SCJB

In the Supreme Court of Judicature of Jamaica

Claim No. 2008 HCV 05710

Between	Caribbean Cement Co. Ltd.	Applicant
And	The Attorney General	1st Respondent
And	The Minister of Finance and the Public Service	2nd Respondent
And	The Anti-Dumping and Subsidies Commission	3rd Respondent
And	ARC Systems Ltd.	Interested Party

Mr. M. Hylton Q.C., Mrs. N. Foster-Pusey and Mr. Kevin Powell instructed by Michael Hylton and Associates for the Applicant

Mr. L. Robinson, Mr. C. Cochrane, Mr. N. Williams and Miss I. Evans instructed by the Director of State Proceedings for the 1st, 2nd and 3rd Respondents.

Miss G. Gibson-Henlin for the Interested Party instructed by Gibson, Henlin, Gibson

Heard: 29th January, 2009.
30th January, 2009
16th July, 2010

Marsh J.

By Notice of Application for Court Orders dated the 11th day of December, 2008, the Respondent sought the following orders:-

1. That the Order of the Honourable Mr. Justice Morrison made on December 20089 be set aside or varied.

2. That the Attorney General be struck out as a party to these proceedings.

3. That costs be costs in the claim.

The grounds on which the orders were sought as follows:-

1. Having regard to the orders sought and granted the Respondents are entitled to be served and to be given an opportunity to participate in the hearing and to respond to the application made by the claimant.

2. That the Learned Judge erred in Law in granting an interim declaration.

3. The Learned Judge erred in making an order directing the Minister to indicate whether he intended to make an Order under the Provisional Collection of Tax Act and, if not, the reasons for his decision.

4. The Order made by the Learned Judge in effect waived and/or abridged provisions of the Civil Procedures Rules 2002 when there was no substitution of fact permitting waiving an abridgement of the Rules.

5. The provisions of Part 56 of the Civil Procedure Rules 2002 promulgated for the benefit of the Respondents were waived and/or abridged without giving the Respondents an opportunity to be heard.

6. The Respondents were prejudiced by the orders made by the Learned Judge.

7. The Application does not disclose an arguable case.

This last ground was later abandoned by the Mr. L. Robinson Attorney-for the Respondents.

The evidence relied on by the respondent to ground their application is contained in affidavits of Nadine Williams and Andrea Marie Brown each filed on the 18th December, 2008.

On the 14th January, 2009, ARC Systems Ltd. was added as an interested party to the proceedings. It has also filed its application for orders to set aside the order made by Mr. Justice Morrison on the 2nd December, 2008.

The orders sought by the Intervenor ARC Systems Ltd. are as follows:

1. An order that the Order of Mr. Justice Morrison be set aside.

2. An abridgement of time for the service of this application herein.

3. Such further or other relief as this Honourable Court deems fit.

The grounds on which the ARC Systems Ltd. Applicant seeks these orders are as follows:-

1. Pursuant to Part 11.18 of the Civil Procedure Rules 2

2. The interim declarations affect the Intervenor's right.

3. The application should have been made on Notice to the Intervenor.

4. The interim declarations were made in circumstances that were not urgent.

5. The matters in the application were matters of priority.

6. There is no basis on which the Court could grant the interim declaration.

The said Intervenor's application is grounded by the affidavit of Norman Horne filed on the 27th January, 2009. He deponed that he is

the Intervenor's Managing Director and that the Intervenor has intervened in the matter as the rights and interests of the Intervenor are imparted; that the Court's ruling may result in the closure of ARC's business.

The Intervenor was served with a copy of the interim order dated the 3rd of December, 2008, which significantly affects its business operations.

He further referred to the Fixed Date Claim Form filed on 3rd December, 2008 and the orders therein sought. He indicated that there are material facts relevant to the hearing of the Claim which the Claimant failed to disclose in the application before the Court, which when heard will affect the outcome of the ruling and determine whether the said remains a going concern in the next twelve (12) months.

