the leave had expired, and the claim filed was invalid and could not be renewed.

2. The substantive relief sought in the claim is an order of certiorari to quash notices of assessment for income tax which were raised against the applicant for the years of assessment 1997 - 2003.

The chronology of the proceedings in this matter is as follows:

(1) The applicant filed and obtained leave to apply for judicial review from Sinclair- Haynes, J on 4 November, 2008.

(2) The formal order in respect of the above order was filed on 18 November, 2008.

(3) The applicant filed the fixed date claim form dated 25 November, 2008 on 2 December, 2008 and served the same on all relevant parties.

(4) At the first hearing of the fixed date claim form the preliminary objection was taken and arguments made thereon.

(5) On 29 January, 2009 Williams, J (Ag) upheld the preliminary objection, thereby ruling that the fixed date claim form was invalid and that leave could not be renewed.

(6) On 20 October, 2009 Beckford, J refused leave to appeal the order of Williams, J (Ag).

(7) On 3 November, 2009, the applicant filed notice of application 190/09, in the Court of Appeal, which was amended and re-filed on 5 November, 2009, for permission to appeal the order of Williams, J (Ag).

3. There were two grounds on which the applicant relied. Firstly, that the order of Williams, J (Ag) was an interlocutory order, and pursuant to s.11(1)f of the Judicature (Appellate Jurisdiction)Act, permission is required for an appeal to be made to this court, and as an application for permission to appeal had been made below and refused by Beckford, J, then it was necessary to file this application, pursuant to Rule1.8 of the Court of Appeal Rules. The second ground of appeal was that the appeal had a real chance of success. I should state right away that I accept that this is an interlocutory order and therefore permission to appeal is required.

The submissions- real chance of success

4. The applicant relied on his supplemental affidavit sworn to on 5 November, 2009 and filed on the same date in support of the application, and in particular paragraph 12 (a)-(g), which sets out what the applicant claimed were the merits of the application and why the court ought in the interest of justice to hear the appeal as it had a real chance of success.

In essence, the applicant through his counsel, submitted the following:

(i) That the learned judge erred in failing to appreciate that the proper interpretation to be given to Rule 56.4(12) of the Civil Procedure Rules (CPR) was that the leave granted to apply for judicial review is

days of the order granting leave if the order has been "received" by the applicant. It does not envisage an oral order, even if counsel was present when the order was made, as in this case. Since in this case the formal order was not filed until 18 November, 2008, 14 days after the order granting leave, and the fixed date claim form was filed on 2 December, 2008, the leave would not have lapsed and the learned judge should have proceeded with the first hearing on 29, January, 2009. Counsel submitted in further support that the order cannot be oral, that Rule 56.11(4) of the CPR requires that, where leave has been granted to make a claim for judicial review, the order giving leave must be served with a copy of the application for leave and the affidavit in support thereof. Counsel indicated that the learned judge had ruled that pursuant to Rules 42.2 and 42.8, of the CPR the party before the court is bound by the order of the court and it takes effect from the day that it is made, unless a different date is specified, even if it is not served. Thus the words, "receipt of the order" must refer to the oral order made in court. Counsel challenged this ruling and wished the Court of Appeal to re-visit this matter as he submitted the Judges of Appeal may take a different view.

(ii) That since there were no express provisions governing cases where the leave to file the claim had expired and the claim had not yet

been filed, the court should exercise its inherent jurisdiction, and in the exercise of its discretion do justice between the parties. Counsel also argued that since the applicant had a meritorious case he should not be driven from the judgment seat on the basis of a failure to comply with procedural rules, and for that proposition he relied on the case of **Watson v Fernandes** [2007] C.C.J.1.

5. Counsel also submitted that the judge erred when he ruled that the applicant could not renew the application once leave was granted and the claim had not been filed. He submitted that Rule 56.5 of the CPR had no applicability to Rule 56.4(12) of the CPR as the former rule refers to cases where leave has been refused, or where leave has been granted on terms other than under Rule 56.4(12). Thus, Rule 56.5 had by its own language excluded all applications for leave granted on the condition stated in Rule 56.4 (12). Counsel therefore submitted that in the absence of express provisions in the rules, the court ought to be guided by the Practice Direction issued on 30 May, 2006 which states in paragraph 4:

> "4. Where an applicant obtains leave and fails to file a claim within 14 days of receipt of the order granting leave, any new application for leave should be made in the same proceedings and the judge may require that the application for leave be served."

Counsel submitted the judge ought to have permitted the applicant to renew the application and to file the renewed application in the same proceedings.

6. Finally, counsel submitted that the rules (Rule 9.6) require that a defendant wishing to challenge the court's jurisdiction, and or whether the court should exercise its jurisdiction must file an acknowledgement of service and, within the time limited for filing a defence, take out an application to that effect. In this case, the respondent having failed to file the acknowledgement of service, was therefore in breach of the rules and ought not to have been allowed to proceed with the challenge to the claim form, but the judge should have ruled that its actions indicated its acceptance of the court's jurisdiction. He further submitted that under the old civil procedure code, failure to file a conditional appearance would have meant that one had accepted the jurisdiction of the court. Counsel therefore submitted that in the absence of the acknowledgement of service, at the first hearing of the fixed date claim form, the claimant is required to show proof of service of the relevant originating documents, which the applicant had done, and the hearing of the fixed date claim form, should have proceeded, (see para 27.2 (6)). Also the respondent had not filed any application to challenge the court's jurisdiction, but had relied on taking a preliminary objection, which

counsel submitted ought not to have been permitted in all the circumstances.

