[2018] JMSC Civ. 166

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV 03045

BETWEEN	**PETROJAM LIMITED**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1st RESPONDENT**
AND	**THE MINISTER OF LABOUR & SOCIAL SECURITY**	**2nd RESPONDENT**

IN CHAMBERS

Ms. Dorothy Lightbourne QC and Mr. Herbert Hamilton instructed by Lightbourne & Hamilton for the Applicant

Ms. Althea Jarrett, the Director of State Proceedings for the Respondents

Mr. Michael Hylton QC and Ms. Carlene Larmond instructed by Hylton Powell for the Proposed Intervener/Interested Party, Mr. Howard Mollison

Heard: 15th March, 16th May, & 14th December, 2018

Civil Practice and Procedure – Notice of Application for Permission to Intervene and to Set Aside Order - Whether Intervener/Interested Party directly affected by the proceedings - Rules 56.11 (1), 56.11 (4), 56.11 (7), 56.13 and 56.15 (1) and (2) of the Civil Procedure Rules - Permission to Appeal.

Cor: Rattray, J.

[1] Mr. Howard Mollison was employed to Petrojam Limited as its General Manager, pursuant to an Employment Contract dated the 2nd February, 2015. The said contract was for a fixed term of two years commencing on the 9th February, 2015, and ending on

the 8th February, 2017. However, Petrojam Limited, by way of letter dated the 20th July, 2016, notified Mr. Mollison that his employment was terminated with immediate effect.

[2] An employment dispute arose between Mr. Mollison and Petrojam Limited, surrounding the termination of his employment. In an effort to have the dispute resolved, a series of correspondence passed between Mr. Mollison and Petrojam Limited. Unfortunately, the dispute was not resolved, and as a result, Mr. Mollison on the 21st September, 2016, wrote to The Ministry of Labour and Social Security, seeking its intervention in the dispute. In response, the Ministry held conciliatory meetings between the parties in an attempt to have the matter settled. Despite these meetings, the dispute remained unresolved.

[3] By letter dated the 15th September, 2017, The Minister of Labour and Social Security, directed that the dispute be referred to the Industrial Disputes Tribunal, pursuant to section 11A (1) (a) (i) of **The Labour Relations and Industrial Disputes Act**, which reads: -

> *"Notwithstanding the provisions of sections 9, 10 and 11, where the Minister is satisfied that an industrial dispute exists in any undertaking, he may on his own initiative-*
>
> *(a) refer the dispute to the Tribunal for settlement-*
>
> *(i) if he is satisfied that attempts were made without success, to settle the dispute by such other means as were available to the parties;"*

[4] As a consequence of the referral to the Industrial Disputes Tribunal, Petrojam Limited, by way of Notice of Application for leave to apply for Judicial Review, filed on the 25th September, 2017, sought the following reliefs from the Court: -

a) Leave to apply for Judicial Review by way of Certiorari to quash the decision of The Minister of Labour and Social Security to refer to the Industrial Disputes Tribunal the dispute between Petrojam Limited and Howard Mollison relating to the termination of his employment;

b) An Order of prohibition to prevent the Industrial Disputes Tribunal from exercising its jurisdiction to hear the dispute relating to the termination of the employment of Howard Mollison;

c) A stay of proceedings relating to the dispute about the termination of Howard Mollison's employment, pending hearing of the Application for Judicial Review;

d) Costs of the Application to Petrojam Limited;

e) The Court on the grant of leave to give such other consequential directions as may be deemed appropriate.

[5] The Application for leave to apply for Judicial Review, came before this Court on the 23rd October, 2017. At that time Mr. Mollison was not present, as he was not served with the said Application. However, Ms. Lightbourne QC on behalf of Petrojam Limited, and the Director of State Proceedings who appeared for the Minister of Labour and Social Security, and the Industrial Disputes Tribunal, were present. The parties advised the Court that they had arrived at a Consent Order in relation to the Application. In accepting the submissions of Counsel present, the Court made *inter alia* the following Orders, by and with the consent of the parties: -

a) Leave for Judicial Review granted;

b) Order by way of Certiorari granted to quash the Minister's referral to the Industrial Disputes Tribunal the dispute between Petrojam Limited and Howard Mollison relating to the termination of his employment;

c) Order of Prohibition granted to prevent the Industrial Disputes Tribunal from exercising its jurisdiction to hear the dispute relating to the termination of the employment of Howard Mollison;

d) No Order as to costs.

[6] On the 25th October, 2017, the Industrial Disputes Tribunal wrote to Mr. Mollison, advising him that it would commence hearing the dispute between him and Petrojam Limited, on the 7th and 8th February, 2018.

[7] Thereafter, by letter dated the 30th October, 2017, the Industrial Disputes Tribunal again wrote to Mr. Mollison, informing him that the Tribunal had cancelled the hearing, in light of the Order on Application for leave to apply for Judicial Review dated the 23rd October, 2017.

