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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV 1499 OF 2004

BETWEEN	**INSPECTOR MAX MARSHALLECK**	**Claimant**
AND	**THE INSPECTORS' BRANCH BOARD OF THE POLICE FEDERATION**	**First Defendant**
AND	**SUPERINTENDENT K. A. WADE**	**Second Defendant**

IN CHAMBERS

Mr. Seymour Stewart for the claimants

Mrs. Taylor-Wright and Mrs. Kayann Balli for the first defendant

July 2, 7 and 9, 2004

Sykes J (Ag)

APPLICATION TO STRIKE OUT CLAIM

Judicial review or ordinary action that is the question

The last seven days have been momentous ones in the life of the Police Federation. On June 30, 2004 Inspector Marshalleck, on behalf of himself and a number of other inspectors of the Jamaica Constabulary Force, launched an action by fixed date claim form in which they alleged that Superintendent Wade was negligent and consequently the court should grant the following relief:

a) a declaration that the election of a number of inspectors to form the Inspectors' Branch Board (IBB) was null and void;
b) an order that new elections should be held;
c) the replacement of Superintendent Wade;
d) such further or other relief as the Court thinks fit
e) damages; and

f) costs.

When the matter first came before the court on the morning of June 30, 2004 an interim injunction was granted to prevent the executive of the IBB from holding any elections among themselves and to participate in any election to decide who should become the Chairman and General Secretary of the Central Committee of the Police Federation. A very tight time schedule was set which resulted in an inter partes hearing, forty eight hours later, on July 2, 2004. I gave judgment on July 7, 2004.

This frenetic activity was precipitated by what the claimant alleges is the abdication of responsibility by Superintendent Wade. He, according to the claimants, was responsible for sending out nomination forms to all inspectors in the police force so that they could nominate persons to stand for elections to the IBB. It is alleged that Superintendent Wade did not exercise any independence in the matter but allowed himself to be manipulated by the current post-election office holders who were the incumbents prior to the now disputed elections. This manipulation, the claimants say, manifested itself in this way: he failed to either distribute or ensure proper distribution of the nomination forms to all inspectors and consequently many inspectors were deprived of the opportunity to nominate persons for the various posts in the IBB. To the matter bluntly: the current office holders and Superintendent Wade hatched a plan to minimize any electoral challenge to the pre-election office holders.

At the inter partes hearing Mrs. Taylor-Wright raised a number of issues. The most important one was procedural. She says that the claimants should have proceeded by way of judicial review under part 56 of the Civil Procedure Rules (CPR) and not by way of ordinary action. Is she correct? I decided that she was and discharged the injunction and struck out the claim as an abuse of process.

What is the Police Federation

The Federation was created by section 67 of the Constabulary Force Act. It has the specific statutory duty to make representations concerning the welfare of its members. The membership comes from all ranks below the level of Assistant Superintendent. There is nothing to suggest that one applies for membership of this organisation. Once you are below the rank of Assistant Superintendent, for better or worse, you are a member.

The legislation and rules set out in the Second Schedule to the Act state that the Federation shall act through a number of Branch Boards, Central Conferences and a Central Executive. The Branch Boards are groups that are made up of police officers of similar rank. For example the inspectors have their own Branch Board; there is a separate Branch Board for sergeants, Acting Corporals and Constables, together, form yet another Branch Board. Once these Boards are in place then the executive of each board selects the Chairman and General Secretary of the Central Committee of the Police Federation. This Central Committee is the chief organ that administers the affairs of the Federation.

Under rule 19 of the Second Schedule to the Constabulary Force Act power is given to each Branch Board and the Central Executive to make regulations governing the mode of election of members of the particular Branch Board. So it is possible for there to have as many rules for elections as they are Branch Boards.

Though the claimants have not stated the matter so clearly they are saying that Superintendent Wade did not follow the required procedure that would have ensured that the election of the IBB executive was properly conducted. In other words he breached the electoral regulations of the IBB. All this sounds like public law and not private law.

