

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

COMMONWEALTH OF DOMINICA

DOMHCVAP2021/1001

BETWEEN:

CARA SHILLINGFORD

Appellant

and

**[1] STEPHENSON HYACINTH (in his capacity of Chairman of the
Integrity Commission)**

**[2] THOMAS HOLMES (in his capacity as member of The
Integrity Commission)**

**[[3] INTEGRITY COMMISSION OF THE COMMONWEALTH OF
DOMINICA**

Respondents

Before:

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mde. Margaret Price-Findlay

Justice of Appeal

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

Appearances:

Mr. Wayne B. Marsh for the Appellant

Mr. Gilbert Peterson, SC with him Mr. Jeffrey Douglas-Murdock for the
1st and 2nd Respondents

Mr. Gilbert Peterson, SC with him Ms. Lisa de Freitas for the 3rd Respondent

2022: November 25.

Interlocutory appeal – Refusal of application for leave to apply for judicial review - Delay - CPR 56.3 (3)(g) - Whether appellant breached CPR 56.3(3)(g) in that she failed to state or account for the time lapse between when her cause of action arose and when she sought to make her ex parte application

for leave to apply for judicial review - Duty of candour in ex parte proceedings – Whether judge erred in finding that appellant failed to give full and frank disclosure – Whether application for leave to apply for judicial review was heard on an ex parte basis – Principles for grant of an extension of time- Refusal of application to rely on supplementary affidavit filed out of time - Whether judge’s exercise of discretion was plainly wrong to warrant appellate interference

REASONS FOR DECISION

- [1] **ELLIS JA:** This appeal was brought by the appellant against the oral decision (with written reasons later provided) of the High Court Judge (“the Judge”) whereby she: (i) determined that the appellant had failed in her duty to give full and frank disclosure to the court when making her ex parte application for leave to apply for judicial review when she failed to comply with rule 56.3(3)(g) of the **Civil Procedure Rules 2000** (“CPR”), and (ii) refused the appellant’s application for leave to have a supplementary affidavit admitted outside the time prescribed by the case management order (“the Ruling”).
- [2] Following the hearing of the appeal on 25th November 2022, the Court allowed the appellant’s appeal, set aside the Ruling of the learned Judge and indicated that brief written reasons would be provided at a later date. The following sets out the reasoning of the Court.

Background

- [3] On 11th May 2021, the appellant filed an ex parte application (later amended on 19th May 2021) in which she sought leave to apply for judicial review of the decision of the Integrity Commission of the Commonwealth of Dominica (“the third respondent”) taken on 12th February 2021 allowing a person in public life to keep a gift of a motor vehicle valued at EC\$194,000.00 and for interim injunctive relief preventing the Commissioner of Police, the officer in charge of the Traffic Department, the Inland

Revenue Division and any of their servants or agents from transferring ownership of the motor vehicle PY294 (“the Ex parte Application”).

- [4] Following the filing of the Ex parte Application, the appellant was instructed to serve the application upon the respondents named therein.
- [5] When the matter came up for case management on 2nd June 2021, the learned judge, listed the matter to be heard on 23rd July 2021 and *inter alia* directed as follows:
- “1) The respondents file and serve their affidavits in response on or before 16th June 2021
 - 2) The appellant to file her affidavit in reply (if necessary) on or before 30th June 2021. ...
 - 6) Liberty to apply.”
- [6] Pursuant to the 2nd June 2021 order, the respondents filed an affidavit in reply on 16th June 2021 and a supplemental affidavit in reply on 17th June 2021. The appellant then filed an affidavit in response on 7th July 2021 and a supplemental affidavit in support of the Ex parte Application on 21st July 2021 in which she purported to explain why the Ex parte Application was filed on 11th May 2021, almost three (3) months after the date of the impugned decision (“the Supplemental Affidavit”).
- [7] At the hearing of the matter on 23rd July 2021, counsel for the respondents submitted that the appellant should not be permitted to rely on the supplemental affidavit. The appellant on the other hand submitted that the supplemental affidavit was filed in response to the respondents’ submissions that the appellant should be denied leave on the basis that the Ex parte Application was untimely and failed to provide any explanation for the purported delay. The respondents also argued that

the appellant breached her duty of candour, requiring the court to disallow the supplemental affidavit.

