

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
MONTSERRAT



CLAIM NO.: MNIHCV2012/0028

BETWEEN:

JON MILLER
STEVE PRICE
ANDY BURK
ED BURGER
HANK HENRY
ERIC TOMME
GREG MEHRING
GERRY BLOMQUIST
TROY DEPPERMAN
GEORGE F. WALKER QC

Claimants/Respondents

AND

THE ATTORNEY GENERAL

1st Defendant/Applicant

PLANNING & DEVELOPMENT AUTHORITY

2nd Defendant/Applicant

EASTON FARRELL-TAYLOR - THE MINISTER RESPONSIBLE FOR PLANNING

3rd Defendant/Applicant

ON AN APPLICATION BY THE DEFENDANTS/APPLICANTS

Appearances:

Ms. Karen Reid, Ms. Alison Skerritt and Ms. Jamiel Greenaway for the Defendants/Applicants

Mr. John Fuller and Ms. Marcelle Watts for the Claimants/Respondents

2012: October 31
: November 28

RULING

- [1] **THOMAS W.R. ASTAPHAN J.:** This is an Application filed on October 4th 2012 by the Applicants in which they seek to Strike Out the Claimants' Claim "...pursuant to Rule 26.3 (1) (a) of The Civil Procedure Rules 2000, on the grounds that the Claimants have failed to comply with Rule 8.1(1) c) and Rule 56.7(3)... and Rule 56.7(4) of the Civil Procedure Rules."
- [2] The Grounds set out in the Application are that the Claimants/Respondents "... failed to file with their Claim Form evidence on Affidavit in support of the said Claim..." as mandated by Rule 8.1(1)(c) and Rule 56.7 (3) of the Civil Procedure Rules 2000, and that Claimants have failed to state the provisions of the Constitution which they allege have been, is being, or is likely to be contravened, contrary to Rule 56.7 (4) (c) thereof. Hereafter I shall refer to the Rules as "CPR".
- [3] The Application is supported by an Affidavit filed on the same day and sworn to by Claudina Ryan, Senior Clerical Officer in the Chambers of the 1st Defendant/Applicant.
- [4] An Affidavit in Reply was filed on the 17th October 2012, sworn to by Roselin Browne, Senior Clerk in the Chambers of John E. Fuller. Exhibited to that Affidavit is a chain of emails bearing the date "Aug 21" which I will assume means "August 21st 2012".

- [5] These emails between John E. Fuller, Counsel for the Claimants/Respondents and Sheree Jemmotte-Rodney, Principal Crown Counsel (Ag.) (Civil and Commercial) of the Attorney General's Chambers, deal with the question of the non-service of an Affidavit which was required to be filed along with the Fixed Date Claim Form in accordance with Rule 56.7 (3) of CPR, which was served on the Defendants/Applicants on July 31st 2012. Of this more will be said later in this Ruling.
- [6] At the Hearing of this Application on 31st October 2012, Ms. Reid, Counsel for the Defendants/Applicants, sought to introduce a new ground which was not disclosed in the written application - by submitting that, on the facts and circumstances of this case, Rule 56.4 (11) was engaged. This Rule mandates that "Leave must be conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave."
- [7] Mr. Fuller, Counsel for the Claimants/Respondents, took issue with this viva voce submission on the grounds, inter alia, that all applications must, pursuant to CPR, be written applications, and that the Defendants/Applicants, acting through the Attorney General, had expressly, and in writing, consented to an extension of the time within which the claim for judicial review was to be made by the filing of the Fixed Date Claim Form. This consent, says Mr. Fuller, was obtained during the said 14 day period and, was it not for the Attorney General's consent, the Claimants/Respondents would have been in a position during the said 14 day period to take the necessary steps.
- [8] At the end of the Hearing Mr. Fuller requested that the Court permit both parties to file written Submissions, and the Court ordered that written submissions be filed by both parties by 4 p.m. on Wednesday 7th November 2012. This was done.