The cases

Mrs. Taylor-Wright relied on ***O'reilly v Mackman*** [1983] 2 A.C. 237. That case decided that, as a general rule, where the remedy sought was for rights protected by public law then the person should proceed by way of judicial review and not by way of ordinary action. This case went all the way to the House of Lords but Mrs. Taylor-Wright relied on the judgment of Lord Denning MR in the Court of Appeal. There is nothing in the judgment of the House that impugned any of the pronouncements of the Master of the Rolls. Lord Denning put the matter more strongly than my summary of the decision. He said at page 254F-G:

> *Some point was made about the scope of "abuse of process." Reference was made to the opening paragraph of Lord Diplock's speech in Hunter v. Chief Constable of the West Midlands Police [1981] 3 W.L.R. 906, 909. But that should not be regarded as a statutory definition. Suppose a prisoner applied under R.S.C., Ord. 53 for judicial review of the decision of a board of visitors: and the judge refused leave. It would, to my mind, be an abuse of process of the court for him to start afresh an action at law for a declaration, thereby avoiding the need for leave. It is an abuse for him to try and avoid the safeguards of Order 53 by resorting to an action at*

law. ***So also if he deliberately omits to apply under Order 53 so as to avoid the necessity of obtaining leave. Where a good and appropriate remedy is given by the procedure of the court - with safeguards against abuse - it is an abuse for a person to go by another procedure - so as to avoid the safeguards.*** (my emphasis)

In a judgment delivered the same day as ***O'reilly***, the House of Lords reiterated its position. This was the case of ***Cocks v Thanet District Council*** [1983] 2 A.C. 286. In a speech characterized by much self flagellation Lord Bridge of Harwich chided himself for not fully appreciating the dichotomy between public and private law (see page 293B-294C). This led him to the view that rights that are protected by public law should be vindicated by the procedure prescribed.

These two decisions dominated this area of law for the next two decades. However during that period there were a number of decisions that marked the boundaries of the O'reilly principle.

In ***Davy v. Spelthorne Borough Council*** [1984] AC 262 the House of Lords held that the claim by the plaintiffs that they had suffered damage arising from the negligent advice given to them by the council was maintainable as an action in private law since it did not raise any public law issues. This was in response to the claim by the council that the action was misconceived and the challenge should have been by way of judicial review.

This was the first boundary set by the courts. The House decided that since the action did not implicate any public law issues there was no need to go by judicial review. The fact that the defendant to the suit was a public body did not, without more, turn the dispute into one involving public law issues.

In ***Wandsworth London Borough Council v Winder*** [1985] 1 A.C. 461 the council sought, by ordinary action, to recover arrears of rent owed by the tenant. By way of defence the tenant alleged that the council had acted ultra vires when it made decisions to raise the rent. The subsequent litigation revealed a remarkable divergence of judicial opinion on what, on the face of it, was supposed to be simple procedural issue (see page 505E). The case went to the House from a divided Court of Appeal, which by a majority allowed the appeal from the decision of the first instance judge. That judge had himself allowed the appeal from the Registrar's who decided not to strike out the proceedings. The Registrar had rejected the argument that the challenge should have been by way of judicial review. The House

concluded that the tenant could challenge, in his defence, the validity of the council's decision and was not restricted to an application for judicial review. Lord Fraser distinguished ***O'reilly*** on the basis that in ***O'reilly*** there was no infringement of any private law right whereas in ***Wandsworth*** the tenant complained of an infringement of a private law right. Lord Fraser made it clear that in ***Wandsworth*** the tenant was responding to an action brought against him. The tenant was not applying for judicial review. The defendant was merely saying he did not owe the sums asked of him because the council acted improperly when it raised the rent. Lord Fraser could not accept that Order 53 (i.e. judicial review) had the effect of limiting the tenant in the way contended for by the council. According to Lord Fraser, Lord Diplock's speech in ***O'reilly*** was applying a general rule which by definition cannot apply to all situations and that this situation was one in which it did not apply.

This case then had marked another corner of the O'reilly principle. It is this: if a public authority initiates a private law action against a citizen then that citizen can seek to challenge, by way of defence, the legality of the decision of the public authority on which the action rests.

The next case is ***Roy v Kensington and Chelsea and Westminster Family Practitioner Committee*** [1992] 1 A.C. 624. In this case the House decided that the challenge to the lawfulness of the decision of the family practitioner committee could be made by ordinary action since the decision implicated private law, namely, the law of contract. The significance of this decision is that the House was prepared to accept that even if there was no contractual relationship between the plaintiff and the committee, there were "contractual echoes" and that these "echoes" were sufficient to enable the plaintiff to maintain his ordinary action (see page 649F).

Lord Lowry speaking for the House in ***Roy's*** case accepted in principle, which he did not find necessary to apply to the case having regard to the effect of the "contractual echoes", the broad approach suggested by counsel for the plaintiff. Counsel's submission was to the effect that ***O'reilly*** only applied to cases where no private law rights were at stake.

Thus by 1992 the law was that whether by initiating action or by way of defence a litigant could challenge, in an ordinary action, the decision made by a public authority once it could be said that a private law right was at issue. The litigant can raise the challenge as claimant if he initiates the action or by way of defence to an action brought against him.

