IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO 2010 HCV 01199

BETWEEN	**UTON FAIRWEATHER**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

AND

CLAIM NO. 2010 HCV 01837

BETWEEN	**ABLETON LAWES**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

CORAM: **The Honourable Mr. Justice L. Campbell**
The Honourable Miss Justice J. Straw
The Honourable Mr. Justice L. Pusey

Miss Tara Brown instructed by Norman Manley Law School Legal Aid Clinic for the Claimant.

Mr. Curtis Cochrane instructed by Director of State Proceedings for the Defendant.

Heard: October 20th , 21st, 2011 and November 11, 2011

Campbell J.

We heard this matter on October 20th & 21st, 2011 and gave our decision on November 11, 2011. We have now set out our reasons for Judgment. I have read the reasons of Pusey J in draft and I agree with them.

Straw J.

I have read the draft reasons of Pusey J and I am in agreement with his reasons.

Pusey J

[1] The interpretation of the Maintenance Act (2005) is central to the determination of this case. This Court is being asked to consider whether a judge of the Family Court acted properly in exercising her powers under Section 21 (1) of the Act. That portion of the Act states that:

> "A person shall not be committed to an adult correctional institution for default in payment under a maintenance order unless the Court is satisfied that the default is due to the willful refusal or culpable neglect of that person."

[2] The applicants claim that a judge of the Family Court in Kingston ("the judge") had committed them to prison by way of "forthwith" orders without having properly enquired into the circumstances to determine whether the default was caused by "willful refusal or culpable neglect".

[3] They argue that the judge had a responsibility to hold a hearing into their circumstances before making the order. It is contended that the absence of such a hearing is a violation of the applicants' right to be heard. Consequently the judge acted in breach of the rules of natural justice and the decision to commit the applicant should be quashed. Alternatively the Full Court should declare that the orders of the Family Court were made in breach of the constitutional rights of the applicants. Additionally the parties seek damages for false imprisonment as a result of the judge's breach of the applicants' constitutional rights and/or breach of natural justice.

The Fathers

[4] Uton Fairweather ("Fairweather") fathered three children with CD between 1985 and 1989. In 1993 CD obtained orders for maintenance in the sum of $300 per week per child. These orders were collecting officer orders. This means that

Fairweather should have paid the sums to an officer of the court who would keep a record of the payments made by him. Fairweather fell into arrears as early as 1996. Action was taken in relation to enforcement of the arrears.

[5] Warrants of distress were issued in 2005 and the documents were endorsed that there were insufficient goods to levy on. Fairweather is contesting in these proceedings that the bailiffs had actually gone to his premises. There is no indication that there was any previous challenge to the return of the warrants.

[6] Consequent on the warrants of distress being unsatisfied, Mr. Fairweather was brought before the court on warrants of arrest in August 2005. At that time the outstanding amount was over $500,000 The matter came before the court regularly until March 2010.

[7] During this time period Fairweather indicated to the court that he had paid the money directly to the children. Two of the children came before the court in January 2009 and confirmed this position. The judge spoke with the children and discounted the amount owed by $200,000. Fairweather appealed this decision in February 2009. That appeal was withdrawn in January 2010.

[8] After the withdrawal of the appeal Fairweather appeared before the court on two occasions and paid a total of $ 5,000. On Monday 1st March 2010 Fairweather brought $1,000 to court. He was sent out for more and returned to court with another $1,000. The judge indicated that he should return on Friday 5th March 2010 with more money. He indicated that he preferred tc return on Monday. The judge made an order for Fairweather to pay $29,935.00 forthwith or serve eight days in prison.

[9] Fairweather was incarcerated and returned to court on 8th March 2010. On that date the judge restored his bail and ordered him to return in April. Fairweather seeks a review of the order of 1st March 2010.