BACKGROUND

- [9] On June 11th 2012 the Claimants/Respondents filed an application for Leave to bring Judicial Review proceedings against the Defendants/Applicants. Two lengthy and detailed affidavits were filed in support of this Application.

- [10] Affidavits of Service upon the Defendants/Respondents were filed on June 11th 2012, and an Affidavit in Response sworn to by Jerome Meade of the Physical Planning Unit was filed on 27 June 2012.
- [11] The Application came up for Hearing before the Honourable Mr. Justice John Benjamin and a Consent Order was filed on June 29th 2012. That Order is undated.
- [12] The Consent Order ordered, so far as is relevant for the present application, as follows:

"BY CONSENT IT IS ORDERED THAT

1. The Claimants application for leave is hereby granted;
2. The Claimants application for interim relief is stayed; [this upon Counsel for the Honourable Attorney General, on behalf of all Defendants, giving an undertaking "...that any new developments or permission there for (sic) below or west of the Old Belham Valley Bridge including Isles Bay shall be stayed until the determination of the claim for judicial review.]
3. The claim for judicial review is deemed to be urgent and a trial date shall be scheduled for an early trial of the claim on the 31st October 2012;
4. **THE CLAIMANTS FIXED DATE CLAIM FORM AND AFFIDAVITS TO BE FILED WITHIN 14 DAYS;**
5. ...,
6. ...,
7. ...,
8. ...,
9. The trial shall be set down for two (2) days commencing 31st. October 2012, the parties shall be at liberty to apply." [Emphasis added]

- [13] This Consent Order was signed by Mr. John Fuller on behalf of the Claimants/Respondents and by Ms. Alison Skerritt on behalf of the Defendants/Applicants.

- [14] What followed next set in train the events which premised the current application.

- [15] On 9th July, 2012, Counsel for the Claimants/Respondents emailed the Honourable Attorney General "...seeking a short extension of time of 21 days to file the fixed date claim form...." Reasons were given for the request.
- [16] On 13th July 2012 the Honourable Attorney General replied by email and, after apologizing for the delayed response, said that "we are not opposed to agreeing an extension to July 27, 2012. We await receipt."
- [17] July 27 was a Friday, and when Ms. Watts, Junior Counsel for the Claimants/Respondents, during normal working hours attended the Court Registry to file the Fixed Date Claim Form, the Court was closed to the Public. It was not open to the Public again on that day.
- [18] Ms. Watts then attended the Registry on the Monday next following and filed the Fixed Date Claim Form and the two Affidavits in Support. Hence the Filing Date on these documents of July 30th 2012.
- [19] At page 11 of the Fixed Date Claim Form it is stated that "The Claimants rely on the affidavit filed in support of the application for leave for Judicial Review."
- [20] An Affidavit of Service of these documents upon the Defendants/Applicants was filed on August 7th 2012.
- [21] An Acknowledgement of Service of Fixed Date Claim Form was filed on August 14th 2012. It is stated therein that the Claimants' affidavit in support of the Fixed Date Claim Form was **not** received.
- [22] On September 10th 2012 an affidavit of Clement Jerome Meade, Chief Physical Planner, (Ag.), was filed, presumably – for it does not state so – on behalf of the Defendants/Applicants, or at the very least, on behalf of the 2nd Defendant/Applicant, the Planning & Development Authority.

[23] Then was filed on October 4th 2012 the Notice of Application under consideration in this hearing.