A subsidiary principle seems to be that where there are private law issues that have arisen because of a decision made by a functionary exercising power under a statute the courts should be slow to turn the citizen out of court unless there was a clear abuse of process.

The next case in this review is ***Clark v University of Lincolnshire and Humberside*** [2000] 1 W.L.R. 1988. A student brought an action against the university, alleging, after an amendment to the pleadings, that the university had breached its contract with her. The Court of Appeal held that her case was not an abuse of process. The first observation here is that the Court of Appeal classified her action as one of breach of contract and so were able to save her claim (see Sedley LJ at 1991 para. 6 and 1992 para. 12). The court did recognise that even though she had a cause of action in contract it was not all breaches that were actionable. Some breaches may involve issues of academic judgments which were unsuitable for judicial adjudication.

Lord Woolf MR in ***Clark's*** case spoke of the relationship between Order 53 and the new Civil Procedure Rules in England. He indicated that the intention of the new rules was to harmonise procedure and so "avoid barren procedural disputes which generate satellite litigation" (see para. 37). The Master of the Rolls added that there has been a shift in emphasis since ***O'reilly*** (see para. 39). The shift is to look at substance not form. His Lordship compared and contrasted, mentally, an ordinary action and judicial review proceedings and concluded that the distinctions between the two are now limited (see para. 27-28). This current situation, he says, stands in sharp contrast to law as it stood at the time of ***O'reilly***. I say he did the comparison mentally since he did not articulate the points of similarity or dissimilarity.

The clear inference from all this is that the courts should now take a more flexible approach to procedural matters. The points made above by the Master of the Rolls are indeed formidable ones. I respond to them in this way. The framers of the rules in Jamaica still believe that there is some useful purpose to be served by treating judicial review as separate from ordinary actions. The judicial review procedure places, expressly, an onus on the party seeking leave to establish that he has a good arguable case. The leave requirement is to weed out unmeritorious cases. This imposes a cost on no one other than the applicant. There is no defendant who has, at this stage, to expend resources responding to a claim or to apply to have the claim dismissed summarily, if the defendant feels that that is an appropriate response. Once the applicant gets leave it is an indication, though not

conclusive, that he would not be kicked out on a summary judgment application if one were to be made. The reason for this is to be found in rule 56.13(3) where great detail is required from the applicant for judicial review. Where he is late in his application the applicant has give a "good reason" before the court can exercise its discretion to extend time within which to make the application. These are distinct advantages that accrue, indirectly, to the intended defendant. He ought to be able to rely on the courts to insist that its processes be followed and minimum thresholds met so that his time and resources are not engaged until the court has said that the required threshold has been met. Having regard to the expense of litigation this safeguard is a salutary one. One could argue that the leave requirement is part of furthering the overriding objective in that it ensures that only cases that appear to have a good prospect of success go before the courts. Unless the minimum requirement is met there is no need to spend more of the court's time and resources to deal with the matter. If leave is denied and there is either no appeal or successful appeal from this denial then this would be a good example of the courts disposing of a case justly. All this can be done before the public authority's resources are engaged to fend off cases lacking merit.

To insist on correct procedure in respect of public bodies is not simply a question of a wrong or right approach to procedure. The rationale is found in public policy. The applicable public policy being that public bodies should be able to get on with the business of administration rather than worry about whether a claim form is going to land on their door steps. This is buttressed by the fact that the judicial review rules require the applicant to come to court within three months of the date of the act or omission that provide the basis of the application. Again the time limit here is not one derived from any high legal principle but simply the result of the collective wisdom of the rules committee. They decided that three months is a reasonable time for the aggrieved person to act. The further removed in time from the three-month expiration the application is made the greater the burden on the applicant to justify why he should be allowed to revisit an issue that has passed. Nothing is wrong with that.

Administrators are not to be kept in limbo. If it were intended to obliterate the procedural distinction between public and private law matters the rules committee would have done so. The fact that they have maintained the distinction must mean something. It could not be that they intended the courts to ignore the distinction in the name of flexibility. I would say that based upon the authorities cited the courts have shown the desired

flexibility by allowing claimants to pursue public law challenges in the context of litigating private law rights. However the attempt at harmonizing the rules, as indicated by Lord Woolf, must not obscure the fact that in purely public law disputes judicial review is the only route to go. If it were otherwise then it would mean that litigants could ignore the procedure, launch an ordinary action in order to circumvent the important procedural steps, especially if they are out of time for judicial review and when questioned simply say, "Oh no judge, you must only look at the substance not the form." I agree with Lord Denning's proposition in ***O'reilly*** that to go by a method that permits you to sidestep the safe guards against abuse when a clear procedure is provided by the courts is itself an abuse of process. The very fact of having to say why you wish to challenge a public authority and, to say if the application is late, why it was late, are important procedural safeguards. It would be wrong in principle, to assimilate the two procedures, to the point where they are indistinguishable. What would be the point of appointing gate keepers and then tear down the walls? Judges may think the rules committee was foolish to maintain the distinction but the solution is not to ignore the rules under the banner of flexibility.

