



[2016] JMSC Civ. 61

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2015HCV00271

BETWEEN	ROYAL CARIBBEAN CRUISES LIMITED	1ST CLAIMANT/ RESPONDENT
AND	FALMOUTH JAMAICA LAND COMPANY LIMITED	2ND CLAIMANT/ RESPONDENT
AND	ACCESS TO INFORMATION APPEAL TRIBUNAL	DEFENDANT/ APPLICANT
AND	PORT AUTHORITY OF JAMAICA	1ST INTERESTED PARTY
AND	JAMAICA ENVIRONMENT TRUST	2ND INTERESTED PARTY

IN CHAMBERS

Mr. Jerome Spencer and Mr. Hadrian Christie for the claimants/respondents, instructed by Patterson Mair Hamilton Attorneys-at-Law.

Mrs. Sandra Minott-Phillips QC and Mrs. Alexis Robinson for the defendant/applicant instructed by Myers Fletcher Attorneys-at-Law

Heard: 11th December 2015 and 14th March 2016

Judicial review - Whether conditions of permission have been adhered to – jurisdiction - whether failure to adhere to conditions fatal - CPR Rules 2.2, 3.2 (3), 9.6, 26.3(1)(a), 56.4(12),56.9(2),(4)&(5).

BERTRAM-LINTON, J (Ag.)

[1] The application before the court emanates from the Access to Information Tribunal (the applicant) and seeks to strike out the claim form filed on 22nd July 2015. This claim form was filed pursuant to leave to apply for judicial review of a decision of the applicant having been granted on the 7th July, 2015, that decision had been handed down on the 13th April 2015.

SUBMISSIONS

The applicant contends that;

- i) The court has no jurisdiction to try the claim and asks that
- ii) The Fixed date Claim form be struck out as a nullity and judgment issued for the defendant with costs against the claimants.

It is firstly, the Civil Procedure Rules (CPR) Rule 9.6 that is proffered to ground this application.

The Civil Procedure Rules

Rule 9.6 provides that

A defendant who-

(a) disputes the court's jurisdiction to try the claim; or

(b) argues that the court should not exercise its jurisdiction, may apply to the court for a declaration to that effect.

For the applicant Mrs. Minott –Phillips submits that;

a) the claimant filed the fixed date claim form to commence the claim out of the time prescribed by the rules and sanctioned by the Court of Appeal and as a result the court now has no jurisdiction to try the claim. This argument has been based on Rule 56.4(12)

Rule 56.4 (12) says that,

“Leave is conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave.”

She relies on the interpretation of that section as discussed in the case of **Golding and Anor. v Simpson Miller** SCCA No.3 of 2008 where Panton P,(as he then was) commented at paragraph 11 that:

“Rule 56.4(12) as mentioned earlier, provides that “leave is conditional on the applicant making a claim for judicial review within 14 days of the receipt of the order granting leave. One does not require the use of a dictionary to appreciate that “conditional” means “not absolute”, “dependent.” in the instant circumstances, the leave that was granted was dependent on the applicant making her claim within fourteen days of the order. By ordinary calculation, the claim ought to have been made by the 27th December, 2007, that is fourteen days from the 13th December, 2007, the date of the order of Beckford, J.”

b) As well, counsel argues that the claimant has run afoul of Rule 56.9(2), as the affidavit required under the rule was not filed with the claim form, the fixed date claim form was filed on the 22nd July, 2015, 15 days after the order was granted and the affidavit in support was attested to by a partner in the law firm that represents the claimants and was filed on 11th November, 2015 and both served on the applicant on the 11th November, 2015

c) It is the applicant’s contention in addition that the affidavit as it is which was sworn to by an attorney in the firm representing the claimant and is not in keeping with the requirements under Rule 56.9 (4) and (5).

Rule 56.9(2)

“(2) The claimant must file with the claim form evidence on affidavit

(4).The general rule is that the affidavit must be made by the claimant or where the claimant is not an individual by an appropriate officer of the body making the claim.

5) Where the claimant is unable to make the affidavit it may be made by some other person on the claimant’s behalf but must state why the claimant is unable to make the affidavit.”

- [2] In summary then the arguments for the applicant are that;
1. The time (14 days) expired for the claim form to be filed.
 2. The affidavit that should have accompanied the claim was not filed with the claim.
 3. The party who has sworn to the affidavit is not the claimant or an appropriate officer additionally the person making the affidavit has not offered a sufficient reason that the claimant or an appropriate officer has not been able to make the affidavit.

“The conditions upon which this Court granted the Claimants leave to commence judicial review having not been met; the Court has no jurisdiction to try the claim, as it can only adjudicate upon judicial review proceedings of this kind if properly commenced following a grant of leave.”(*Extracted from page 2 of the applicant’s written submissions*)

The Response

- [3] Mr. Spencer, for the respondents, argued that the mere fact of noncompliance does not automatically invalidate the steps that have been taken, so that even if the time for filing had expired, the Civil Procedure Rules makes provisions that the claim may be cured. This argument he based on the provision for the exercise of discretion contained in;

CPR Rule 26.9 which states

“(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party.”

The rules contained in the CPR are applicable to Part 56, he says as is clearly indicated in Rule 2.2(as is relevant)

(1) "Subject to paragraph (3), these Rules apply to all civil proceedings in this court.

(2) "Civil proceedings" include Judicial Review and applications to the court under the Constitution under Part 56.