[8] After hearing arguments on this discrete point, the learned judge gave an oral ruling on 28th July 2021 in which she refused to admit the appellant's Supplemental Affidavit on the basis that the appellant had breached her duty of candour to the court, having failed to provide the reason for the purported late application for leave. The learned judge adjourned the hearing of the Ex Parte Application and promised to provide written reasons for her decision at a later date.

[9] The written reasons were later delivered on 17th August 2021.

[10] Following an order made on 30th November 2021 granting an extension of time within which to apply for leave to appeal and leave to appeal, the appellant filed a notice of appeal on 12th December 2021 which advanced several grounds of appeal. These grounds can be condensed as follows:

- (i) Bearing in mind that the respondents were served with the Ex Parte Application and had filed evidence and submissions in response thereto, the learned Judge failed to appreciate that the matter before her did not proceed on an ex parte basis and so the legal principles and authorities relied upon in support of the appellant's duty of full and frank disclosure were not relevant.
- (ii) The learned Judge erred in law in finding that the appellant had not complied with CPR 56.3(3)(g) by failing to account for the lapse of time between the date of the decision of the third respondent and date of filing of the Ex Parte Application.
- (iii) The learned Judge erred in law and in fact when she found that the appellant failed to comply with her duty of candour when she failed to inform the court of the reason for the delay in bringing the Ex Parte Application.

- (iv) The learned judge erred in law when she refused the appellant's application for leave to have the supplementary affidavit filed out of time, deemed properly filed and to rely on the averments contained therein.
- (v) The learned Judge erred in law and in her finding of fact that the appellant's breach of her duty of candour was seriously culpable and egregious when there was no evidence before the court to support such a finding.

Discussion and analysis

[11] At the heart of the Ex parte Application before the learned judge, was the contention that the appellant had not complied with CPR 56.3(3) which prescribes the contents of applications for leave for judicial review. This rule provides that:

- "56.3 (1) -
- (2) -
- (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) the applicant's address for service;
 - (e) whether an alternative form of redress exists and, if so, why judicial review is more appropriate or why the alternative has not been pursued;
 - (f) 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;
 - (g) **whether any time limit for making the application has been exceeded and, if so, why;**
 - (h) whether the applicant is personally or directly affected by the decision about which complaint is made;

- (i) if the applicant is not personally or directly affected – what public or other interest the applicant has in the matter;
- (j) the name and address of the applicant's legal practitioner (if applicable); and
- (k) the applicant's address for service..." (Emphasis mine)

[12] At paragraph 26 of her amended Ex Parte Application, the appellant states as follows:

"The applicant has made this application without delay."¹

[13] In written legal submissions filed in opposition to the Ex Parte Application, the respondents submitted that:

"[T]he Application for Leave ought to be refused on the ground of delay which is detrimental to good administration – the decision having been taken on the 12th of February 2021 but the Application for Leave not filed until the 11th May, 2021."²

[14] Thereafter at paragraphs 8 – 19 of the legal submissions, the respondents made extensive arguments in support of this contention. In response to these submissions, the appellant filed her Supplemental Affidavit on 21st July 2021 (two days before the scheduled hearing date of the Ex Parte Application) in which she averred inter alia that the Ex Parte Application was filed promptly in all the circumstances which existed between the date of the impugned decision and the date when the application was made. In her supplemental affidavit, the appellant also provided her reasons for what she described as the delay in filing the application. She maintained that such delay was not intentional.

[15] Counsel for the appellant made an oral application seeking leave to rely on the Supplemental Affidavit which would have been filed outside the time prescribed by the case management directions. This application was opposed by the respondents

¹ Bundle of documents for Interlocutory appeal, page 75.

² Bundle of documents for Interlocutory appeal, page 187 paragraph 4a.

who argued that the Supplemental Affidavit should not be read or considered by the learned Judge.

- [16] The learned Judge was apparently persuaded by the respondents' submissions and concluded that the appellant was in breach of CPR 56.3(3)(g) in that she failed to state or account for the time lapse between when her cause of action arose and when she sought to make her ex parte application for leave. She was therefore in breach of her duty to comply with the mandate of CPR 56.3(3)(g) and is guilty of non-compliance. The learned Judge further determined that the appellant failed in her duty to give full and frank disclosure when making her ex parte application in initially not complying with CPR 56.3(3)(g). The Judge observed that the appellant remained in breach of her duty during the directions hearing and that such breach was seriously culpable.