[8] As a consequence, Mr. Mollison by way of Application for Permission to Intervene and to set Aside Order, filed on the 23rd November, 2017, now seeks the following reliefs from this Court: -

1. The Applicant, Howard Mollison, be permitted to intervene in these proceedings;

2. The Order dated the 23rd October, 2017 be set aside;

3. As an alternative to (2), Howard Mollison be given leave to appeal against the Order dated the 23rd October, 2017;

4. Costs to Howard Mollison to be taxed if not agreed.

[9] The grounds on which Mr. Mollison seeks the aforementioned reliefs are as follows: -

<u>As to proposed Order 1</u>

1) Howard Mollison is directly affected by the Order dated the 23rd October, 2017;

2) The matters in respect of which Orders for leave and Judicial Review remedies were made concern Howard Mollison as they relate in particular to: -

a) the termination of his employment with the 1st Respondent;

b) the scheduled hearing in February 2018 between Mr. Mollison and the 1st Respondent before the 2nd Respondent in respect of the termination of his employment;

3) The interests of justice will be promoted by permitting the intervention;

As to proposed Order 2

4) The Court has an inherent jurisdiction to set aside Orders made without notice including the grant of leave to apply for Judicial Review;

5) The Application for leave, with the consent of the parties, was expanded to include claims for immediate relief; and in those circumstances a hearing of the Application for leave on notice to Howard Mollison was desirable in the interests of justice and should have been fixed;

6) The Order dated the 23rd October, 2017, grants Administrative Orders of Certiorari and Prohibition without there being any claim for Judicial Review being before the Court. There is no claim for an Administrative Order before the Court in breach of Rule 56.9(1) and (2) of the **Civil Procedure Rules (CPR)**;

7) The Court had no jurisdiction to grant the said Administrative Orders as it did;

8) Howard Mollison is a person directly affected and would have been entitled to service of any claim seeking administrative Orders by virtue of Rule 56.11 (1) of the **CPR**;

9) The Order dated the 23rd October, 2017 was made in the absence of Howard Mollison who has not been served with any claim, the Application for leave, the Affidavit in Support of that Application or the Order granting leave;

10) The proceedings constitute an abuse of the process of this Honourable Court and the inherent jurisdiction of the Court to protect its process ought to be exercised by the setting aside of the said Order dated the 23rd October, 2017;

As to proposed Order 3

11) An appeal against the Order dated the 23rd October, 2017, will have a real chance of success. Mr. Mollison relies upon and repeats grounds 5 to 10 of this Application.

[10] In support of the Application, Mr. Mollison relied on the Affidavit of Howard Mollison in Support of Application to Intervene and to set Aside Order, and Affidavit of Urgency, both filed on the 23rd November, 2017. Further, in an effort to assist the Court, the parties filed Skeleton Submissions which were supported by Authorities, as well as speaking notes. These Submissions, Authorities and Notes were examined and carefully considered by the Court in coming to its decision in this matter.

THE ISSUES FOR CONSIDERATION BEFORE THE COURT

[11] The issues to be discussed are as follows: -

a) Whether Mr. Mollison can and should be allowed to intervene in the proceedings;

b) Whether leave to apply for Judicial Review ought to have been granted in the absence of Mr. Mollison;

c) If Mr. Mollison is allowed to intervene, should the Court set aside the Order made for leave to apply for Judicial Review, and the Orders of Certiorari and Prohibition.

Whether Mr. Mollison can and should be allowed to intervene in the proceedings

[12] Part 56 of the **CPR**, does not offer any specific guidance as to when a person may be permitted to intervene in proceedings. However, it is clear that persons who are

directly affected or persons with sufficient interests must be served with the Claim Form and Affidavit in Support pursuant to Rule 56.11 (1) of the **CPR**, and may be allowed to intervene.

[13] The term "directly affected" was defined by the Court in the case of **R v Rent Officer Service, ex parte Muldoon** [1996] 3 All ER 498. At issue in that case, was the meaning of RSC Order 53 rule 5(3), which provided that the notice of motion or summons must be served on all persons directly affected. The Secretary of State for Social Security applied for an Order that he be joined as a Respondent to the Judicial Review proceedings, in which the refusal or failure of the Liverpool City Council to determine claims for housing benefit was at issue. The Secretary of State argued that he would be directly affected by the outcome of the proceedings. In rejecting the Secretary of State's Application, Lord Keith opined at page 500: -

> *"**That a person is directly affected by something connotes that he is affected without the intervention of any intermediate agency.** In the present case, if the applications for judicial review are successful the Secretary of State will not have to pay housing benefit to the applicants either directly or through the agency of the local authority. What will happen is that up to 95% will be added to the subsidy paid by the Secretary of State to the local authority after the end of the financial year. **The Secretary of State would certainly be affected by the decision, and it may be said that he would inevitably or necessarily be affected. But he would in my opinion, be only indirectly affected by reason of his collateral obligation to pay subsidy to the local authority**."*
>
> [Emphasis supplied]

[14] In the case of **Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)**, Claim No. 2009 HCV 04798, a judgment delivered on the 23rd October, 2009, Sykes J (as he then was) expressed the view at paragraph 39 that: -

> *"Part 56 distinguishes between persons "directly affected" and any person or body having "a sufficient interest" (rule 56.2, 56.11 and 56.13). While it is clear that any person who is directly affected must necessarily have a sufficient interest, it is not true to say that every person who has a sufficient interest is directly affected."*

[15] I am convinced that Mr. Mollison has an interest in the outcome of these proceedings, as they affect him directly. He wants the referral made to the Industrial Disputes Tribunal to be upheld, and for the dispute between himself and Petrojam

Limited to proceed to the Industrial Disputes Tribunal for a hearing. The Orders made by this Court on the 23rd October, 2017, directly affect and concern him, as the Court decided to set aside the referral to the Industrial Disputes Tribunal, and also prevented the Tribunal from hearing the dispute. The proceedings before the Court would inevitably affect him, as they relate to the termination of his employment with Petrojam Limited. I am satisfied that Mr. Mollison's interest is sufficient to consider him an interested party to the proceedings. That being said, the issue to be considered is whether he can now intervene at this stage as an interested party?