[10] Ableton Lawes ("Lawes") was ordered to pay $3,500 per week plus half educational and medical expenses for the maintenance of a child born in 1996. This order was made in 2006. It was also a collecting officer's order and was made with the consent of the parties. In October 2008 a warrant of distress was issued in respect of the sum of $434,000 owed by Lawes. This sum was alleged to relate to 124 weeks of outstanding payments.

[11] These warrants were also returned with endorsements indicating that the Bailiff found insufficient goods to levy upon. Lawes also indicates that there has never been any attempt to detrain on goods at his home.

[12] A warrant of arrest was issued for Lawes in November 2008. Lawes was arrested on this warrant and brought before the Family Court on 26th May 2009. On June 1st 2009 he paid $92,000 and was offered bail in his own surety in the sum of $50,000. He was to return to court in August 2009. Lawes failed to appear. He was located by the police and returned to court in March 2010.

[13] On 8th March 2010 the court made a forthwith order for him to pay $322,000 or to serve 10 days. He was imprisoned and returned to court on 17th March 2010 when he was offered bail. According to the Court between March and November 2010 he has paid some $52,000. Lawes has contended that he had paid sums of money to the child who is the subject of the order. However, attempts to have the mother of the child confirm this have proven futile.

Lawes seeks a review of the order of 8th March 2010.

Judicial Review

[14] Counsel for the applicants relied heavily on the case of **Williams v Bedwelty** Justices (Bedwelty) in support of their case. In that case the magistrates in determining whether the appellant could be committed to trial on a case of conspiracy to pervert the course of justice considered inadmissible evidence. There was in fact no admissible evidence which could support the charge against her.

[15] On an application for judicial review to the divisional court it was held that it was clear from a long line of established authority that whether or not the court has such jurisdiction, it does not in practice exercise it in such circumstances.

[16] The divisional court certified questions to the House of Lords, namely:

> Whether it is open to a Divisional court ... by order of certiorari to quash a committal for trial... where there was (a) misreception of inadmissible hearsay evidence by the magistrates and (b) no other evidence capable of being deemed sufficient to put the accused on trial by jury. (2) If so, on what principle should the discretion to order certiorari be exercised?

[17] Their Lordships considered the authorities and concluded that:

> To convict or commit for trial without admissible evidence of guilt is to fall into error of law. As to the availability of certiorari to quash a committal for such an error... all your lordships [are] satisfied that in principle the remedy is available and that the only issue presenting any difficulty relates to the exercise of the courts discretion. This conclusion about the principle reflects the position now reached in the development of the modern law of judicial review....

[18] Lord Cooke in delivering the decision of their Lordships applied the reasoning of Lord Mustill in **Neill v North Antrim Magistrates' Court**. Lord Cooke concluded that a committal should be quashed in judicial review proceedings if there was no

admissible evidence of the defendant's guilt. He indicated that the discretion to grant relief should be exercised in favour of the defendant as there was no alternative remedy available which would have given the defendant the right to cross examine before the trial.

[19] Lord Cooke also cited with approval Lord Mustill's reasoning that only in the case of a real substantial error leading to a demonstrable injustice should relief be granted. Such an error ought to be not a mere harmless technical error but "an irregularity which had substantial adverse consequences for the [defendant]." (see p746e-f).

[20] In summary, Bedwelty decides that judicial review ought to be granted in cases where a magistrate makes a substantial error creating a demonstrable injustice for which there is no alternative remedy.

[21] Bedwelty was contrasted with the Jamaican case of **Brown v Resident Magistrate, Spanish Town Resident Magistrate's Court St. Catherine (Brown).** In Brown the Full Court was asked to quash the decision of a resident magistrate who ruled that a company which had been struck off and then restored to the register was a legal person. The Full Court refused the application and the applicants appealed to the Court of Appeal.