SUBMISSIONS

[24] Encapsulated, the Defendants/Applicants submit as follows:

- (i) That the Claimants/Respondents failure to file the Fixed Date Claim Form within 14 days as ordered, and in accordance with CPR 56.4 (11), is fatal, notwithstanding that the Attorney General had expressly consented to an extension of that time to July 27th 2012. [The Rule says "...making a claim for judicial review within 14 days of receipt of the order granting leave" and this I take to mean "...filing a claim for judicial review within 14 days of receipt of the order granting leave."]
- (ii) That the Claimants/Respondents failing to file an affidavit with the Fixed Date Claim Form is fatal in light of Rule 8.1 (c) and Rule 56.7 (3).
- (iii) That insofar as the Claimants/Respondents seek Constitutional Relief, they have breached Rule 56.7 (4) which is mandatory.
- (iv) The Defendants/Applicants rely on the following Authorities in support of their submissions:

(a) CPR 8.1 (c), 56.3, 56.4, and 56.7 (3)

(b) General Aviation Services Ltd. v Director General of the ECCAA HCVAP 2012-0006;

(c) Ivan O'Neal et al v Supervisor of Elections et al Claim No. 349 of 2000;

(d) Re Blake 1994 47 WIR;

(e) Tobias-Douglas v Tobago House of Assembly et al CV2007-04742;

(f) Treasure Island Company et al v Audubon Holdings Limited et al CA 22 of 2003, B.V.I.

(g) Homer Richardson v AG of Anguilla Claim No. AXAHCV 2005-0031; and

(h) Esprit et al v Speaker of the House of Assembly et al HCVAP 2008-005

(i) IVAN O'NEAL and SVG GREEN PARTY v THE SUPERVISOR OF ELECTIONS OF ST.VINCENT AND THE GRENADINES, MRS. SYLVIA FINDLAY and THE

ATTORNEY GENERAL OF ST. VINCENT and THE GRENADINES Claim No. 349 of
2009.

[25] The Claimants/Respondents submit as follows:

- (i) The Overriding Objective of CPR is to prevent trial by ambush. The Defendants/Applicants were required by Rule 11.7 (1) to set out the specific grounds of their application *in the application*, and cannot, at the hearing of the application raise the Rule 56.4 (11) point. The CPR, they say, "...does not contemplate oral applications. There must be an application in writing which gives the opposing party at least 7 days notice." **Beach Properties Barbuda Limited v CCI Group and Others**, *infra*.
- (ii) This oral application on Rule 56.4 (11) on the morning of the Hearing of the written application, says the Claimants/Respondents, "...is a manifest abuse of the process of the court." **Beach Properties Barbuda Limited**.
- (iii) Further, submit the Claimants/Respondents, CPR *does* permit the parties to consent to an extension of time, even in regards of Part 56 applications notwithstanding Rule 56.4 (11). **Treasure Island Company and Another v Audubon Holdings Limited and others**, *infra*.
- (iv) Part 56.4 (11) does not impose sanctions for any breach thereof and therefore, the authority of **The Attorney General v. Walker** [2011] UKPC 38, Rule 26.9 (1) applies and, pursuant to sub (2) of that Rule, the "...failure to comply with...[the 29 June]...order...does not invalidate any step taken in the proceedings, unless the court so orders."
- (v) Further, on the authority of **The Attorney General v Keron Matthew** [2011] UKPC 38 because Rule 56 *does not* expressly specify and impose a sanction for breach of Rule 56.4 (11), Rule 26.9(1) applies.