[16] The learned Director of State Proceedings submitted that Mr. Mollison cannot intervene, as there are no extant proceedings before this Court, or any other Court. It is noted however, that she has not provided any authority to substantiate her submission. I am of the view that the case of **Anthony Benjamin and Ors v Percival Hussey and Ors** [2011] JMCA Civ. 5, which was not cited by any of the parties, is very instructive. This was not a case that involved Judicial Review proceedings, but the reasoning of the Court to my mind, is applicable to the circumstances of the present case. In that case, the Appellants, who were not named parties to the suit, sought to be added as interested parties subsequent to judgment being entered in favour of the 1st Respondent. The question for the Court was whether they could be joined in the suit subsequent to the entry of the judgment. Harris JA, who delivered the judgment of the Court opined at paragraph 9 that: -

> *"The answer to the question is found in the case of **Spence and Another v Hitchins and Another** SCCA No 127/05 delivered on 16 November 2009 in which this court considered the issue as to whether intervening parties could be joined in a suit after judgment. In that case a judgment setting aside an agreement for sale of property between the defendant and third parties was given in favour of the claimant. Subsequent to the entry of the judgment, an order was made amending the claim form by joining the third parties as parties to the action in order for them to pursue an appeal. Their appeal was struck out by a single judge of this court but was reinstated by the court which held that the third parties had a clear interest in the property and they, being affected by the judgment, should be heard on appeal."*

[17] The learned Judge of Appeal concluded that the Appellants were affected by the judgment of the Court, and ordered that they be granted leave to appeal, as they had a real prospect of success in the appeal.

[18] It is to be noted that unlike the **Anthony Benjamin** case (supra), Mr. Mollison does not want to be added as a party to the proceedings. He seeks permission to intervene, so as to set aside the Orders made by the Court on the 23rd October, 2017. I am satisfied that he should be allowed to intervene in the proceedings, as he has an obvious interest in the matter, and ultimately, the outcome will directly affect him.

Whether leave to apply for Judicial Review ought to have been granted in the absence of Mr. Mollison

[19] There is no requirement under the **CPR**, directing that an interested party must be served with the Application for leave to apply for Judicial Review. It is after leave has been granted, that the Court will give directions that persons with sufficient interest or those directly affected must be served with the claim. This is highlighted by Rule 56.11 (1) of the **CPR** which provides that: -

> *"The claim form and affidavit in support must be served on all persons directly affected not less than 14 days before the date fixed for the first hearing."*

[20] In the case of **Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)**, (supra), it was noted that at the hearing of an Application for leave to apply for Judicial Review, the Court may direct that a Respondent or any interested third party be served, so that the Court may hear from them.

[21] In that case, J. Wray and Nephew Limited (J. Wray), by way of an Application for leave to apply for Judicial Review, sought the Court's permission to review the decision of the Industrial Disputes Tribunal. The Tribunal after a hearing involving J. Wray, and the Union of Clerical Administrative and Supervisory Employees (the Union), ordered that workers who were alleged to have been dismissed by reason of redundancy should be reinstated. When the Application first came before the Court, it was ordered that the Attorney General and the Union be served with the Application. On the subsequent occasion when the matter came before the Court, Lord Gifford QC represented the Union, and Mr. Robinson and Ms. Shand appeared for the Attorney General. Counsel Mr. Robinson took the preliminary objection that at the leave stage, the Union had no right of audience, and could only come in after leave has been granted. Even in those

circumstances, Counsel contended that the Union can only take part in the proceedings, if the Court sees fit.

[22] The Court ultimately concluded that it was correct for the Union to have been served with the Application, and that the Union can be heard at the leave stage. At paragraph 17 of that case, Sykes J (as he then was), in commenting on the **English Civil Procedure Rules (English CPR)**, observed the following: -