[22] Carey JA in upholding the decision of the Full Court stated that:

> The function of this court is to examine the proceedings to see if the Full Court exercised its supervisory powers correctly. In my view, the Full Court was required in this matter to satisfy itself that the resident magistrate had not by some error of law exceeded her jurisdiction. The question was not simply whether she had erred in law, because in any event an appeal lies against any judgment which in the event she may have given. A resident magistrate is allowed to fall into error but that does not necessarily make her judgment amenable to certiorari. It becomes so is, and only if, the magistrate can be said to be acting in excess of jurisdiction or without jurisdiction.

[23] The learned judge relied on the discussion on jurisdiction by Lord Reid in **Anisminic Ltd v Foreign Compensation Commission**. Carey JA concluded that the discretionary remedy of certiorari ought not to be invoked were the jurisdictional excesses set out by Lord Reid in Anisminic do not occur.

[24] The Court of Appeal concluded in Brown that unless there is an excess of jurisdiction the Full Court ought not to provide relief. The Court decided that an error of law was not a sufficient basis for judicial review unless that error leads to an excess of jurisdiction or a lack of jurisdiction.

[25] Ms. Brown has criticized this decision in its reliance on Anisminic which she suggests has been disapproved by more recent authorities including Bedwelty. She suggests that Lord Cooke in Bedwelty and the courts in **R v Greater Manchester Coroner, exp Tal** and **R v Ipswich Justices, exp Edwards** are critical of Anisminic.

[26] In my view what the courts have done is merely an elucidation and refinement of Anisminic. Lord Reid himself realized that there were problems involved in the definition of the term "jurisdiction". That is why he spent time trying to define the term. The concept of 'really substantial error causing manifest injustice' as set out in Bedwelty may be seen as a refinement or an exception to the rule as to jurisdictional error.

[27] It is my view that the court ought to interfere in the instant case only if there is a really substantial error leading to a manifest injustice.

The Maintenance Act

[28] Ms. Fara Brown who represented Lawes and Fairweather argued that the actions of the judge amounted to an excess of jurisdiction. She posited that the judge

ought to have enquired into the circumstances of the default of these two applicants. In her view a correct reading of the Maintenance Act puts a duty on the judge to hold a hearing to determine whether or not the absence of payment by a defaulter is a " willful refusal or culpable neglect" by that person. This hearing forms the foundation for the power to imprison the defaulting individual. Having failed to hold a hearing the judge would not have had jurisdiction to issue the forthwith orders. Consequently those orders would be ultra vires and void.

[29] Ms. Brown's arguments have considerable force to them. They are also fortified by the principles of natural justice. If the Act requires a hearing and the judge deprived the applicants of such a hearing then any incarceration of the applicants would be a breach of natural justice. Additionally, it is clear that an individual ought not to be deprived of his liberty without an opportunity to be heard.

[30] Section 21 of The Maintenance Act requires that the Judge be satisfied in relation to willful refusal or culpable neglect. There is no wording in this section or in any other place in the act that indicates that there ought to be a formal hearing to determine these factors. In my view, the act requires that the judges consider all the relevant factors to ascertain that there was in fact willful refusal or culpable neglect.

[31] The facts as set out indicate that she had material by which she could come to this conclusion. The judge had been dealing with both matters for some time and had discussions with both applicants on more than one occasion. The Act required her to advert her mind to the facts known to her and consider whether there was a willful refusal or culpable neglect.

[32] The detailed nature of the affidavits in both matters indicates that the relevant facts were considered by the judge. In each case she traces the history of the court's encounter with each person from the time they were first brought before

the court for default of the court orders. In Fairweather's case sums were remitted based on information brought before the court by the applicant. In both cases the matters were delayed by the fact that the applicants absconded when they were to return to court.

[33] The judge of the Family Court in this case asserts in her affidavit, that because the applicants were represented by counsel there was a duty on counsel or the applicants to request a hearing. I do not agree that there was any such duty. However it is clear that the judge had extensive interaction with the applicant in person and through counsel. It is also clear that the judge used the information gleaned from those interactions to come to her conclusions.