- (vi) It is further submitted by the Claimants/Respondents that under 26.9 (3) "...the court may make an order to put matters right" and pursuant to sub (4) the "...court may make such an order on or without the application by a party."
- (vii) In any event, the Court should not countenance a repudiation of the consent given by the Attorney General, at the very least, without due notice. Had the Attorney General *not* consented when the request was made, the Claimants/Respondents would have been in a position to make matters right. It would be unjust and inequitable to permit the Defendants/Applicants to benefit from the alleged breach to which they consented.
- (viii) The Defendants/Applicants are estopped by their conduct, relied upon by the Claimants/Respondents, from taking the Rule 56.4 (11) mandatory 14 day point, says the Claimants/Respondents.
- (ix) Part 56 must not be read isolated from the other Parts of CPR, and that since Part 56 does not specify and impose a sanction for a breach of its parts, and since the Order of June 29 does not specify the consequences of a failure to comply with it, as is required by Part 26.7, then Part 26.9 applies. The Court should make an order "putting matters right."
- (x) In support of these submissions the Claimants/Respondents rely on the cases of **Orrett Bruce Golding and Another v Portia Simpson Miller** CA No.3./08 [Jamaica]; **Keron Matthew case**, *ibid*; and **Quorum Island (BVI) Limited v Virgin Island Environmental Council and Another** HCVP2009/021; **Linton Lewis and Others v The Director of Public Prosecutions** HCCC No. 19 of 2011; **Chatham Bay Club Limited and Another v Judith Jones-Morgan** HCVAP 2007/021; **Richard Frederick and Lucas Frederick v Comptroller of Customs and Attorney General** HCVAP 2008/037; **Castaway Developments Limited and Castaways Hotel Limited v Hakim E.F. Gordon** Civil Appeal No. 2 of 1972, [Dominica]; **Belize Alliance**, *infra* and **Castaways Hotel Limited v University of Dominica (School of Medicine and Health Sciences) Limited** now known as **Ross University** Civil Appeal No. 4 of 1990, [Dominica];

(xi) In respect of the Defendants/Applicants submission on the "failure" to file an affidavit with the Fixed Date Claim Form the Claimants/Respondents say that it was clearly stated in the Fixed Date Claim Form that they were relying on the same affidavits used in support of the application for Leave.

(xii) That there is no Rule which precludes a party from relying on the very same affidavits used in support of its application for Leave which have been served on the other parties, submit the Claimants/Respondents. They, for this proposition, rely on the authority of **Belize Alliance of Conservation Non-Governmental Organizations v (1) The Department of the Environment and (2) Belize Electric Company Limited** [PCA 47 of 2003].

(xiii) On the submission by the Defendants/Applicants that the Fixed Date Claim Form is defective, in that it did not plead the section of the Constitution allegedly violated, as is required by 56.7 (4) (c), the Claimants/Respondents submit that they have indeed so fully disclosed on the face of their Pleadings by virtue of the following:

- (i) The Fixed Date Claim Form is headed '**In the matter of the Constitution**',
- (ii) "At paragraph (7) on the Nature of the claim is pleaded 'threats to the claimants' legal **and constitutional rights** or legitimate expectations and health.'", [emphasis in the original]
- (iii) And in paragraphs "...6 and 9 of the fixed date claim form at page 5 the Claimants made it pellucid that they were alleging an infringement of their constitutional rights to property." [emphasis in the original],
- (iv) That a First Hearing has not yet been held and "...the Claimants [/Respondents] are entitled to amend and/or correct errors, if any, in the claim filed."
- (v) "Consequently", it is submitted, "there can be no basis for a strike out prior to the first hearing or at all."

[26] The Claimants/Respondents rely on the authorities of **Beach Properties Barbuda Limited v CCI Group and Others** CA No. 2 of 2007, and on **Treasure Island Company**, Ibid.

FINDINGS

FAILURE TO FILE WITH THE FIXED DATE CLAIM FORM EVIDENCE ON AFFIDAVIT AS IS MANDATED BY CPR 8.1 (c) and 56.7 (3)

- [27] Part 8 of CPR is headed: "How to start Proceedings". CPR 8.1 (c) states: "A Claimant starts proceedings by filing with the court office the original and one copy (for sealing) of-
- (a)...;
 - (b)...;
 - (c) if any rule or practice direction so requires – an affidavit or other document."
- [28] CPR 56.7 (3) states: "The claimant must file with the claim form evidence on affidavit."
- [29] There were two affidavits in support of the application for leave and they were filed and served upon the Defendants/Applicants.
- [30] The Claimants/Respondents started proceedings under Part 56 of CPR which deals with applications for administrative orders. These proceedings were not started under Part 8 of CPR.
- [31] Part 56 proceedings are not, as a matter of principle, "civil proceedings" which are commenced under Part 8. They are "...sui generis..." and "...are a peculiar specie of civil proceedings falling outside of the ambit of ordinary types of 'civil proceedings'... CPR 2000 recognizes this peculiar specie of civil proceedings by providing a regime of rules in Part 56 which are applicable only to proceedings of this kind..." **Richard Frederick and Lucas Frederick v Comptroller of Customs and Attorney General**¹, per Madam Justice George-Creque, as she then was, at page 15, paragraph 32.