> *"Further reform was undertaken and a report to the Lord Chancellor was submitted by Sir Jeffrey Bowman in March 2000. His basic reforms were accepted and became Part 54 of the English CPR. A critical part of the Bowman reforms was that the leave stage became for inter partes – a radical shift from the ex parte approach of the past. These ideas have influenced Part 56 of the Jamaican CPR. While not explicitly making the leave stage inter partes by requiring service of the claim form before securing leave as in England, the judge in Jamaica must conduct a hearing with the applicant in certain circumstances. However, the rules do not prohibit a hearing in other circumstances not expressly provided for in the rules. This is in keeping with the flexibility referred to at the beginning of this judgment.* ***There is no mandatory requirement that any other person be present. The judge has the discretion to notify persons about the hearing. What will influence the judge in deciding whether other persons and which persons should be notified of the hearing is largely a matter of judgment depending on the circumstance of the particular case.*** *As Lord Woolf said, civil procedure is largely about judgment and knowledge. This thinking is reflected in various rules which I will not examine.* ***The point being made is that the notion that an application for leave is always ex parte or cannot be inter partes is now relegated to history. Whether it becomes inter partes is left to the good sense and judgment of the leave judge.*** *This is in keeping with the idea of giving the judge full scope to deal with cases and applications justly. The old has gone. We not only have new wine but new wine skins too. There is now a new way of thinking."*
>
> [Emphasis supplied]

[23] The learned Judge further observed that: -

> *"24. Rule 56.4 (4) states that the judge may direct that notice of the hearing be given to the respondent or the Attorney General. It is to be noted that even if a hearing is going to be held, the rule does not require that the respondent be informed. The rule merely permits the judge to decide whether the respondent or the Attorney General should be informed.*
>
> *25.* ***Significantly, the rule does not limit who can be at the hearing. The reason is obvious. It is possible, as is the case before me, that there may be instances where the judge may wish to hear from other persons such as directly affected third parties****…*
>
> *…*

> *28. There is certainly nothing in the rules that precludes the conclusion that Part 56 is subject to the overriding objective of dealing with cases justly and I cannot see any rational reason why a court in seeking to dispose of an application for judicial review, cannot have an inter partes hearing if the judge forms the view that this is necessary for a just disposal of the application.*
>
> *29. In other words, the sheer common sense of the matter makes it plain, that dealing with a case justly must mean that a court, should it think necessary, can hear from persons who may be directly affected by the decision the court may make."*
>
> [Emphasis supplied]

[24] The case of **Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)** (supra), is clear authority for the proposition that at the leave stage, it is entirely within the Judge's discretion to decide if persons directly affected by or with sufficient interest (interested parties) in the matter, ought to be served with the Application for leave to apply for Judicial Review. In the instant case, the Court was of the view that Petrojam Limited had an arguable case in contending that the referral to the Industrial Disputes Tribunal was wrong in law. This point was conceded by the learned Director of State Proceedings, and in an effort to save judicial time and with the consent of the parties, the Court granted the Order for leave to apply for Judicial Review.

[25] Although, a Consent Order was entered, the Court was of the view that Petrojam Limited overcame the threshold test for leave to apply for Judicial Review, as outlined in the leading case of **Sharma v Brown-Antoine and Others** (2006) 69 WIR 379, a decision of the Judicial Committee of the Privy Council. In that case Lord Bingham of Cornhill and Lord Walker of Gestingthorpe observed the following at paragraph 14: -

> *"**The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy**; R v Legal Aid Board, ex parte Hughes (1992) 5 Admin LR 623 at 628, and Fordham, Judicial Review Handbook (4th Edn, 2004), p 426. But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application..."*
>
> [Emphasis supplied]

[26] In granting leave, the Court took into consideration the terms and conditions of Mr. Mollison's Employment Contract dated the 2nd February, 2015. In particular, Clause 15 of the said contract dealt with the issue of termination. Clause 15.1 states that: -

> *"This Agreement shall terminate upon one (1) months' notice or one (1) month's salary in lieu of notice:*
>
> *(a) by mutual agreement;*
>
> *(b) to facilitate the return to the post of General Manager, Petrojam, of the substantive post holder, currently on secondment to the PCJ; and*
>
> *(c) upon any change in the ownership or control of the Company."*

[27] Moreover, the Court also considered Clause 21 of Mr. Mollison's Employment Contract dealing with the issue of Dispute Resolution, which provides that: -

> *"Save and except otherwise provided herein,* ***if a dispute, controversy or claim arises between the parties hereto with respect to the construction or effect of this Agreement or any paragraph or thing therein contained or the rights, duties or liabilities of any party, attempts shall be made to resolve such dispute, controversy or claim shall be attempted to be settled and resolved firstly through negotiation between the parties****, failing which, the parties agree to thereafter submit such dispute, controversy or claim to Mediation**, which Mediation shall be guided by a single Mediator selected by the parties from the Dispute Resolution Foundation's Roster of approved Mediators. Should the parties fail to agree on the single Mediator as aforesaid, the Mediator shall be selected by the Chief Executive Officer of the Dispute Resolution Foundation.* ***Where any such dispute, controversy or claim has not been settled between the parties by virtue of Mediation as aforesaid, the dispute, controversy or claim shall be settled by Arbitration*** *and shall be referred to a single arbitrator to be mutually appointed by the parties hereto or if they cannot agree upon a single arbitrator to the decision of two arbitrators, one to be appointed by each of the parties. Save as otherwise provided herein, the arbitration proceedings shall be governed in all respects by the Arbitration Act of Jamaica, or any statutory modification or reenactment thereof in force from time to time."*
>
> [Emphasis supplied]

[28] The Court was satisfied, on a consideration of the evidence before it, that the case on behalf of Petrojam Limited had a realistic prospect of success. There was no evidence that the parties had properly utilised the Dispute Resolution Clause (Clause 21) of Mr. Mollison's contract, before the dispute was referred to the Industrial Disputes Tribunal. The contract provided specific mechanisms to resolve disputes, and the

parties ought to have implemented those mechanisms before the matter was referred by The Minister of Labour and Social Security to the Industrial Disputes Tribunal.

