[2022] **JMFC Full 08**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2021CV00711

BEFORE: **THE HONOURABLE MR. JUSTICE DAVID BATTS**
THE HONOURABLE MRS. JUSTICE CAROLYN TIE POWELL
THE HONOURABLE MS. JUSTICE CAROLE BARNABY

BETWEEN	**LOUIS SMITH**	**APPLICANT**
AND	**HER HONOUR SANDRIA WONG-SMALL (Senior Parish Court Judge for the parish of St. James)**	**1st RESPONDENT**
AND	**THE DIRECTOR OF PUBLIC PROSECUTIONS**	**2nd RESPONDENT**

Civil Procedure - CPR 64.6 - Renewed application for leave to apply for order of certiorari to quash criminal proceedings refused - Previous decisions of the court indicating similar applications inappropriate - Whether renewed application an abuse of process - Whether wasted costs order to be made against counsel.

Hugh Wildman instructed by Hugh Wildman & Company for the Applicant.

Faith Hall instructed by the Director of State Proceedings for the 1st Respondent.

Latoya Bernard and Kathrina Watson instructed by the Director of Public Prosecutions for the 2nd Respondent.

Heard: **11th November and 20th December, 2022.**

[1] The substantive matter, with which we were concerned, was a renewed application for leave to apply for judicial review. That application followed a refusal of an application for leave by a single judge who determined that there was an alternative remedy available

by way of appeal. The renewed application was on the basis, as urged by the Applicant's counsel, that an appeal was not an alternative remedy. The Applicant sought an order of certiorari to quash the ongoing criminal trial and for a stay of the criminal proceedings.

[2] We refused the renewed application for leave to apply for judicial review on the 18th July 2022: see **Louis Smith v Her Honour Sandria Wong-Small (Senior Parish Judge for the parish of St. James) and the Director of Public Prosecutions** [2022] JMFC Full 05. On that date we reserved on the matter of costs in order to allow an enquiry into possible costs and wasted costs orders and to enable counsel for the Applicant, Mr. Hugh Wildman, to show why such orders should not be made. That hearing proceeded on the 11th November 2022 and we reserved our decision to today's date.

[3] At the substantive hearing, the gravamen of the Applicant's challenge was that the Senior Judge of the Parish Court (hereinafter called "the learned judge") admitted into evidence witness statements, by virtue of an agreement between counsel representing other accused persons and the prosecution, without his client's consent or the consent of his counsel. The evidence was admitted after the learned judge heard submissions on the point. It was the Applicant's contention that the learned judge erred in construing a provision in the **Evidence Act** and acted in breach of his client's constitutional right to a fair hearing. He therefore sought declaratory orders relating to the admission of the witness statements, an order of certiorari to quash proceedings before the learned judge as well as an order for the stay of the trial.

[4] On the matter of costs, the essence of the submissions of Counsel for the Applicant was primarily two fold. Firstly, a repetition of the arguments that had been put forward on the substantive matter; and secondly, an assertion that the court erred in its determination of that matter, hence the Applicant should not be burdened with costs. We were not moved by these submissions, and for the reasons set out below, we consider it appropriate that the Applicant be made to bear the costs of the Respondents on the renewed application for leave to apply for judicial review, which costs are to be paid by his counsel.

[5] It was aptly observed by Phillips JA, with whom the rest of the court agreed, in **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2020] JMCA App 13, para. 42 that:

> *The Parish Courts in Jamaica have extensive jurisdiction, and Parish Court Judges are called upon to adjudicate upon very complex and important criminal and other matters. An argument could not be sustained that the Parish Court is an inferior court lacking the requisite competence to deal with issues pertaining to statutory interpretation…*

To that we would add, "and the admission or exclusion of evidence". That is a significant part of what trial judges do in determining matters over which they preside.