Lord Woolf was undoubtedly sensitive to the possible charge that his prescription might have the undesired and unintended effect of emasculating the concept of abuse of process. This is why in paragraphs 34 – 37 he was careful to indicate that the court still has the power to control abuses and the fact that an action was commenced within the limitation period did not immunize it from the charge of abuse of process. Perhaps it is appropriate that I list the factors that the Master of the Rolls indicated could be taken into account when a court is deciding whether its process is abused. This list did not purport to be exhaustive. These are:

a) whether there was delay of a party commencing proceedings other than by way of judicial review within the limitation period;
b) the nature of the claim;
c) if the remedy sought is discretionary, was there delay in commencing the action;
d) does the claim affect the public generally or does it affect only the parties.

I must confess that it is not readily apparent why this approach would not generate "barren procedural disputes". This approach commended by the learned Master of the Rolls by its very nature involves weighing a number of factors in order to decide how the judicial

power to control abuse of process should be exercised. It seems clear that the weight of each factor cannot be constant but will vary according to each case. What is the inherent virtue of this approach why it should produce less litigation than the approach that takes a stricter approach to proper procedural? At the time of writing the Master of the Roll's proposition had not been tested by experience. It seems to be more of a hope than a description of what actually exists. The simple fact is that there is, to date, no evidence empirical data that suggest that Lord Woolf's proposition will produce the desired result. It is good to remember that it was hoped that House of Lords decision ***Birkett v James*** [1978] AC 297 would have settled the principles regarding the power to strike out an action on the grounds of undue delay and prejudice thereby forestalling litigation on the issue. The actual experience was that the very application of the clear principles produced much case law.

Finally in ***Rhondda Cynon Taff County Borough Council v Watkins*** [2003] 1 W.L.R. 1864 the defendant sought to rebuff the council's claim made against him by seeking protection under the relevant statutory provision. The county court judge and a judge of the High Court agreed that he should have raised the challenge by judicial review. Not surprisingly the Court of Appeal, applying ***Wandsworth***, allowed the defendant's appeal since the issues were not purely public law ones.

The principles

The legal principles that I have derived from all these case are:

a. a claimant cannot escape the procedural requirements for judicial review by filing an ordinary action where no issue of private law arises (see ***O'reilly*** and ***Cocks***);

b. a defendant in response to an ordinary action initiated against him can challenge the lawfulness of a decision made by a functionary acting under a statute if the action is based upon or precipitated by the decisions of the functionary (see ***Wandsworth***);

c. a claimant can initiate an ordinary action if the action implicates private law issues despite the fact that the defendant is a public body acting under a statute (see ***Roy's*** case);

Application to facts of this case

The claimants sought to ground their claim in the tort of negligence. This was always going to be a difficult proposition since they would have been hard pressed to establish that this is an appropriate private law vehicle in which to transport their claim.There was no claim grounded in contract or any other area of private law. What they were claiming was that the Superintendent did not exercise fairly the power given to him, under the rule making powers of the IBB, to conduct elections. This is a pure public law matter.

From my reading of the statute membership in the Federation and the various boards that make up Federation does not rest in contract. It appears that once a police officer is under the rank of Assistant Superintendent he is automatically a member of the Police Federation. He does not have to pay any dues or sign any membership form. In short all police officers below the rank of Assistant Superintendent are involuntary members of the Federation. If any member is disgruntled with his representatives he or she is not free to join any organization having as its object improvement in pay and working conditions (see ***The Government of Jamaica v The Police Federation*** (1994) 31 J.L.R. 370).

What is complained of here does not arise because of any contract between the members of the Federation. Neither is there any "echo" of contract. The case involves a possible breach of rule 19 and/or any other rule of the second schedule to the Constabulary Force Act. The right the claimants seek to vindicate can be appropriately protected by judicial review.

Since there is no private law issue in this case the O'reilly principle is the controlling legal precept. I therefore conclude that the claimant should have begun his matter by judicial review. The dictum of Lord Denning M.R. that was highlighted earlier applies here. The claim is struck out as an abuse of process. The injunction is discharged. Costs of Friday July 2, 2004 and Wednesday July 7, 2004 to the first defendant. Leave granted to appeal.