If Mr. Mollison is allowed to intervene, should the Court set aside the Order made for leave to apply for Judicial Review, and the Orders of Certiorari and Prohibition

[29] It is not in dispute that the Court has the inherent jurisdiction to set aside the Order granting leave to apply for Judicial Review, in circumstances where the Order was made ex-parte. In the present case, the Order for leave was not made ex-parte, as the Respondents were both served with the Application. However, a party directly affected was not served.

[30] In **Sharma v Brown-Antoine and Others** (supra), Lord Bingham of Cornhill and Lord Walker of Gestingthorpe, indicated at paragraph 14 that: -

> *"Where leave to move for judicial review has been granted, the court's power to set aside the grant of leave will be exercised very sparingly; R v Secretary of State for the Home Department, ex parte Nazir Chinoy (1991) 4 Admin LR 457 at 462. But it will do so if satisfied on inter-partes argument that the leave is one that plainly should not have been granted; ibid. These passages were cited by Simon Brown J in R v Secretary of State for the Home Department, ex parte Olanrewaj Jamiu Sholola [1992] Imm AR 135 and we do not understand him, in his reference to delivering 'a knockout blow' (at p 139), to have been propounding a different test."*

[31] Similarly, in the case of **City of Kingston Co-Operative Credit Union Limited v Registrar of Co-Operatives Societies and Friendly Societies and Anor**, Claim No. 2010 HCV 00204, a judgment delivered on the 8th October, 2010, Sykes J (as he then was), in emphasising the power of the Court to set aside the grant of leave said at paragraph 30: -

> *"…However, the source of the power was not the rules but the inherent power of the court. May L.J. (pp 1084-1085) and Purchas L.J. (p 1092) were clearly of the view that an ex parte grant of leave by its very nature was provisional only and was itself subject to being set aside either by the judge who granted the leave or by another judge. It is important to note that this case was expressly approved by the Judicial Committee of the Privy Council in the case of **Ministry of Foreign Affairs and Foreign Trade v Vehicles and Supplies Ltd and another** (1989) 39 WIR 270, 282. There the Board held that under the then English Ord. 32 rule 6 of the RSC, the courts in England had the express power to set aside a grant of leave for judicial review. However, before noting this power, the Board observed that an ex parte order, by its nature, is provisional only. The Board went on to*

> *hold that an ex parte order can be set aside. This was so even though the then Civil Procedure Code did not have any express provision relating to setting aside an ex parte order. In the event, the Board was confirming the inherent power of the Supreme Court to set aside an ex parte order in appropriate cases. This power has not been taken away from the court. I, therefore, agree with Mrs. Taylor-Wright that an ex parte order is provisional only and can be set aside by judge who granted it or another judge. However, such a jurisdiction should be exercised cautiously, very cautiously."*

[32] The **CPR**, at Rules 56.3 and 56.4, contemplates a two stage approach in making a claim for Judicial Review. The first step is an Application to the Court, seeking leave to make the claim for Judicial Review. If leave is granted, then the claim (the Fixed Date Claim Form) for Judicial Review is filed seeking the substantive reliefs. Smith JA made this observation in the case of **Orrett Bruce Golding and Anor v Portia Simpson Miller**, SCCA No. 3/2008, a judgment delivered on the 11th April, 2008, when he stated at page 13 that: -

> *"Leave having been granted, the next procedural step required the respondent to file a fixed date claim form for judicial review within fourteen (14) days of receipt of the order granting leave…"*

[33] The learned Judge of Appeal further stated at page 15 that: -

> *"A person wishing to apply for judicial review must first obtain leave – rule 56.3 (1). An application for leave must be considered forthwith by a judge of the Court – rule 56.4 (1). The requirement for leave is to ensure that no frivolous, vexatious or unmeritorious applications for judicial review are made and also to avoid abuse of the process of the Court. This is clearly the aim and intendment of rules 56.3 (3) and (4).*
>
> *This appeal turns on the interpretation of rule 56.4(12) which provides:*
>
> *'Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.'*
>
> *Leave is not absolute. It is conditional. The condition is precedent, that is to say the vesting of the right is delayed until the claim for judicial review is filed. Only when the claim for judicial review is made does the leave become absolute."*

[34] Harris JA in that case, also expressed similar sentiments when she indicated the following at page 31: -

> *"Part 56 of the C.P.R. outlines the procedure with respect to applications for administrative orders. It mandates that the judicial review process be carried out in two stages. An application for leave to apply for judicial review must first be made. This is followed by the filing of a Fixed Date Claim Form supported by evidence on affidavit for judicial review, after leave has been granted. Under rule*

56.4 (12) of the C.P.R. leave is conditional upon the applicant making a claim within 14 days from the date of the obtaining leave..."

[35] Rule 56.3 of the **CPR** states that: -

"(1) A person wishing to apply for judicial review must first obtain leave.

(2) An application for leave may be made without notice.