[6] As we observed in our reasons for refusing leave to apply for judicial review, *"[s]ave in exceptional circumstances, the Parish Courts should be allowed to complete trials embarked upon. The alternative remedy by way of appeal suffices."* Judges are undoubtedly fallible, but as observed by Sykes J (as he then was) in **Fritz Pinnock and Ruel Reid v Financial Investigations Division** [2019] JMSC Civ 257, para. 89:

> *One of the important ideas behind this important principle is to avoid the supervisory jurisdiction being used as a "de facto" appeal from a decision or ruling of the Parish Court. Parish Courts must be free to decide the matters there without the "fear" that any decision made will be brought to and entertained by the Supreme Court. The appellate process is there to correct errors made by the Parish Court Judge. The Supreme Court must be cautious in exercising its power to grant stays of criminal proceedings in inferior courts thereby interrupting the normal and expected flow of criminal proceedings.*

[7] Leave to apply for judicial review was refused by the Full Court on which Sykes J sat, and subsequent applications for permission to appeal refused. Mr. Wildman also appeared as counsel for the applicants and appellants in the case cited. It was therefore a matter of concern for us that Mr. Wildman persisted with this application for leave to apply for judicial review, in respect of the trial judge's decision to admit evidence during

the course of a trial. It is this concern which moved us to require counsel to show cause why a wasted costs order would not be appropriate.

[8] In proceedings for judicial review, the general rule is that costs ought not to be awarded against the unsuccessful applicant: see **Julian Robinson v the Attorney General of Jamaica** [2019] JMCC Full 5 in which the rationale for Rule 56.15 was explained. The rule is not immutable however, and the court still has a discretion in an appropriate case, to award costs against an unsuccessful applicant for judicial review. The Court of Appeal recently decided that Rule 56.15 does not apply to protect the unsuccessful applicant for leave to apply for judicial review: see **Kingsley Chin v Andrews Memorial Hospital Limited** [2022] JMCA Civ 26. In this case the application is for leave and therefore the ordinary rule, that costs follow the event applies. Furthermore, the Applicant, as we demonstrate below, unreasonably renewed the application before this court having already failed before a single judge. It is appropriate therefore to award costs against this unsuccessful applicant for judicial review.

[9] To the extent relevant, rule 64.13 provides as follows in respect of wasted costs.

> *(1) In any proceedings the court may by order -*
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> *(a) disallow as against the attorney-at-law's client; and/or*
>
> *(b) direct the attorney-at-law to pay, the whole or part of any wasted costs.*
>
> *(2) "**Wasted costs**" means any costs incurred by a party -*
>
> *(a) as a result of any improper, unreasonable or negligent act or omission on the part of any attorney-at-law or any employee of such attorney-at-law; …*

[10] As to what is meant by "improper, unreasonable or negligent" as used in the rule, assistance may be found in **Ridehalgh v Horsefield and another** [1994] Ch. 205, where a like provision which appeared at section 51(7) of the UK Supreme Court Act 1981 came on for construction and application. In delivering the judgment of the court Lord Bingham M.R. said this at pages 232-233.

"Improper" means what it has been understood to mean in this context for at least half a century. The adjective covers, but is not confined to, conduct which would ordinarily be held to justify disbarment, striking off, suspension from practice or other serious professional penalty. It covers any significant breach of a substantial duty imposed by a relevant code of professional conduct. But it is not in our judgment limited to that. Conduct which would be regarded as improper according to the consensus of professional (including judicial) opinion can be fairly stigmatised as such whether or not it violates the letter of a professional code.

"Unreasonable" also means what it has been understood to mean in this context for at least half a century. The expression aptly describes conduct which is vexatious, designed to harass the other side rather than advance the resolution of the case, and it makes no difference that the conduct is the product of excessive zeal and not improper motive. But conduct cannot be described as unreasonable simply because it leads in the event to an unsuccessful result or because other more cautious legal representatives would have acted differently. The acid test is whether the conduct permits of a reasonable explanation. If so, the course adopted may be regarded as optimistic and as reflecting on a practitioner's judgment, but it is not unreasonable.

"[N]egligent" should be understood in an untechnical way to denote failure to act with the competence reasonably to be expected of ordinary members of the profession.

[11] In the circumstances of the instant case, further guidance is to be found in the dictum below, which appears at pages 233-234 of the said judgment.

