IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

Judgment Book

CLAIM NO.HCV-1796 OF 2004

BETWEEN	INSPECTOR MAX MARSHALLECK	APPLICANT
AND	THE INSPECTORS' BRANCH BOARD OF THE JAMAICA POLICE FEDERATION	1ST RESPONDENT
AND	INSPECTOR W.E. PENN	2ND RESPONDENT
AND	INSPECTOR W.B. WILTSHIRE	3RD RESPONDENT
AND	INSPECTOR V.M.HAMILTON	4TH RESPONDENT
AND	INSPECTOR C.H.SMITH	5TH RESPONDENT
AND	INSPECTOR S.S.MOODIE	6TH RESPONDENT
AND	INSPECTOR H.P.MORGAN	7TH RESPONDENT
AND	SUPERINTENDENT K.A.WADE	8TH RESPONDENT
AND	THE JAMAICA POLICE FEDERATION	9TH RESPONDENT

Heard the 8th and 15th September 2004.

Mr. David Batts, instructed by Livingston Alexander & Levy, Attorneys-at-Law for the Applicant.

Mrs. Marvalyn Taylor-Wright and Miss Kerri-Ann Balli, instructed by Taylor-Wright & Co for the 1st-7th Respondents.

Ms. Katherine Denbow instructed by the Director of State Proceedings for the 8th Respondent.

Mr. Glen Cruickshank for the 9th Respondent.

Mangatal J:

1. By way of Notice of Application for Court Orders dated 9th August 2004 the 1st-

7th Respondents have taken the following preliminary points in respect of the application for leave to apply for judicial review:

1. *That this Honourable Court do strike out the Application for leave for judicial review on the basis that it is an abuse of the process of the Court and is likely to obstruct the just disposal of the proceedings.*

2. *In the alternative that this Honourable Court stays this application until the costs of Claim No. HCV 1499 of 2004 and which was struck out on the 7th day of July 2004 have been paid.*

2. The grounds upon which the application is made are as follows:

(a) The Rule in **Henderson v. Henderson** applies. The issue of whether leave should have been granted for judicial review was already determined by this Honourable Court. In the alternative the Claimant would have had an opportunity to seek leave at the earlier proceeding and is now estopped.
An appropriate amount of the Court's resources have already been allocated to the issues raised in this matter.

(a) The costs in Claim HCV 1499 of 2004 which was struck out of Court on the 7th day of July 2004 has not been paid although this new claim seeks a similar relief on similar facts.

2a. The 9th Respondent before the commencement of the matter, agreed to abide by any decision made by the Court about the status of the Inspectors Branch Board and agreed to cooperate fully. The Applicant agreed to withdraw the claim against the 9th Respondent and undertook to file a notice of discontinuance by 10th September, 2004. There was no order as to costs.

Miss Denbow who appeared for the 8th Respondent, Superintendent K. A. Wade indicated that she would not be making any submissions either in support of or in opposition to the preliminary points.

3. My ruling is that the issue of whether leave should be granted for judicial review has not yet been determined by this Honourable Court, notably by Mr. Justice Sykes(Ag.) in his judgment striking out Claim No. HCV 1499 of 2004. His Lordship's Judgment does not expressly or inferentially contain any determination as as to the issue of whether leave should have been granted for judicial review. The judgment never decided that leave would not or should not be granted. The decision of Mr. Justice Sykes was simply, and I daresay I agree, that the claim should have been brought by way of judicial review and ought not to have been brought by private action in negligence. That is the plain meaning of the judgment.

4. The fact that Rule 56.7 of the Civil Procedure Rules 2002 (CPR) states that the Court may (my emphasis) at any stage direct that the claim is to proceed by way of an application for an administrative order for judicial review does not give rise to an assumption that the Judge must have considered the appropriateness of doing so or that he determined on its merits that leave ought not to be granted. This is so even though the CPR has provided a wide array of powers to the Court for the management of matters, other than the draconian power to strike out-see **Biguzzi v. Rank Leisure - plc** [1999] 4 All E.R. 934. The Judge is left free not to convert the matter, particularly if, as in the instant case, as I understand it from

Counsel for the Respondents, the judge was not directly asked to exercise his discretion in that manner. In any event, the fundamental point is that the power to transfer or convert to judicial review proceedings was not adverted to in the judgment. I cannot speculate, or interpret, or add any gloss to the crystal-clear judgment of Justice Sykes.

Indeed, on the last page of his judgment (page 10), just before striking out the claim, the judge made it clear that the avenue of judicial review was still open to the Applicant. He stated:

> *"The right the Claimants seek to vindicate can be appropriately protected by judicial review."*

5. In my view, an application for leave to apply for judicial review cannot be held to have been determined or rejected by a sidewind.

6. The alternative submission that the Claimant had an opportunity to seek leave at the earlier proceeding, failed to do so, and did not do so, and is now estopped, also fails. No estoppel arises in this case. It may well be that as an administrative matter, it would have been more convenient and economical if the application had been made. However I do not see how that could amount to an estoppel as a matter of law.