The Intervenor has a sufficient interest in these proceedings and its interest in these proceedings was known to the applicant. This was made clear by the affidavit of Alice Hyde for the Claimant at paragraph 17 – 22 thereof.

The Intervenor should therefore have been served with Notice of the Application. There was no urgency attached to the application for interim declarations as the final declaration has been in effect since

June 14, 2004 and the Intervenor has operated under that policy framework since 2006.

The Notice of Application of the Respondents and the Intervenor respectively, referred to above were occasioned by the order of Mr. Justice Morrison on the 2nd of December, 2008 on the Ex parte application of the claimant for leave to apply for Judicial Review.

Submissions:

1. **The Respondents**

The Respondent submitted that it is now well settled that on order made ex parte is provisional only and may be set aside by the Judge who made the order or by any other available judge.

Reliance for this proposition was placed on the statement of Sir John Donaldson M.R. ***in WEA Records Ltd. v. Visions Channel 4 Ltd (1983) 589*** at pp. 593, and approved by the Privy Council in ***Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Ltd. (1991) 4 All E.R. p. 65.*** He stated, inter alia –

> ***"…. There is no doubt that the High Court has power to review and to discharge or vary any order which has been made Ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte*** …..
>
> ***…… ex parte orders are essentially provisional in nature.***
>
> ***They are made by the Judge on the basis of evidence and submissions emanating from one side only.***

> ***Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists this application, this is no basis for making definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side ..... he is not hearing an appeal from himself....."***

On an application for Leave to Apply for Judicial Review, leave may be granted without the Court hearing this Applicant. It is the further contention of the Respondents that where the applicant also seeks Interim Relief there must be a hearing. See Rule 56.4 (2) and (3) of the Civil Procedure Rules 2002.

In the circumstances of the instant case, the Judge had no jurisdiction to make the orders for interim declarations of the following reasons. Counsel for the respondent proffered the following reasons:-

> The powers given to a judge to grant interim injunctions in an application for Judicial Review proceedings is primarily to maintain the status quo and to mitigate injustice to an applicant while awaiting a full hearing.

It is insufficient to establish that there is a risk of injustice to the applicant but it must also be shown that there is no remedy for any loss which the impugned action's continuation may cause.

The interim orders granted herein are in terms final orders which would have the effect of determining the issues between the parties and granting orders being sought in the substantive application.

The judge cannot grant a declaration without affording the person affected an opportunity to be heard, nor can he grant a declaration without an opportunity to hear arguments.

Further, it is submitted that the provisions of Section 16 of the Crown Proceedings prohibits the grant of an interim declaration against the Crown. See Section 16a of the Crown Proceedings Act.

See ***Underhill and Another***
v.
Ministry of Food Vol. 1 Ch. D. 591

International General Electric Company of New York Ltd. et al
v.
Commissioner of Customs and Excise (1962) Chancery Division 764.

The Respondents also maintained that the order directing to respond to letters written by the claimant and its Attorneys at Law is in terms a mandatory injunction, the grant of which is precluded by the provisions of Section 16 of the said Crown Proceedings Act.

By making the said order the learned judge has granted in Claimant's favour paragraphs 7 (d) and (e) of the grounds on which relief is sought by the claimant.

Whether or not the claimant is enlisted to be given reasons should be determined only after the Respondents have been heard, this being a question of law.

On granting leave to apply, the Rule 56.4(1) of the Civil Procedure Rules 2002 requires that the judge is required to fix a date for the first hearing.

At this hearing, the Judge is required to make orders such as to "ensure the expeditious and just trial of this claim."

In making orders at the first hearing (of the Judicial Review Proceedings) Parts 25 to 27 dealing with case management conference apply. See Rule 56.13 of the Civil Procedure Rules 2002.

The Judge hearing an Application for Leave to apply for Judicial Review may, in a case of urgency fix a date for a full hearing. In exercising his discretion under the provision in Rule 56.4 (11) of the Civil Procedure Rules, the Judge ought to take into consideration the provisions of Parts 56.12 and 56.13 of the Civil Procedure Rules.

The Respondents were denied a benefit but without being given an opportunity to be heard.