What does CPR Part 56.3(3)(g) require?

- [17] The provisions of CPR Part 56.3(3)(g) are clear and unambiguous. They prescribe that an applicant seeking leave to apply for judicial review must disclose the following:
- (i) Whether there is any time limit prescribed for making the application;
 - (ii) Whether such time limit has been exceeded; and
 - (iii) If the prescribed time limit has been exceeded what are the reasons for the delay.
- [18] This rule recognizes that legislatures may, where the particular circumstances warrant, prescribe a time limit for invoking the court's supervisory jurisdiction. Where a particular enactment imposes a particular time limit, an applicant is obliged to file his application promptly and in any event within the prescribed time frame.
- [19] However, it has not been suggested by either side that there is a particular time limit imposed by any enactment which may be relevant in the circumstances of this case.

It is apparent that there was some reference to a three-month time frame advanced in arguments, however this could only allude to the provisions of Part 54 of the English Civil Procedure (Amendment No.4) Rules 2000³ which provides that:

“**54.5**—(1) The claim form must be filed—

- (i) promptly; and
- (ii) In any event not later than 3 months after the grounds to make the claim first arose.
- (iii) The time limit in this rule may not be extended by agreement between the parties.
- (iv) This rule does not apply when any other enactment specifies a shorter time limit for making the claim for judicial review.”

[20] It is immediately noticeable that there is no similar rule in the Eastern Caribbean Supreme Court’s (“ECSC”) CPR which is comparable to the English provisions. This Court has repeatedly acknowledged this and in **Roland Browne v The Public Service Commission**⁴ this Court made clear that:

“... the absence of any rigid time limit for invoking the supervisory jurisdiction in Saint Lucia is salutary, subject of course to the Court’s insistence on reasonable promptness in all the circumstances of each particular case, and rejection of stale claims.”

[21] In that case, Edwards JA cited with approval the decision in **Doolittles v Doubloon International Limited et al**⁵ in which the Court rejected the Attorney General’s argument that the 3 months’ time limit applies under the CPR 2000.

[22] It follows that there would have been no time limit prescribed or imposed by any enactment which the appellant would have been obliged to disclose in her notice of application and so the learned Judge would have erred when she concluded that the appellant was in breach of CPR Part 56.3(3)(g) which obliges an applicant to

³ This replaced Order 53 r 4 of the English Rules of the Supreme Court

⁴ SLUHCVP2010/023 (delivered 15th December 2010, unreported), Held point 1.

⁵ SLUHCVP2005/0009 (unreported) .

state whether any time limit for making the application has been exceeded and to account for the delay.

Delay – Judicial review

- [23] Notwithstanding the foregoing, it is clear that the applicant seeking leave to apply for judicial review must do so promptly. The failure to act promptly may well prevent an applicant from pursuing an arguable ground for judicial review even though the application may have a realistic prospect of success. CPR 56.5 makes that plain. It provides that:

“56.5 (1) In addition to any time limit imposed by any enactment, the judge may refuse leave or to grant relief in any case in which the judge considers that there has been unreasonable delay before making the application.

(2) When considering whether to refuse leave or to grant relief because of delay the judge must consider whether the granting of leave or relief would be likely to –

- (i) be detrimental to good administration; or
- (ii) cause substantial hardship to or substantially prejudice the rights of any person.”

- [24] The effect of this rule was helpfully explained by Blenman JA (as she then was) in **Tropical Distributors Company Limited v Permanent Secretary in the Ministry of Finance**⁶ in the following terms:

“...in determining whether there has been unreasonable delay, the judge should consider whether the granting of leave would be likely to be detrimental to good administration or cause substantial hardship to or substantially prejudice the rights of any person.”

- [25] The term “unreasonable delay” is not defined in CPR 56.5(1), however at paragraph 36 of the judgment in **Tropical Distributors**, Blenman JA went on to note:

“In assessing what period amounts to unreasonable delay, it is important to note that there is no rigid time frame provided by [the] CPR. The court in **In the Matter of an Application by Robert and Sonia Burkett**⁷ highlighted that what is at issue is promptness and it will be **an identifiable question**

⁶ AXAHC VAP2018/0007 (delivered 15th April 2019, unreported), paragraph 31.