¹ SLUHCv 2006/0397

- [32] Part 56 proceedings cannot be started under Part 8 of CPR. They *must* be started under CPR 56.3 and CPR 8.1 is therefore inapplicable to this case, and to Part 56 proceedings.
- [33] Part 56 sets out the procedure for the commencement and progress of Part 56 proceedings. These proceedings are distinct from what Madam Justice George-Creque, as she then was, referred to as "...ordinary types of 'civil proceedings'".
- [34] Part 56 proceedings are of two types: (a) those for Judicial Review of administrative action against both Private and Public bodies or officers, (such as, for example, a claim for Judicial Review against a private organization, such as a Cricket Association, a Club and the like, for actions taken by them which affect a person with locus standi, and a claim against a Public Officer, such as the Chief Immigration Officer, or a public body such as the Police Service Commission by persons who have been affected by their decisions,*[other than in respect of the person's Constitutional Rights]*, respectively), and (b) those for relief under a relevant Constitution by persons who claim that their *Constitutionally protected Rights* were, are or are likely to be affected by some act or omission on the part of a Public Officer or Body, as distinct from a Private Body or Organization, or an Officer of any of them.
- [35] These are two separate and distinct proceedings which can be started only under Part 56 of CPR. All **other** civil proceedings must start under Part 8 of CPR.
- [36] Before making a claim for an administrative order, an applicant must first obtain leave to do so. Upon being granted leave, the applicant is then required to go ahead and make his claim. It is therefore a two stage process. It appears from the title of this claim that a claim number was assigned to the matter upon the filing of the application for leave, and upon the filing of the Fixed Date Claim, the same suit number was assigned. As a matter of practice, therefore, the filing of the application for leave is treated as arising in the same cause as the application for judicial review itself.
- [37] Pursuant to Rule 56.7 (3) "The claimant must file with the claim form evidence on affidavit."

- [38] The Defendants/Applicants contend that (a) no affidavit was filed and (b) the Claimants/Respondents do not meet the requirements of Rule 56.7 (3) by stating in the Fixed Date Claim Form that "The Claimants rely on the affidavit filed in support of the application for leave for Judicial Review." [At page 11 of the Fixed Date Claim Form]. They should have actually and physically, filed the evidence on affidavit "...with the claim form..."
- [39] Further, submit the Defendants/Applicants, the Fixed Date Claim Form speaks to "...the affidavit..." when two affidavits were filed with the Application for Leave.
- [40] One of the fundamental aims of CPR 2000 is to introduce efficiency into civil proceedings in our Judicial System. This is achieved by the saving of time, and of costs to Litigants, and to the System itself.
- [41] The Rules are designed to achieve this aim. In fact, Rule 1.1, "The overriding objective", makes this aim quite clear. Rule 1.1 states: "The overriding objective of these Rules is to enable the court to deal with cases justly." Rule 1.1 (2) states that: "Dealing justly with cases includes- (a)...; (b) saving expense..."
- [42] Rule 1.2 requires the Court to seek to give effect to the overriding objectives when it, inter alia, interprets any rule. Of course the Court is not free to ignore the clear meaning of a rule in reliance on this provision, but when the meaning of a particular rule is reasonably capable of more than one interpretation, the Court should adopt that meaning which gives effect to the overriding objective.
- [43] With this in mind, I now turn to Rule 56.7 (3). What is the purpose of the requirement that evidence on affidavit must be filed with the claim form? Rule 56.7(4) sets out what the affidavit must contain and when compared to Rules 8.6 and 8.7 the purpose of the requirement is readily apparent. It is to perform a dual function: (a) to apprise the other side of the nature of the claim setting out all relevant facts; and (b) to do so in the form of evidence. The latter aspect is explicable on the basis that the claim is by way of Fixed Date Claim and pursuant to Rule 27.2(3), the Court may treat the first hearing as a trial.