Further it was submitted that the Judge did not have any evidence of urgency before him. The Attorney General, it was submitted, was improperly joined because the Crown Proceedings Act and more particularly Section 16 thereof do not apply to judicial review proceedings.

See ***Ministry of Foreign Affairs Trade and Industry***
v.
Vehicles and Supplies Ltd. (1991) 4 All E.R. 65

The Supreme Court of Jamaica only has jurisdiction to grant injunctions "where it is just and convenient to do so." See **Section 52 Judicature (Supreme Court) Act.**

The Court has granted interim reliefs even though there is no right or cause of action/complaint in the Fixed Date Claim Form which ground the application and orders for interim declarations.

Mr. Michael Hylton Q.C., for the Claimant Caribbean Cement Company Limited replied to the Respondents' submissions in robust tones. He outlined the history of the matter leading up to and including the application for leave to apply for judicial review and the consequent orders made by Justice Morrison, the orders which the Respondents seek to impugn.

He outlined the grounds on which the Respondents are seeking the Orders in the instant Application to set aside Mr. Justice Morrison's orders.

Respondents were entitled to be served, given an opportunity to respond to the application and participate in the hearing.

The orders made by Justice Morrison in effect waived and/or abridged provisions of the Civil Procedure Rules 2002 where there was no substratum of fact permitting waiving or abridging the rules.

The provisions of Part 56 of the Civil Procedure Rules 2002 promulgated for the benefit of the Respondents were waived and/or abridged without giving the Respondent an opportunity to be heard.

The Claimant's response to these grounds addressed them at the same time. Here Mr. Hylton pointed to the fact that the CPR 56.3 outlines the required contents of the application for leave and Rule 56.3 (2) specifically provides that an application for leave to make a claim for judicial review can be made without notice. In addition, the Rules also provide that the application for leave to make a claim for judicial review is to be considered forthwith by a judge of the Court. The application for leave to make an application is to be considered forthwith, by a judge of this Court and leave may be given without hearing the applicant. There are however specific circumstances in which a hearing must take place. A hearing must take place if –

(a). the Judge is minded to refuse the application

(b). there is a claim included in the application for immediate interim relief; or

(c). it appears that a hearing is desirable in the interest of justice.

An oral hearing was held in the instant case as there was a claim for immediate interim relief.

It was open to the Judge to direct that notice of the hearing be given to the Respondents. In the course of hearing an application for leave under the Civil Procedure Rules 2002-

"may grant such interim relief as appears just."

The orders made by the judge indicate what he felt in the circumstances.

CPR 56.4(11) provides that "on granting them leave the judge must direct when the first hearing or, in the case of urgency, the full hearing of the claim for judicial review should take place."

The judge has the option therefore, in a case of urgency to dispose with the first hearing and proceed with dispatch to set an early date for the hearing of the matter.

It is submitted that the Judge granting leave, exercised his powers on facts outlined in the claimant's affidavit, facts which have not been contraverted by the Respondents. There was evidence of urgency before the Judge.

The Judge had exercised the powers given to him generally in CPR 26.1(2) with regards to Case Management and more particularly he had been empowered by CPR 56.9 (8) to fix "an early date to be fixed for the hearing of the application for an administrative order."

The Interim Declarations granted by the Judge were not granted in error and the reasons advanced by the Respondents that the Judge erred in their grant were baseless. The cases relied on by the Respondents, to support their contentions here are not reflective of the present legal position and are therefore of no relevance.

The Respondents maintained that the Learned Judge was in error when he made the Order directing the Minister to indicate whether he intended to make an order under the Provisional Collector of Tax Act and if

not, the reasons for his decisions; that an injunction cannot be granted against the Crown in civil proceedings.

The Claimant submitted that this is the misconceived since claims for Judicial Review are not civil proceedings against the Crown as defined in the Civil Proceedings Act. See ***Minister of Foreign Affairs Trade and Industry v. Vehicles (1991) WLR 550 AT 555b.***

The Respondents argued that this order should not have been granted since it was made for the purposes of maintaining the status quo. The claimant countered that there is no such limitation on when an interim remedy can be granted in the course of an application of judicial review.