7. Counsel conceded however that this last submission had not been made before Williams, J (Ag), but had been made before Beckford, J at the application for leave to appeal, which had been refused, but for which no reasons had been given to date. Counsel therefore submitted that the appeal had a real chance of success and permission to appeal ought to be granted.

8. In reply, counsel for the respondent conceded that it had not filed an acknowledgement of service. However, she submitted that the respondent was not challenging the jurisdiction of the court or whether it should exercise its jurisdiction; what the respondent was saying is that there is no claim for the court to adjudicate on. Additionally, she submitted, the claim form was served on 4 December, 2008 and so the challenge taken to the claim, by way of preliminary objection, was within the time for filing the defence, and was therefore within the rules, and could therefore have been properly taken, as it was, at the first hearing of the claim. Counsel further submitted that Part 27 of the rules is not applicable to the instant case as the management of a case can only occur if the case is one that is recognized under the rules and this one was not. Reliance therefore on Rule 27.2(6) was ill-advised.

9. Counsel submitted that the real issue on this application was whether the applicant had a real chance of succeeding on appeal and she submitted this was not a question of whether the chance was fanciful or not, as in this case, she submitted, there was no chance of success at all. The judge, she submitted, had ruled correctly as the applicant had obtained leave to file his claim form, and he had not filed it within the time that the rules require. The leave had therefore lapsed, was no longer valid and there was no claim before the court. Counsel also submitted that the rules make it very clear that an oral order is effective from the day that it is made or given; it does not have to be served.

10. With regard to whether the applicant could renew the leave, counsel relied on the dicta in the case of **Orrett Bruce Golding and Attorney General of Jamaica v Portia Simpson-Miller** (SCCA No. 3/08, delivered April 11, 2008) which stated very clearly that there were only certain circumstances wherein an applicant could renew his application for leave and this case did not fall within any of them, (See Rule 56.5(1-3)). The application for leave was not initially refused and had not been granted on terms other than that stated in Rule 56.4 (12); the application did not relate to a matter involving the liberty of the subject, or any other criminal cause, and in any event, there had already been a hearing in the matter on 4 November, 2008.

11. With regard to the Practice Direction, counsel submitted that Smith, JA on page 19 of the **Bruce Golding** judgment (supra) having stated that Rule 56.5 does not permit the renewal of an application for leave where the applicant has failed to make a claim for judicial review pursuant to Rule 56.4(12), made it pellucid that he did not think that "the Practice Direction issued to take effect on 1 June, 2006 to which reference was made by Mr. Henriques, QC is helpful in this regard".

Counsel therefore submitted that the application for permission to appeal should be dismissed with costs.

Discussion

12. Having set out the competing submissions of counsel, I think it is only necessary for me to state clearly my view of the same, as this is only an application for permission to appeal. I will deal with matters as they were argued before me.

13. 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. The 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. I do not see any merit whatsoever in the submissions on behalf of the applicant.

14. Rules 42.2 and 42.8 make it very clear that the order is effective once it is made. Even if it is an oral ruling, it is binding. It does not need to be served to be effective and binding. To obtain the order granting judicial review, however, the order for leave must be served with the application for leave and the affidavit in support, on all those persons directly affected not less than 14 days before the day fixed for the first hearing. (See Rule 56.11(1) – (4)).

15. The court cannot therefore exercise its inherent jurisdiction to grant relief when the rules are clear and have been promulgated for just that reason, so that there can be certainty in litigation. I do not accept that there are no express rules to guide the litigants in this regard.

16. I accept the dicta of the court in the **Bruce Golding** case (supra), with regard to the interpretation to be given to Rules 56.4(12) and 56.5. This applicant cannot renew the application for leave to file a claim for judicial review. Leave was not granted on any terms. Leave was granted at the hearing before Sinclair-Haynes, J and this application for leave relates to matters concerning taxes raised against the applicant for the years of assessment 1997-2003, not to an application involving the liberty of the subject or a criminal cause or matter.

17. The Practice Direction could only be applicable in circumstances when leave has been granted on terms, (Rule 56.4(8)or relates to matters involving the liberty of the subject or a criminal matter and indicates that the new application must be filed in the same proceedings in which the original application had been made. Suffice it to say on the dictum of Smith, JA as stated aforesaid, the Practice Direction would not have helped the applicant in this case.

18. Finally, I accept the submissions of the respondent with regard to the issue of the filing of the acknowledgement of service. The preliminary objection could have been taken at any time and in this case was taken within the time for filing the defence, and at the first hearing of the fixed date claim form. It was not a challenge to the court's jurisdiction; it was a challenge as to whether there was any recognizable claim before the court. Part 9 of the rules is not applicable.

19. **Conclusion**

There is no merit in this application. The application for permission to appeal is refused with costs to the respondent.