A legal representative is not to be held to have acted improperly, unreasonably or negligently simply because he acts for a party who pursues a claim or a defence which is plainly doomed to fail. *As Lord Pearce observed in* Rondel v. Worsley *[1969] 1 A.C. 191, 275:*

> "It is easier, pleasanter and more advantageous professionally for barristers to advise, represent or defend those who are decent and reasonable and likely to succeed in their action or their defence than those who are unpleasant, unreasonable, disreputable, and have an apparently hopeless case. Yet it would be tragic if our legal system came to provide no reputable defenders, representatives or advisers for the latter."
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> …
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> ***It is, however, one thing for a legal representative to present, on instructions, a case which he regards as bound to fail; it is quite another to lend his assistance to proceedings which are an abuse of the process of the court. Whether instructed or not, a legal representative is not entitled to use litigious procedures for purposes for which they were not intended****, as by issuing or pursuing proceedings for reasons unconnected with success in the litigation or pursuing a case known to be dishonest, nor is he entitled to evade rules intended to safeguard the interests of justice, as by knowingly failing to make full disclosure on ex parte application or knowingly conniving at incomplete disclosure of documents.* ***It is not entirely easy to distinguish by definition between the hopeless case and the case which amounts to an abuse of the process, but in practice it is not hard to say which is which and if there is doubt the legal representative is entitled to the benefit of it."***
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> ***[Emphasis added]***

[12] The enquiry into whether a wasted costs order should be made against the attorney-at-law for the Applicant is not on account that the application for leave was unsuccessful, to which a costs order against the Defendant could ordinarily go in aid. We consider that the conduct of Mr. Wildman in continuing to lend his assistance in pursuing the renewed application for leave is an abuse of the processes of the court. As indicated by the Applicant at ground 20 of his renewed application, he

> *… is advised by his Counsel and verily believes that, a potential appeal is not an alternative remedy in law. For there to be an alternative remedy, the remedy*

must exist at the time of the application, and a prospective appeal does not qualify as such.

[13] We have already expressed our view on the opinion of counsel in that regard, see our judgment referenced at paragraph 2 above. Nevertheless, we take the opportunity to set out the following pronouncement by Bongiorno J in **Atlas v DPP** [2001] VSC 209 which was cited with approval by Sykes J in the **Fritz Pinnock** case (paragraph 5 above):

> *Many questions arise before and in the course of a trial in respect of which a trial judge would be much assisted by a definitive ruling of this Court [a superior court where the use of declaratory powers on questions of evidence or procedure arising during the course of criminal proceedings in an inferior court were sought] or the Court of Appeal. However, the proper application of the principles of criminal procedure means that trial judges are required to make rulings on evidence or determine points of procedure as and when they arise either prior to or in the course of criminal trials (or, for that matter, civil trials) no matter how novel or difficult the points raised might be. The appeal system exists to ensure that an error made by a trial judge which leads to the possibility of a miscarriage of justice in the result can be corrected in the Court of Appeal.*

[14] It is the contention of counsel Mr. Wildman that the matter which was the subject of the renewed application for leave to apply for judicial review, raised novel points not previously covered by Jamaican law. As demonstrated by the authorities from this jurisdiction which have been earlier cited, this argument is devoid of merit.

[15] It is also submitted that the appropriate remedy in a case of alleged constitutional breach is judicial review; and that an appeal to the court of appeal cannot be considered as an alternative remedy in the case of such breaches. Mr. Wildman says that these values are "highlighted" in the Memorandum of Reasons of the Court of Appeal dated 15th July 2021 in **Louis Smith v the DPP and the Parish Judge for the Parish of St James Sandria Wong-Small** COA2021APP00102. We find these submissions equally unmeritorious.

[16] In the first instance, there was in fact no claim before this court for constitutional redress, a remedy which is distinct from judicial review. The application was for leave to pursue the prerogative remedy - an order of *certiorari.*

[17] Secondly, on careful review of the six (6) paragraphs of the Memorandum of Reasons, we are unable to find, whether expressly or by implication, anything which could have caused Mr. Wildman to attribute his submissions or support for them to the Court of Appeal.

[18] The Memorandum of Reasons show that the Court of Appeal has done no more than grant permission to Mr. Smith to appeal the orders of the Full Court (otherwise constituted), which affect the laying of charges against him. Among other things, the Full Court had found that the Director of Public Prosecutions was entitled to charge Mr. Smith for breach of the **Money Laundering Act** which had been repealed by the time the charges were laid against him. It was apparently Mr. Smith's contention that the Full Court "*erred in, among other things, interpreting section 25(2) of the Interpretation Act"*. That legislative provision is concerned with the effect of repealed legislation. Permission to appeal was granted as

> *[t]he court [was] of the view that there is sufficient room for differing opinions in respect of the interpretation of the section, so as to find that Mr. Smith has an arguable case for an appeal from the decision of the Full Court.*

The Court of Appeal nevertheless refused permission to appeal the decision of the Full Court in respect of the learned trial judge, and indicated in the said Memorandum of Reasons that those orders should stand.