(3) The application must state -

(a) the name, address and description of the applicant and respondent;

(b) the relief, including in particular details of any interim relief, sought;

(c) the grounds on which such relief is sought;

(d) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued;

(e) 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;

(f) whether any time limit for making the application has been exceeded and, if so, why;

(g) whether the applicant is personally or directly affected by the decision about which complaint is made; or

(h) where the applicant is not personally or directly affected, what public or other interest the applicant has in the matter;

(i) the name and address of the applicant's attorney-at-law (if applicable); and

(j) the applicant's address for service.

(4) The application must be verified by evidence on affidavit which must include a short statement of all the facts relied on."

[36] Furthermore, Rule 56.4 of the **CPR** provides that: -

"(1) An application for leave to make a claim for judicial review must be considered forthwith by a judge of the Court.

(2) The judge may give leave without hearing the applicant.

(3) However, if -

(a) the judge is minded to refuse the application;

(b) the application includes a claim for immediate interim relief; or

(c) it appears that a hearing is desirable in the interests of justice,

the judge must direct that a hearing be fixed.

(4) The judge may direct that notice of the hearing be given to the respondent or the Attorney General.

(5) Where the application relates to any judgment, order, conviction or other proceedings which are subject to appeal, the judge may adjourn consideration of the application to a date after the appeal has been determined.

(6) The judge may allow the application to be amended.

(7) Where the applicant seeks an order for certiorari relating to any matter in respect of which there is a right of appeal subject to a time limit, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

(8) The judge may grant leave on such conditions or terms as appear just.

(9) Where the application is for an order (or writ) of prohibition or certiorari, the judge must direct whether or not the grant of leave operates as a stay of the proceedings.

(10) The judge may grant such interim relief as appears just.

(11) On granting leave the judge must direct when the first hearing or, in case of urgency, the full hearing of the claim for a judicial review should take place.

(12) Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave."

[37] The **CPR** in this jurisdiction, does not permit what is termed a "rolled-up hearing." In other words, the Court cannot hear the substantive claim for Judicial Review at the same time that leave is being sought from the Court. This point was rightly conceded by the learned Director of State Proceedings. However, such an approach is permissible under the **English CPR**, while not permissible under the Jamaican **CPR**. This is so because at the leave stage, there is no claim filed as yet, and so the substantive reliefs that would be sought in the claim, cannot be considered or granted by the Court, even if the parties were to consent to such an Order being made. This Court therefore fell into error on the 23rd October, 2017, when it granted, by and with the consent of the Attorneys-at-Law for the parties present, the Orders of Certiorari and Prohibition, without there being a claim for Judicial Review before the Court. Moreover, even if the Court had the authority to make the Orders, Mr. Mollison ought to have been made

aware of the proceedings based on Rule 56.11 (1) of the **CPR** (supra), and be given the opportunity to be heard before the Orders of Certiorari and Prohibition were granted.

[38] A "rolled-up hearing" is possible under the **English CPR**, because in seeking leave of the Court, it is a Claim Form that is filed, and if leave is granted, that would form the basis of the claim. Therefore, at the leave stage, the Court, if so minded, could grant the substantive reliefs, because there is already a claim for Judicial Review before it. This was the approach adopted in the case of **R (on the application of S.P.C.M.A. SA and others) v The Secretary of State for Environment, Food and Rural Affairs** [2007] EWHC 2610 (Admin), cited by Ms. Jarrett. In that case there was an Application for permission to proceed with Judicial Review proceedings, and an Application to refer certain questions to the European Court of Justice, concerning the validity and interpretation of Regulation (EC) No 1907/2006 of the European Parliament and of the Council. Walker J, directed that there be a "rolled-up hearing" in order to deal with the Application for permission and the Application for reference to the European Court of Justice. The Applications were eventually heard on the 9th October, 2007, before Jackson J, who granted *inter alia*, the Claimants' permission to proceed with the Judicial Review claim in relation to the interpretation of Article 6 (3) of Regulation (EC) No 1907/2006, and granted by way of final judgment a Declaration as to the proper interpretation of Article 6 (3).

[39] Part 54 of the **English CPR** governs Judicial Review proceedings. Rule 54.4 of the **English CPR**, which is similar to Rule 56.3 (1) of the Jamaican **CPR**, indicates that the Court's permission is needed before proceeding with a claim for Judicial Review. Rule 54.4 of the **English CPR** reads as follows: -

> *"The court's permission to proceed is required in a claim for judicial review whether started under this Section or transferred to the Administrative Court."*

[40] Rule 54.5 of the **English CPR** outlines how, and when to commence Judicial Review proceedings, and provides: -

> *"… (1)* ***The claim form must be filed*** *–*
>
> *(a) promptly; and*

> *(b) in any event not later than 3 months after the grounds to make the claim first arose.*
>
> *(2) The time limits in this rule may not be extended by agreement between the parties.*
>
> *(3) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review.*
>
> *(4) Paragraph (1) does not apply in the cases specified in paragraphs (5) and (6).*
>
> *(5) Where the application for judicial review relates to a decision made by the Secretary of State or local planning authority under the planning acts, the claim form must be filed not later than six weeks after the grounds to make the claim first arose.*
>
> *(6) Where the application for judicial review relates to a decision governed by the Public Contracts Regulations 2015, the claim form must be filed within the time within which an economic operator would have been required by regulation 92(2) of those Regulations (and disregarding the rest of that regulation) to start any proceedings under those Regulations in respect of that decision."*
>
> [Emphasis supplied]