The sole requirement is that the grant of the interim remedy must appear to be just in the Judge's discretion.

The order did not direct the Minister to make the order pursuant to the Provisional Collection of Tax Act. It merely ordered the Minister to respond to the Claimant's letters and indicate his position as to the making of the orders. This does no more than seeking to be possessed of the "details of any consideration which the applicant knows the respondent had given to the matter in question in response to a complaint made by or on behalf of the applicant." See CPR 56.3(3)e.

The evidence produced by the 1st and 3rd Respondents they are only prejudiced in relationship to the order made relevant to the period within

which affidavits were ordered to be filed and served by them. See affidavits of Andrea Marie Brown and Nadine Wilkins respectively. The Court however seems to have clearly felt that the time given was reasonable in the circumstances.

The Attorney General is a proper party since the Claimant was also seeking administrative orders which are civil proceedings – Section 13(2) of the civil proceedings – Section 13 (2) of the Civil Proceedings Act provides that "Civil Proceedings against the Crown shall be instituted against the Attorney General."

Was the Court clothed with the power to have made the orders, to have made those orders ex parte and also to have abridged time?

Rules 56.3 and 56.4 of the CPR 2002 authorize the Judge to hear an application for Judicial Review made without notice. The Judge may give leave without hearing the Applicant. However, where the application includes a claim for immediate interim relief, the judge must direct that a hearing be fixed (CPR 56.3 (1)).

The Judge has the discretion to "grant leave on such conditions or terms as appear just." (CPR 56.3)(8). He may also grant such interim relief as appears just."

On granting leave the Judge must direct when the first hearing is to be held, or in a case of urgency, the full hearing of the claim for judicial review must take place.

It was contended that there was no substratum of evidence before the Court suggesting any urgency.

The evidence before His Lordship Mr. Justice Morrison, indicated that there would be the arrival into the island immediately of ship bearing a significant amount of goods subject to anti-dumping duty on or around December 2008

This item of evidence, by itself, provided the judge with evidence of urgency. There was no contrary evidence for the Judge to have considered.

I am firmly of the view that the Judge, having before him an ex parte application in which there was a claim for immediate interim relief, or it appears that a hearing is desirable, is obliged to hold a hearing. This is provided for in **Part 56.4(3) of the CPR.** The Court must have had placed before it, evidence on affidavit" which must include a short statement of all the facts relied on.

There must be consideration forthwith of the application for leave to make a claim for Judicial Review, by the Judge; he may give leave without hearing the Applicant where a hearing must take place as stipulated in **Part 56.4(3) of the CPR.** The judge must direct that a hearing be fixed. He may after holding a hearing, "grant such interim relief as appears just."

Where leave is granted, the judge must direct when a first hearing is to take place, but in a case of urgency, the full hearing of the claim for a judicial review should take place. **(Part 56.4 (11) of the CPR 2002).**

It is therefore obligatory for the Judge to direct a fast hearing. However in the case or urgency, the full hearing of the claim for judicial review should take place.

There was evidence before the court, unchallenged and uncontroverted that there was an imminent arrival of a chip with goods. This provided a basis on which the Court could find that there was urgency and the court should therefore proceed to hear the matter as soon as is possible.

There were general powers which Part 26.1(2) invested the Court, as provided in Part 26.1(2) of the Civil Procedure Rules 2002. The Court was empowered to

> "extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court....."

Where there is an application for administrative orders, any party may apply to a judge in chambers to bring forward the date or for an early date to be fixed for the hearing of that application. This is despite the general rule that stipulates that the first hearing must take place no later than four weeks after the date of the issue of the claim.

The Respondents' argument that an order waiving or abridging time within which affidavits are to be filed and the holding of a case management conference, "should only be made where notice has been given to the party to be affected an after hearing are the parties to the claim", sounds attractive on its surface. However, this submission is without merit as this would fetter the ability of any Court to make an order for an early hearing in a case of urgency.