   The fact that as Inspector Moodie, the 6th Respondent, says in paragraph 6 of his Affidavit sworn to on the 9th August 2004 that " at all material times the Claimant contended that judicial review proceedings were not relevant to his claim" does not create an estoppel. In any event it could hardly be otherwise when the

Attorney-at Law who at that time was arguing the case for the Applicant was trying to resist a preliminary point taken that the claim should have been brought by way of judicial review and not by private action and to justify bringing the proceedings in negligence. There has since been a judgment of the Court which demonstrates that the position contended for by the Applicant's Attorney was wrong. The failure to adopt a position in the alternative does not amount to an estoppel.

8. As regards the preliminary point that the Court has already allocated appropriate resources to the issues raised in this matter, that submission also fails. It is true that the Claimant filed a previous claim in negligence and that case was struck out. It is also true that an application could have been made for transfer or conversion but none was made.

   Is the penalty for not making such an application that the Court will refuse to entertain the claim now filed in the correct forum? I do not think so. On balance, that would not be just. This is a different claim, indeed, that was the whole point of Justice Sykes' judgment. i.e. that quite different considerations apply to private actions and proceedings by way of judicial review as discussed in **O'Reilly v. Mackman**[1983] 2 All E.R. 237.

   The issues to be raised here, as opposed to the facts to be raised here, have not yet, up to the time of the arguments before me, had any resources allocated to them.

9. A number of cases were cited by the Respondents' Attorneys-at-Law. I will deal with some of them. **O'Reilly v. Mackman**, simply confirms the basis upon

which Justice Sykes struck out Claim HCV 1499 of 2004. At the time of the decision in **O'Reilly v.Mackman**, the English Courts had no power to convert a private claim to an application for leave to apply for judicial review. Under the CPR the judge does have a power to convert. It is difficult to see how any inference can be drawn about this power or its exercise when the judgment makes no reference to it, oblique or otherwise.

10. The cases of **Henderson v. Henderson** [1843-60] All E.R.378 and **Johnson v. Goorwood**[2001] 1All E.R.481 apply to a situation where a claim is brought in the right forum but the claimant did not deal with issues that should have been dealt with in that claim; he did not ask for all he should have asked for in that claim. It cannot be logical to treat as an issue in the first claim filed the question of changing the nature of the claim itself. The reasoning in these cases is inapplicable to a situation where a claim is initially brought in the wrong forum, then an adjudication is made by a court that it was the wrong forum, and the claim is now filed in the correct forum.

11. The reasoning in the **Securicum Finance v. Ashton** case, reported at England and Wales Court of Appeal decisions, case # 991087813, does not apply to a situation where a claim is brought first in negligence, is struck out as being brought in the wrong forum, and is now re-filed in the right forum. In **Securicum** what was being considered was whether, if the first action was struck out for delay a second action would also be struck out. The proceedings under consideration were both actions and the actual decision was not to strike out because the second claim was

different from the first claim. It seems clear to me that the principles in that case can have no application in the instant case.

12. I now turn to deal with the issue of costs and as to whether the proceedings should be stayed. Rule 26.3(2) of the CPR states:

(2) Where-

> *(a) the court has struck out a claimant's statement of case;*
> *(b) the claimant is ordered to pay costs to the defendant; and*
> *(c) before those costs are paid, the claimant starts a similar claim against the same defendant based on substantially the same facts, the court may on the application of the defendant stay the subsequent claim until the costs of the first claim have been paid.*

13. There have been submissions put forward as to whether or not the costs in HCV 1499 of 2004 have been crystallized, and if they have not, whether costs should be estimated by me and an order made that a sum be paid into court or secured to the satisfaction of the Respondents in the manner adopted in **Thames Investment & Securities PLC. V.Benjamin** [1984] 1 W.L.R. 1381. I did not consider it necessary to decide this issue because of the way I have approached this aspect of the matter.

14. Whilst the claims can be said to be based on substantially the same facts, I think it would be straining the plain language of the Rule to say that the claims are similar claims. There are few things that can be as dissimilar as private and public matters, as opposed to the remedies available. The instant application is also not against the same exact Defendants as in the earlier claim HCV 1499 of 2004. It would also be straining language to say that the Claimant has started similar proceedings; the Applicant is really asking for the Court's leave to apply for

judicial review and that places the decision as to the activity to take place in the hands of the Court, not the Applicant.

15. In any event, even if I am wrong on this point, in circumstances where the order for costs arose because the claim was wrongly filed in negligence and the claim here is for judicial review, a matter involving the public interest, the appropriate way for me to exercise my discretion to deal with the case justly, is not to make progress of these judicial review proceedings conditional on the payment of costs in the private action. The Claimant is to understand however that the costs in the private suit HCV 1499 of 2004 are due and payable and the Claimant has a responsibility and obligation to pay those costs in a timely fashion. It hardly needs stating that public servants such as police

officers are expected to pay due regard to the duty of complying with court orders, for costs or otherwise.

16. In sum, the application to strike out the application for leave to apply for judicial review on the basis that it is an abuse of the process of the court and likely to obstruct the just disposal of the proceedings is dismissed, and the application for a stay is refused.

Permission to appeal is granted. One day's costs to the Claimant/Applicant to be taxed if not agreed or otherwise ascertained. Application for leave to apply for judicial review part-heard and adjourned to 28th and 29th of September 2004 at 9:00 a.m.