[4] In any event he says that the claim for judicial review was not filed out of time. The order was made on the 7th of July 2015 but was not perfected until after the date and was received some time later. The defendant computes the days as since the order was made the 7th of July, Computation of date begins from the 8th of July to the 21st day of the same month which would represent 14 clear days Thereafter he says the 15th day, (July 22nd, 2015) after the order was made would be in keeping with the rule as to 14 clear days, as allowed in CPR Rule 3.2.

CPR Rule 3.2

(1) This rule shows how to calculate any period of time for doing any act which is fixed-

(a) By these rules;

(b) By any practice direction; or

(c) By any judgment or order of the court.

(2) All periods of time expressed as a number of days are to be computed as clear days.

(3) In this rule "clear days" means that in computing the number of days-

a) the day on which the period begins; and

b) if the end of the period is defined by reference to an event, the day on which that event occurs or should, occur are not included.

Counsel also submitted that a proper interpretation of the word “receipt” in Rule 56.4 (12) is when the perfected order comes to hand. He argues that it would not be right for 14 calendar days to be used as the calculation, since there was a lapse of time after the order was made and when it was perfected and “received” by him.

- [5] In relation to whether the affidavit has not been filed with the claim form, he relies on the case of **Chester Hamilton v Commissioner of Police 2013JMCA Civ.35** and the dicta of Phillips JA where she examined and interpreted Rule 56.9

At paragraph 32 she says;

“A claimant must file with the claim form evidence on affidavit (rule 56.9(2) and the affidavit must state the address of the claimant and defendant and details identifying the nature of the relief sought (Rule 56.9(3)). The rule does not state that a claim for judicial review is not made if the affidavit is not filed with the fixed date claim form. There is no sanction stated if the affidavit is not filed with the fixed date claim form.

The issue of the party who has sworn the affidavit was also addressed. The affiant he says gives her reason as is required by the rule (Rule 56.9(5)). In any event, he points out, even if this is deemed to be a procedural irregularity, it is not fatal to the proceedings and can be corrected by the order of the court using its general powers of case management under Rule 26.9.

Analysis and Conclusion

Is there a valid claim?

- [6] CPR Rule 56.4(12) requires the party who has obtained the leave to make the ‘claim’ within 14 days of the receipt of the order for leave. There must be a filing of the fixed date claim form within this period. The period for filing the claim was calculated and set out in **Golding and Anor v Portia Simpson Miller SCCA No 3 of 2008 which was delivered on April 11, 2008**. In that case the Court of Appeal added 14 days to the date the leave was granted and sanctioned that as the means of calculating the time limit for the period of filing, “by ordinary calculation.”

[7] In the case at bar, the leave was granted on July 7th, 2015 and was conditional upon the applicant making a claim within fourteen days of the order. Using the sanctioned means of calculating the time, the claim ought to have been made or filed by the 21st July, 2015. The claim filed on the 22nd July, 2015 was filed outside of the period stated in the precondition, the leave had lapsed, that lapse is fatal to the proceedings, the claim is therefore a nullity and the court has no jurisdiction to deal with it.

Does Rule 3.2 apply?

[8] The Court of Appeal per Panton, P (as he then was) in the **Golding case (para.11)**, in sanctioning the formula for the calculation of the days, spoke about the Interpretation Act and its application in the circumstances where periods of days are to be calculated. He said,

“The Interpretation Act provides that when an act is directed to be done within any time not exceeding six days, excluded days (that is, Sundays and public holidays) shall not be reckoned in the computation of the time. That means that where, as here, the period is more than six days, excluded days are to be counted.

To my mind the calculation outlined by the CPR cannot take the lead in the determination of this matter. It is the Law in the form of the Interpretation Act to which we must accord that place.

[9] The respondent in order to have taken advantage of the leave should have filed the claim on or before the 21st day of July 2015. This was not the case. Rule 3.2 cannot be invoked to give haven to the filing on the 22nd July, 2015.

The Affidavit

[10] Having found that the claim filed in this matter is a nullity. An examination as to whether the Affidavit was properly filed and whether it was sworn to by the appropriate person seems pointless; despite the apparent pointlessness though I would just wish for completeness to make the following points.

Firstly I am minded to cite from the **Chester Hamilton case** dicta of Phillips JA at para 37.

She addresses the issue of the use of Rule 26.9 that Mr. Spencer has called to his aid in response to the issues relating to the affidavit herein. In her agreement with counsel on the point he makes the learned Judge of Appeal says;

“This brings me to the “catch all” rule 26.9, which deals with the general power of the court to rectify matters where there has been a procedural error .But there are restrictions. The rule only applies where the consequence of failure to comply with a rule practice direction or court order has not been specified by any rule, practice direction or court order.”

The Judge went on to point out that the condition set out in Rule 56.4 (12) did not relate to the affidavit, but only to the claim; and so no consequence was specifically attached to not filing of the affidavit within the time specified.

Had the Claim in the case at bar met the precondition; the court could have made an order to rectify any procedural deficiencies with the affidavit if it was so minded bearing in mind all the circumstances.

[11] Secondly I wish to make a comment specifically on the submission of Mr. Spencer that the receipt of the order may be interpreted to mean when it is ‘perfected’ or is ‘in hand’. The law is quite clear as to the time an order of the court is effective and that is when the order has been made; and no lapse in time between when it is made and its “receipt” in hand upon being perfected is available as an excuse in the calculation of time limits that have been laid down.

The orders of the court are as follows;

1. The court has no jurisdiction to try this claim.
2. The Fixed Date Claim Form filed herein is struck out as a nullity and Judgment issues for the Defendant as against the Claimants for costs incurred by the Defendant to date, said costs to be taxed if not agreed.
3. Leave to Appeal is refused.
4. The Applicant’s attorneys at law are to prepare file and serve this Formal Order.