The learned judge has not been shown to have acted outside of the powers specifically granted to him in the exercise of that discretion.

Did the learned Judge err when he granted the interim Declarations?

It was the contention of the Respondents that the judge was in error when he made the orders for interim declarations because the power given to a judge in an application for leave in judicial review proceedings is primarily for maintaining the status quo and to mitigate the risk of injuries to an Applicant while awaiting a full hearing.

It must be shown that there is no remedy for any loss which would be occasioned by the continuation of the impugned action.

The Respondents further submitted that a declaration being by its very nature a final remedy, an interim declaration cannot be granted on an ex parte application for leave in a judicial review application.

These interim declarations are in terms final orders, which have the effect of determining the issues inter partes and granting the orders being

sought in the substantive application. A declaration which is final on its terms cannot be granted without affording the affected person an opportunity to be heard.

The Respondents further maintained that pursuant to Section 16 of the Crown Proceedings Act, an interim declaration cannot be made against the Crown. The Respondents maintained that an adequate remedy for the Claimant was damages therefore declarations should only be made to maintain the status quo.

The claimant submitted in response that the Court has statutory power to grant interim declarations and therefore was correct to have granted the orders in these particular circumstances.

The position before the amendment in 2002 of the Crown Proceedings Act (the Act) was that interim declarations could not be granted against the Court. However subsequent to the amendment, Section 2(1) of the Act now provides as follows:-

> "Any reference to this Act to the provision for this act shall, unless the context otherwise requires, include a reference to Rules of Court or Resident Magistrates Court rules for the purposes of this Act."

S29(1) of the Act states

> "Any powers to make rules of court ..... shall include powers to make rules of the purpose of giving effect to the provisions of this Ac, and any such rules may contain provisions to have effect in relation to any proceedings by, or against the Crown in substratum for or by way of addition to any of the

provisions of the rules applying proceedings between subjects."+

Section 2 (2) of the Act now provides-

"In this Act, except to so far as the context otherwise requires or it is otherwise expressly provided, the following expressions of the meanings hereby respectively assigned to them, that as to say, 'rules of Court' include the Civil Procedure Rules 2002.

Section 16(1) if the Act provides, in part,

"in any civil proceedings by or against the Crown the Court shall, subject to the provisions of this Act, have powers to make all such orders, as it has powers to make in proceedings between subjects, and otherwise to give such appropriate relief, as the case may require..."

The combined effect of these provisions above mentioned is that the Civil Procedure Rules are incorporated into the Act.

Part CPR 56.1, it is expressly stated –

"This part deals with application.

a. for Judicial review
b. for a declaration in which a party is the State, a court, a tribunal or any other public body."

I am in agreement with Claimant's submissions that Part (56.1) of the CPR being provisions of this Act constitute statutory authority to the Court for the grant of interim declarations against the Crown. The authorities relied on by the Respondents and cited by them, especially the case of ***Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Ltd. (1991) 1 WLR 541,*** are no longer relevant.

I am therefore in agreement with the submissions of Learned Queen's Counsel that since 2002 by statutory authority, interim declarations can be granted against the Crown.

Part 17.1 (1) of the Civil Procedure Rules 2002 makes erroneous the statement that a declaration "by its very nature is a final remedy and therefore an interim declaration cannot be granted on an ex parte application for leave in judicial review." Part 17(1)(1) provides that "the court may grant interim remedies including

a. .....

b. an interim declaration"

Part 56.9 of the CPR sets out the procedure for applying of an interim declaration. Part 56.1(c) deals with applications for a declaration or an interim declaration..... The Claimant has proceeded in its application in adherence to the procedure as indicated.

The interim declarations granted by the Court were based upon the unchallenged Final Determination of the 3rd Respondent the Anti Dumping and Subsidies Commission.

The Court therefore had a basis upon which to have granted the interim declarations.

> "Interim declarations should be granted only where the claimant has a prima facie case ..... when considering the balance of convenience test; relevant factors and the strength of the claimant's case and the respective

> detriment to the parties should the interim declaration be granted or denied."