[19] During the course of submissions, Mr. Wildman urged the decision in **Regina v Bedwellty Justices, ex parte Williams** [1997] A.C. 225 in submitting that the Applicant was correct in persisting with his renewed application for leave to apply for judicial review. That case concerned an appeal from the dismissal of the applicant's motion for judicial review of the decision of examining justices to commit her to stand trial in circumstances where there was absolutely no admissible evidence upon which to order

the committal. The proceedings under consideration before us are not committal proceedings but a criminal trial. The case is therefore distinguishable as committal proceedings, like decisions whether or not to prosecute, have always been subject to judicial review and/or applications for constitutional relief. There is no alternate remedy available as appeals do not lie therefrom.

[20] Mr. Wildman also sought to persuade the court that the circumstances of the Applicant's complaint go to the jurisdiction of the learned judge to try the Applicant. We had already indicated in our reasons refusing the application for leave our disagreement with that position. Other assistance may nevertheless be found in the **ex parte Williams** case (cited at paragraph 19 above) in which the following dictum of Lord Sumner in **Rex v Nat Bell Liquors Ltd.** [1922] 2 A.C. 128 was set out at page 233.

> *A justice who convicts without evidence is doing something that he ought not to do, but he is doing it as a judge, and if his jurisdiction to entertain the charge is not open to impeachment, his subsequent error, however grave, is a wrong exercise of a jurisdiction which he has, and not a usurpation of a jurisdiction which he has not. How a magistrate, who has acted within his jurisdiction up to the point at which the missing evidence should have been, but was not, given, can, thereafter, be said by a kind of relation back to have had no jurisdiction over the charge at all, it is hard to see.*

[21] In all these premises it is our judgment that in continuing to lend assistance to the application for leave to challenge the ruling of the learned trial judge, on the admissibility of evidence in the ongoing criminal trial and after a single judge had refused leave on account of the availability of the process of appeal, counsel has engaged in conduct which seeks to improperly circumvent the system of appeals. That system exists to correct errors made by a trial judge. The pursuit of the application, which counsel knew or ought reasonably to have known was futile, had the inevitable consequence of delaying the trial and hence the pursuit of justice. We therefore harbour no doubt that the renewed application for leave to apply for judicial review is an abuse of the court's process.

[22] The purpose of the power reserved to the court to make wasted costs orders against an attorney-at-law was clearly expressed by Sykes J (Ag) (as he then was) in **Catherine Nerissa Gregory v Aubrey Erlington Gregory** HCV 1930 of 2003 delivered 23rd July 2004 when he stated thus at page 6.

> *In exercising this power it is important to bear in mind that even though the order has the effect of compensating one party that is not the true purpose of the power. The power is invoked because of a failure of the attorney to fulfil his duty to the court. Lord Hope of Craighead on behalf the Judicial Committee of the Privy Council in the case of* Harley v McDonald *expressed it in this way at 703B:*
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> > "49. A costs order against one of its officers is a sanction imposed by the court. The inherent jurisdiction enables the court to design its sanction for breach of duty in a way that will enable it to provide compensation for the disadvantaged litigant. But a costs order is also punitive. Although it may be expressed in terms which are compensatory, its purpose is to punish the offending practitioner for a failure to fulfil his duty to the court."

[23] The Respondents, having successfully opposed the renewed application for leave to apply for judicial review, are properly to be regarded as standing in the shoes of any other disadvantaged litigant and are therefore entitled to compensation by way of costs. There being a failure on the part of counsel for the Applicant to fulfil his duty to the court, by lending assistance to proceedings which constituted an abuse of the court's process, we consider that it is appropriate that the Applicant's counsel pays those costs.

ORDER

1. Costs of the renewed application for leave to apply for judicial review to the Respondents to be taxed, if not sooner agreed.

2. The costs are to be paid by Hugh Wildman & Company, Attorneys-at-Law.

3. The 1st Respondent's attorneys-at-law are to prepare, file and serve this order.

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Batts, J.

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Tie Powell, J.

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Barnaby, J.