⁷ [2000] EWCA Civ 321.

of law, namely, when did the grounds for the judicial review claim first arise?” (Emphasis mine)

- [26] The answer to that question would have been obvious and squarely before the learned Judge in the appellant's amended notice of application and in her evidence filed in support which would have set out the date of the impugned decision.
- [27] The requirement of leave is designed to filter out applications which are groundless or hopeless at an early stage. The aim is to prevent a waste of judicial time and to remove the uncertainty which might arise from the need to delay implementing decisions, where the legality of such decisions has been challenged.⁸ While there is no exhaustive list of criteria for determining an application for leave, there are factors which have routinely operated as discretionary bars which the filtering court is obliged to consider. Promptitude or delay is one such critical factor.
- [28] The Judge would therefore have been obliged to consider the issue of delay in determining whether to grant leave, even where she determined that the claim may have merit and even where it is clear that there was no time limit imposed by any enactment. That position was made clear at the highest levels in **Sharma v Antoine and Others**⁹ when the Judicial Committee of the Privy Council held:
- “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 p Hughes* (1992) 5 Admin LR 623 at 628 and *Fordham Judicial Review Handbook* (2004, 4th edn) p 426.”
- [29] Given that there is no time limit imposed by any enactment and given the frank representations set out in the Ex Parte Application and evidence filed in support, I have some difficulty in discerning how it can be concluded that the appellant failed to give full and frank disclosure. The fact that an applicant opines that he has made

⁸ Per Lord Diplock in *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd.* [1982] A.C. 617 at 643

⁹ [2007] 4 LRC 10 at 19.

his application without delay could not prevent a judge from considering delay as a potential discretionary bar when the relevant dates (the date of the alleged decision and the date when the application was filed) would have been disclosed in the application.

[30] I am therefore not satisfied that in this regard there was any “seriously culpable” breach on the part of the appellant. Indeed, I am satisfied that although extensive in nature, the arguments regarding candour on an ex parte hearing were a red herring which unnecessarily diverted the learned Judge from the true issue which was before her for determination.

[31] Regardless of whether the matter was initially filed as an ex parte (without notice) application, it was not heard on an ex parte basis. The respondents were served with the application and the evidence filed in support. The parties also exchanged legal submissions and appeared at a hearing in which they made fulsome oral submissions. From the respondents’ submissions it is clear that the grant of leave to apply for judicial review was opposed on several bases including that of delay. It follows that the learned Judge would have been confronted with this issue as a potential discretionary bar to the grant of leave. At that point the only question would have been whether she had all the information necessary to exercise her discretion.

[32] It is here that the appellant’s supplemental evidence filed outside the time prescribed in the case management order and without leave, becomes relevant. The learned Judge was clearly aware of the import of this evidence when she notes: *‘In essence, the thrust of the applicant’s case at this juncture is that the affidavit merely seeks to present to the court and to place on the record the reasons for the seeming delay by the applicant to bring the application for permission to file judicial review against the decision taken by the third named respondent.’*¹⁰

¹⁰ DOMHCV2021/0107 (delivered 17th August 2021, unreported), paragraph 3.

- [33] Whether the learned Judge considered this evidence or permitted the appellant to rely on the same would depend on whether she was prepared to grant the appellant's application to have the supplemental affidavit filed without the leave of the court deemed to have been properly filed, such that the appellant could properly rely on its contents in addressing the issue of delay. Lateness, in and of itself will not automatically preclude the evidence unless it would cause prejudice to the other party. In deciding whether to permit late evidence to be adduced, the court must have regard to all factors which would inform the exercise of its broad case management powers under CPR 26.1, in order to ensure that the case is dealt with fairly in accordance with the overriding objectives of the CPR.
- [34] The factual matrix in this case discloses that the application for leave to apply for judicial review was the subject of a case management order which set out a timetable for the filing and service of evidence and submissions. The appellant's Supplemental Affidavit filed on 21st July 2021 was clearly outside the timetable prescribed in the case management order. There is, however, no expressed sanction indicated in the court's case management order.
- [35] In these premises, the Court must have regard to the definitive ruling in **KMG International NV v DP Holding SA (a company incorporated under the laws of Switzerland)**¹¹ in which it was determined that the ECSC CPR makes no room for implying sanctions so that where no sanction has been expressed for failure to comply with a rule, order or practice direction, the regime set out in CPR 26.8 for applying for relief from sanctions does not apply and none should otherwise be implied in any case. It follows that where the appellant failed to file her evidence within the prescribed period, she was obliged to seek the leave of the court. The court would then have to consider whether to extend the time for compliance, applying the approach reflected in this Court's decision in **Carleen Pemberton v**