[34] She states this explicitly in paragraph 51 of her Fairweather affidavit. She says:

> ...[I]t is opened (sic) to the court to find that a person has acted in a manner which demonstrates willful refusal or culpable neglect having taken into account all the surrounding circumstances such as those highlighted in this affidavit.

A similar statement is made in paragraph 23 of her Lawes affidavit.

Remedies

[35] Ms Brown argued that since there was a lack of jurisdiction caused by the failure to have a hearing the Full court could correctly exercise Jurisdiction. This Court agrees that a lack of jurisdiction by the Family Court could be remedied by an order of certiorari. One important question is whether the Court should exercise its discretionary jurisdiction in granting certiorari in circumstances such as these.

[36] The remedy of certiorari is not always granted in circumstances where an excess of jurisdiction occurs. The remedies on judicial review are not always exercised as there are factors to be taken into consideration when exercising the discretion to make the relevant order.

[37] Since the decision that is challenged is already spent, then the consideration is not one for certiorari. This is because the Court will not quash a spent decision. We next need to consider whether a declaration is appropriate.

[38] One of those factors is whether or not the order of the court would serve no purpose. In this instance where the time spent in prison by the applicants has already been served then an order of certiorari would be of no practical purpose. In **Williams v Home Office** (No.2) Tudor Evans J stated that "... it is well established that it is inappropriate to grant declarations which are academic and of no practical value."

[39] Ms Brown has argued that the Full Court should order the restitution of the sums which were paid as a result of the unlawful committals. The difficulty with that is that even if the committals were unlawful the sums collected were legally due and the subject of enforcement process that has not been challenged by the applicants.

[40] Finally one has to consider whether there is an available remedy in damages for the Applicants. Ms. Brown prayed in aid Dorothy Fuller and the line of cases which started with Maragh that indicate damages can be awarded for breach of Constitutional rights.

[41] I wish to make two comments in relation to this argument.

Firstly, having held that there was no unlawful commitment of the applicants or breach of the applicants' constitutional rights the issue of damages is immaterial.

[42] Secondly no details were provided to ground the award of damages to the applicants. Ms. Brown has countered that an order may be made for damages to

be assessed. I agree that such an order would be appropriate if this Court had found that there was a violation of the applicants' rights.

The way forward

[43] It is natural that when a court takes action in matters following a protracted process those actions may be misconstrued. The likelihood of misunderstanding is even greater in relation to family matters where strong emotions are evident and the action is punitive.

It is my view that one of the responsibilities of a court with supervisory jurisdiction is to set out best practices for the courts that it supervises. In this case, while it is clear in totality that the judge acted within her powers, I believe that it is appropriate to suggest some guidelines in relation to procedure to be employed by judges when committing individuals.

[44] Judges who have been dealing with matters over some time may need to indicate to the individual the factors considered by them before they make a committal order. While in this case the judge considered several facts that occurred over several months, the consideration of those factors may not be apparent to the person before the Court. The judge often has papers, court records and files before him which would give him information that may not be readily apparent to the litigant.

[45] It is my view that the judge ought to inform a person who is likely to be committed of the factors that has led the judge to that conclusion. The judge ought to set out in clear and concise language what order he intends to make. The individual ought to be granted an opportunity to respond before the committal order.

[46] While I believe that the judge in this case did satisfy her herself of the relevant factors contemplated by Section 21 of the Maintenance Act, I am of the view that had she acted as is suggested that the rationale for her actions would be clearer to the applicants and less likely to be challenged.

Conclusion

In conclusion I am of the view that the judge clearly considered the factors required of her under Section 21(1) of the Maintenance Act. She considered all the material before her and had given both applicants sufficient time to respond to the allegations before she made the orders for committal. Consequently, the applications of Mr. Fairweather and Mr. Lawes do not find favour before this court.

Campbell J.

For the reasons set out in the judgment of Pusey J. the court orders as follows

Motion dismissed

No order as to costs.