- [44] There is to be no 'Trial by ambush.' Thus, CPR 2000 requires that litigants file Statements of Case, Statements of Claim and Affidavits – as well as any other documentary evidence which the parties may wish to rely on - at, or soon after, the commencement of proceedings.
- [45] What are the facts in this case? The Claimants/Respondents filed their application seeking leave supported by two comprehensive – voluminous – affidavits. These affidavits set out the facts upon which they sought to convince the Court that they should be granted Leave to make a claim for Judicial Review.
- [46] These affidavits were served, on June 11, 2012, on the Defendants/Applicants, prior to the Hearing of the Application for Leave which took place in July 2012.
- [47] The Defendants/Applicants filed *an affidavit in Reply to those affidavits* on June 27th 2012.
- [48] Leave was, *By Consent*, granted in July.
- [49] Then the Fixed Date Claim Form was filed. No [further] evidence on affidavit was filed with it. The Claimants/Respondents instead stated that they were relying on the affidavit[s] filed with the application for Leave. Each Claimant signed a Certificate of Truth endorsed on the Fixed Date Claim.
- [50] It is the contention of the Defendants/Applicants that this is fatal to the Claimants/Respondents because Rule 56.7 (3) says that "the claimant must file with the claim form evidence on affidavit." and they did not do so. End of story!
- [51] That cannot be the case. The evidence on affidavit on which the Claimants/Respondents intend to rely on the hearing of the Fixed Date Claim Form is the evidence on the affidavits filed, *and served on the Defendants/Applicants on June 11th 2012*. They are fully apprised on the contents thereof. In fact they filed an affidavit in response to that evidence contained in those affidavits on 27th June, 2012 – this was with respect to the application for leave, not the claim itself. They were fully

informed by the Claimants/Respondents in the Fixed Date Claim Form of their intention to rely on the evidence contained in those affidavits.

- [52] Is there any principle that requires the Court to Hold that a party cannot rely in a Fixed Date Claim on the contents of an affidavit filed earlier in the same cause? Counsel for the Defendants/Applicants has cited no authority which establishes such a principle. The requirement that an affidavit be filed *with* the Fixed Date Claim means that the affidavit must accompany the Claim. Does this require simultaneity of filing so that, for example, if there is a gap of 2 hours between the filing of the Claim and the affidavit the filing is fatally defective? What if the affidavit was filed two hours previously? So phrased, it becomes apparent that it would certainly not further the overriding objective to so interpret the rule. But if 2 hours is not fatal, would 1 day, or 2 days be, and if so, what would be the principle that distinguishes the 2 hour delay from the 2 day delay?
- [53] I find that the true requirement is that there must be the requisite evidence *in being and filed at the time the Fixed Date Claim Form is served on the Defendant*.
- [54] If this is so, then in my view it is also sufficient if that affidavit came into being in an earlier step in the proceedings so long as it satisfies the requirements of Rule 56.7 (4).
- [55] I Hold it to be the Law that where, like in this case, a Party who has sought and obtained Leave to make an application for an administrative order under CPR Part 56, and who has filed in support of that application, and who has served on all Defendants, *evidence on affidavit in support of that application for Leave*, CPR Rule 56.7 (3) is fully complied with if, in lieu of filing and serving the same affidavit[s] again, the Party clearly states in the Fixed Date Claim Form *that he intends to rely on the evidence contained in that affidavit in support of that application for Leave filed and served on the Defendants*.
- [56] In the event that I am wrong in relation to the above, in the circumstances of this case, I hereby deem the affidavits filed in Support of the Application For Leave, and served on the Defendants/Applicants, to have been duly filed, and served with the Fixed Date Claim Form in accordance with CPR Rule 56.7 (3).