[41] Learned Queen's Counsel on behalf of Petrojam Limited, argued that the Court cannot set aside the Consent Order properly entered into by the parties. This she argued, could only be done by way of a fresh action. This Court is not prepared to accept such a contention. The parties cannot consent to give the Court authority, when it is clear that the **CPR** does not confer such authority on the Court. This Court had no authority to grant the substantive reliefs on an Application for leave to apply for Judicial Review, where a claim for Judicial Review had not been filed.

[42] In the final analysis, this Court is prepared to set aside the Orders granting Certiorari and Prohibition made on the 23rd October, 2017, on the ground that it lacked the jurisdiction to grant those Orders. That being said, the issue which then arises is whether the Court should also set aside the Order granting leave to apply for Judicial Review or whether the leave would have lapsed since a claim for Judicial Review has not been filed?

[43] In answering that question, the case of **Orrett Bruce Golding and Anor v Portia Simpson Miller** (supra), is instructive. In that case, Beckford J on the 13th December, 2007, had granted the Respondent leave to apply for Judicial Review of the 1st

Appellant's recommendation to the Governor General, that the members of the Public Service Commission be removed from office. The learned Judge also ordered a stay of proceedings until the 10th January, 2008, the date of the next hearing. The Court further ordered that the relevant documents be served in accordance with the **CPR**. The Respondent having failed to file the claim for Judicial Review, instead filed an Application seeking an extension of time within which to file the claim for Judicial Review. That Application came on for hearing before D. McIntosh J, on the 10th January, 2008, who *inter alia*, extended the time for a period of fourteen days for the Respondent to apply for Judicial Review. The issue on appeal, was whether the learned Judge erred in extending the time within which the Respondent, to whom conditional leave had been granted, was to file the claim for Judicial Review.

[44] The Court concluded, that there was no power under the **CPR** to extend the time for leave to file a claim for Judicial Review, as leave was conditional on the filing of the claim within fourteen days from the date of the Order. Smith JA in his judgment at page 20 indicated that: -

> *"It seems to me that under rule 56.4 (12) the consequence of failure to make a claim for review within the prescribed time is that the leave will lapse – it will become invalid."*

[45] The learned Judge of Appeal further indicated at page 21 that: -

> *"The wording was changed in the CPR 2002, which came into effect on January 1, 2003, to read:*
>
> *'Leave must be conditional on the applicant making a claim for judicial review within 14 days of the receipt of the order granting leave.'*
>
> *This wording was altered on September 18, 2006 by the deletion of the words "must be" and the substitution of the word "is" therefor. It seems to me that the removal of the auxiliary verb "must be" makes it clear beyond peradventure that, when granted, leave automatically become conditional. In other words, the court need not state that it is conditional.* ***Failure of the judge to so state cannot be the basis for the argument that the order is imperfect****."*
>
> [Emphasis supplied]

[46] At page 22 his Lordship emphasised that: -

> *"Unless a particular rule so provides, the court may not exercise its general powers of case management at any stage before the substantive proceedings have commenced. And proceedings are properly started by the filing of the claim form within fourteen (14) days of the granting of leave. There is no special provision permitting the extension of time for filing the claim pursuant to rule 54.4 (12). That is why, of course, the respondent seeks to pray in aid the general provisions of rule 26.1 (2) (c). But these provisions cannot avail the respondent because the rules provide otherwise."*

[47] In similar fashion, Harris JA stated at page 34 that: -

> *"If the framers of rule 56.4 (12) had intended to confer on the court the power to renew an application for the grant of leave for judicial review after a hearing, specific provisions for so doing would have been made by Part 56. No such provision had been made. By rule 56.4 (12), when read in conjunction with rules 56.5 (1) and 56.5 (3), it is obvious that an application for judicial review is not renewable after a hearing. On a true construction of rule 56.4 (12) the grant of leave is dependent upon the respondent filing a Fixed Date Claim Form and supporting affidavit within 14 days of the grant of leave. The pleading having not been filed within the prescribed time, the condition remained unfulfilled and the leave thereby lapsed."*

[48] In the instant case, leave would have been conditional on Petrojam Limited filing a claim for Judicial Review within fourteen days of receiving the Order granting leave, pursuant to Rule 56.4 (12) of the **CPR**. This was not done, and to date a claim has not been filed. As such, leave would have lapsed, and could not be extended by this Court. In such circumstances, an Order setting aside the grant of leave would not be necessary.

[49] Although the Court is prepared to set aside the Orders granting Certiorari and Prohibition, an issue may be raised as to whether the Court can set aside its own Orders? Counsel Ms. Jarrett drew the Court's attention to the Privy Council case of **Strachan v Gleaner Co Ltd and Another** [2005] UKPC 33, and submitted that this Court could not set aside its own Orders, even if it fell into error in making them, as the said Orders were not made ex-parte. This she submitted would have to be done by the Court of Appeal.