See 'English Civil Procedure' page 1035 (per Neil Andrews).

These interim declarations granted by Morrison J are not, as argued by the Respondents, final orders having the effect of determining the issues between the parties being sought in the substantive application. The final declarations being sought in the substantive hearing are different from these granted to the applicant.

It must have been obvious to the judge that the Final declarations sought relate to the steps which the 2nd Respondent Minister of Finance was to take to see to the collection of the anti dumping duty, he having the responsibility for finance.

They also related to the duty of the Anti-Dumping and Subsidies Commission (3rd Respondent) to ensure that all legal steps for the collection of the duty are taken. There was therefore a basis for the grant of these interim declarations which was within the powers of the court to make.

With regards to the order directing the Minister to indicate whether he intended to make an order under the Provisional Collection of Tax Act, and if not the reason for his decisions, this was not an order directing the Minister to have the Order pursuant to the Provisional Collector of Tax Act.

The Court's order was to the Minister to have him respond to the letters and queries to him from the claimant. There seems to be nothing about the order which can be faulted.

The claimant could only properly have satisfied Part 56.3(e) of the Civil Procedure Rules 2002 details of any consideration which the applicant knows the respondent has given to the matter in question in response to a complaint made by or on behalf of the applicant " .... if there was some response for the respondent Minister as to what consideration he had given to the matter."

The Court must have felt that the need to expedite the final hearing required the matter to be managed by way of reducing the time given for filing of and serving of affidavits. This was a power which the court was possessed of, "to give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective." (Part 26.1(1)(v).

There is no evidence therefore that the judge had exercised his discretion wrongfully when he made orders to shorten the time.

The Fixed Date Claim Form in the matter sought orders in Judicial Review and administrative orders – Parts 56.1 (1) and 56.1(2) of the CPR indicate that in application for a declaration where one party is the state or any public body this is an application for an administrative order but it is not a judicial review application. Since administrative orders are sought,

these aspects of the claim are civil proceedings and Section 13(2) of the Crown Proceedings Act applies. "Civil proceedings against the Crown shall be instituted against the Attorney General."

The submissions to the contrary are, in my view misconceived.

I have not been satisfied having heard the submissions in this application, made inter parties that this is a case in which leave should plainly not have been granted.

There is an inherent jurisdiction in the Court to set aside orders made without notice having been given to t he other party, including the grant of permission to apply for judicial review.

The Courts have emphasized, however, that the jurisdiction is to be exercised sparingly, and that they will only set aside permission in a very plain case.

See also ***R v. Secretary of State for Home Department, ex parte Chinoy (1991) Times Law Report 189 (Divisional Court)*** per Lord Bingham, who opined inter alia,

> ***"It seems to me that it is a jurisdiction which exists and which the Court may exercise if it is satisfied on inter parties argument the leave is one that plainly should not have been granted."***

See also-

Sanatan Dhama Maha Sabha v. Patrick A. Manning
C.V. No. 174 of 2004.

In the circumstances the application is dismissed.

It is hereby ordered:-

1. Orders made by Morrison J. on December 2, 2008 at paragraphs 1 -5 are to stand.

2. An early date for the Full Hearing of the Claim for Judicial Review and administrative Orders is to be set by the Registrar.

3. Notice of the Full Hearing is to be served on the Respondents .and on A.R.C. Systems Ltd. (Intervenor)

4. The application for Judicial Review and Administrative Orders is to be heard by a single judge in open court.

5. The parties are to file and serve all affidavits to be relied on in the application within 28 days of the order.

6. No affidavit shall be filed and served without leave of the Court if it has not been done within the 28 days aforesaid.

7. The parties are to file and exchange skeleton submissions and list of authorities no later than two weeks before the date of hearing, agreed with the Registrar.

8. This order shall be prepared, filed and served by the Claimant's Attorneys-at-law on the Respondents and on ARC Systems Ltd.

9. Costs are to be costs on the claim.

Leave to appeal granted to the Interested Party.