¹¹ BVIHCMAP2017/0013 (delivered 18th April 2018, unreported).

Mark Brantley,¹² subject to any relevant procedural rule or practice direction. In **Carleen Pemberton**, Pereira JA (as she then was) at paragraph 13 observed:

“Much depends on the nature of the failure, the consequential effect, weighing the prejudice, and of course the length of the delay, and whether there is any good reason for it which makes it excusable. This is by no means an exhaustive list of all the factors which may have to be considered in the exercise. Another very important factor, for example, where the application, as here, is to extend time to appeal, is a consideration of the realistic (as distinct from fanciful) prospect of success.”

[36] In exercising her discretion to refuse the appellant’s application, it does not appear that the learned Judge considered the relevant factors adumbrated by Sir Dennis Byron CJ (as he then was) in **John Cecil Rose v Anne Marie Uralis Rose**.¹³ At paragraph 2 of the judgment Sir Dennis noted that:

“Granting the extension of time is a discretionary power of the Court which will be exercised in favour of the applicant for good and substantial reasons. The matters which the Court will consider in the exercise of its discretion are: (1) the length of the delay; (2) the reasons for the delay; (3) the chances of the appeal succeeding if the extension is granted; and (4) the degree of prejudice to the Respondent if the Application is granted.”

[37] In what has been described as a “strong stream of jurisprudence”¹⁴ it has been well established by this Court that an appeal against a decision which involved the exercise of judicial discretion:

“...will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account of being influenced by irrelevant factors and considerations; and (2) that as a result of the error or the degree of the error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”¹⁵

¹² SKBHCVP2011/009 (delivered 14th October 2011, unreported).

¹³ SLUHCVP2003/001919 of 2003 (delivered 22nd September 2003, unreported).

¹⁴ *Throne Capable Investment Limited v Agile Star Group Limited* BVIHCP2020/0014 (delivered 14th January 2021, unreported) at paragraph 28.

¹⁵ *Michel Dufour and Others v Helenair Corporation Ltd. and Others* (1996) 52 WIR 188 at 190 – 191.

[38] The judge's decision does not disclose that the factors relevant to the exercise of her discretionary power to extend the time for filing the Supplemental Affidavit were properly considered. It is apparent from her written Ruling that the learned judge failed to take into account or gave too little weight to the relevant factors including the litigation context, the fact that this was supplemental evidence filed after it became clear that the respondents took issue with the timing of the Ex parte Application, the impact which this evidence would have on the viability of that application and its prospects for success and the degree of prejudice to the respondents if the evidence were considered. In so doing, the learned judge erred in principle and her Ruling exceeded the generous ambit within which reasonable disagreement is possible and was blatantly wrong. Having regard to the circumstances as mentioned above I find that this is an appropriate case for the appellate court to exercise its discretion to allow the appeal and set aside the learned judge's decision.

Conclusion

[39] It has been represented that although the Ex parte Application for leave was substantively heard, no decision has been handed down in light of this pending appeal. It is hoped that that Ex parte Application can now be promptly determined.

[40] The Court's order is therefore as follows:

- (i) The appeal is allowed.
- (ii) The decision of the learned Judge dismissing the appellant's application for leave to have the supplementary affidavit filed out of time deemed properly filed and for leave for the appellant to rely on the same is set aside.
- (iii) The Supplementary Affidavit filed on 21st July 2021 is deemed to be properly filed.

- (iv) Costs to the appellant in the sum of \$2000.00, to be paid within 30 days of this order.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Margaret Price- Findlay
Justice of Appeal

By the Court

Chief Registrar