[50] The issue in **Strachan** (supra) was whether an Order made by one judge of the Supreme Court, setting aside a Default Judgment, could be set aside by another judge of that Court, on the ground that the first judge's Order was made without jurisdiction and was therefore a nullity. The second judge, upheld a Preliminary Objection that he

had no jurisdiction to set aside an Order made by a judge of co-ordinate jurisdiction. The second judge's decision was appealed to the Court of Appeal and was upheld. On a further appeal to the Privy Council, it was held that the second judge's decision to decline jurisdiction was right, and that a judge of the Supreme Court, as a judge of co-ordinate jurisdiction, had no power to set aside an Order made by another judge of that Court. Lord Millett speaking on behalf of the Board stated that: -

> *"**[32]** The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case), his jurisdiction will have been challenged and he will have decided, after argument, that he has jurisdiction; more often (as in the Padstow case), he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But, whenever a judge makes an order, he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it.*
>
> ***[33]** In the present case Walker J held that he had jurisdiction to make the order he did. If wrong, his decision could be reversed by the Court of Appeal which would be bound without going into the merits to set aside his substantive order as a nullity. As between the parties, however, and unless and until reversed by the Court of Appeal, his decision (both as to jurisdiction and on the merits) was res judicata. As a judge of co-ordinate jurisdiction Smith J had no power to set it aside."*

[51] In an effort to fortify her submissions, Ms. Jarrett also relied on the case of **In the matter of an Application by Liberty Development Company Ltd (in liquidation) and Another v The Official Receiver**, Civil Appeal No. 91 of 2015, a judgment from the Court of Appeal of Trinidad and Tobago, delivered on the 24th March, 2016. In that case Jones JA who delivered the judgment of the Court opined: -

> *"33. … Like in Strachan's case a judge has no general or inherent power to set aside his own order or that of a judge exercising co-ordinate or concurrent jurisdiction.*
>
> *34. In the instant case the only jurisdiction to set aside the perfected order came from the fact that the order had been made ex parte and, in that circumstance, an application made by an affected party to set aside the ex parte order was necessary."*

[52] As this Court understands it, the principle coming out of the **Strachan** case (supra), is that where a judge of the Supreme Court, makes an Order that exceeds his

jurisdiction, such an error may be corrected by the Court of Appeal. The emphasis being on may, as the Board in my view, was speaking in general terms, as there are provisions under the **CPR**, when a judge may set aside his own Order or that of another judge of concurrent jurisdiction. Such instances include the setting aside of a Default Judgment or an Order made by the Court in the absence of a party. Such an occurrence is not unusual in the Supreme Court, as the Application to Set Aside is normally placed before the same Judge who made the original Order.

[53] This observation was recently made by Brooks JA in the case of **In the matter of a claim by Sharon Allen** [2017] JMCA Civ. 7. In that case, his Lordship in interpreting the case of **Strachan** (supra) noted that: -

> *"[26] On the issue of jurisdiction, it must also be said that* ***Mason v Desnoes and Geddes Limited*** *and* ***Leymon Strachan v The Gleaner Company Limited and Another*** *[2005] UKPC 33 demonstrate that a judge may, in certain circumstances, set aside an order made by a judge of concurrent jurisdiction. Examples of such circumstances are, firstly****, if the application before the first judge was made, in the absence of a party****, or, secondly, where the merits of the case were not decided at that first hearing.* ***It is usual that the application to set aside is placed before the same judge who made the order, which is sought to be impugned. Where, however, as in this case, that judge is not available, another judge may hear and decide the application to set aside the first order****."*
>
> [Emphasis supplied]

[54] Brooks JA concluded, that a judge may, in certain circumstances, set aside an Order of another judge, and went on to outline some examples, which in my view, are not meant to be exhaustive. He also specifically indicated in the passage cited above, that *"It is usual that the application to set aside is placed before the same judge who made the order, which is sought to be impugned."* Additionally, if a judge can set aside another judge's Order, then there ought to be no contention that the same judge can set aside his own Order, particularly in circumstances where the Court fell into error in granting the said Order. The only way of recourse in my view, is **not** by way of an appeal to the Court of Appeal.

[55] I am satisfied that the Order for leave to apply for Judicial Review was properly made in the absence of Mr. Mollison, as the Court on an Application for leave to apply

for Judicial Review, has the discretion to decide if it is necessary to hear from persons directly affected or with sufficient interest in the proceedings. However, the substantive reliefs of Certiorari and Prohibition were improperly granted as the Court had no authority to grant such Orders, and furthermore the said Orders were made in Mr. Mollison's absence. In such circumstances, this Court would have the authority based on the pronouncements of Brooks JA in the **Sharon Allen** case(supra), to set aside the Orders of Certiorari and Prohibition.

THE CONCLUSION

[56] In light of the foregoing, the Court hereby orders that: -

a) Mr. Mollison is permitted to intervene in these proceedings;

b) The Order granting leave to apply for Judicial Review has lapsed;

c) The Orders granting Certiorari and Prohibition are hereby set aside;

d) Costs are awarded to Mr. Mollison to be paid by Petrojam Limited, such costs to be taxed if not agreed.