[57] This Ground is dismissed.

FAILURE TO STATE THE PROVISIONS OF THE CONSTITUTION ALLEGED TO HAVE BEEN,
IS BEING, OR IS LIKELY TO BE BREACHED, CONTRARY TO RULE 56.7 (4) (c)

[58] The Defendants/Applicants submit that the Claimants/Respondents have failed to comply with the mandatory requirements of Rule 56.7 (4) (c) in that they have not stated the provisions of the Constitution which is allegedly being, or to have been, or is likely to be breached.

[59] I agree with this Submission.

[60] This Ground succeeds.

THE VIVA VOCE APPLICATION UNDER CPR RULE 56.4 (11) – THE FIXED DATE CLAIM
FORMED NOT FILED WITHIN 14 DAYS. – THE CASUS BELLII

[61] CPR Rule 56.4 (11) is pellucid. "Leave must be conditional on the applicant making a claim for judicial review within 14 days of receipt of the order granting leave."

[62] - It admits of no ambiguity.

[63] I have read and studied all the cases submitted by the Claimants/Respondents on this point. None of them deal either specifically or tangentially, or in principle with this issue. With the utmost respect for Counsel for the Claimants/Respondents, they all deal with the non-Part 56 powers of the Court under CPR 2000 in respect of matters in all Parts of CPR 2000 except Part 56.

[64] The **O'Neal** case, *ibid*, and the **Fredericks** case, *ibid*, deal specifically with the relationship, or lack thereof, between Part 56 and the other Parts of CPR 2000.

[65] Leave is the pre-requisite to the claim being made for judicial review: See: Remy J in the **O'Neal** case.

- [66] Without Leave there is no claim: *ibid*.
- [67] The Leave has a life of 14 days from receipt of the Order granting Leave.
- [68] This is governed by CPR Part 56. Not by any other Part of CPR 2000: See: *ibid*; and the dicta of Madam Chief Justice Pereira, as she now is, in the **Fredericks** case, at page 15, paragraphs 31 and 32, *ibid*.
- [69] The Parties cannot consent to the extension of that 14 day period. *ibid*.
- [70] In fact, not even the Court before whom the Application for Leave is brought can extend or diminish the 14 day period. *ibid*. For example, in granting Leave the Court cannot say that "Leave is conditional on the applicant making a claim for judicial review within 21 days – or within 7 days – of receipt of the order granting leave." The period within which the claim must be made is 14 days of receipt of the order granting leave.
- [71] If an applicant has gotten Leave but is unable to comply with that 14 day mandatory period, the applicant may well be obliged to apply afresh for Leave.
- [72] It is therefore clear that the Fixed Date Claim Form was not filed, as is mandated by Rule 56.4 (11), within 14 days of receipt of the order granting leave, notwithstanding the consent to the extension of time.
- [73] But, that is not the end of the matter. The Defendants/Applicants agreed to the requested extension of time for the filing of the claim. This agreement was made within the 14 day period and if agreement was refused the Claimants/Respondents could presumably have adopted a different course than they did. In relying on the agreement for the extension, therefore, there can be no doubt that the Claimants/Respondents acted to their detriment.

- [74] The Defendants/Applicants not only accepted service of the Fixed Date Claim Form, on September 10th 2012, they filed and served an Affidavit in Response to the Fixed Date Claim Form. Thereafter, on October 4th 2012, they filed the Application under consideration. In this Application they *did not* raise the issue of Rule 56.4 (11). It was raised, much to the shock and horror of Mr. Fuller, by Ms. Reid at the Hearing of this Application.
- [75] The Defendants/Applicants are, in the circumstances of this case, estopped from asserting that the Fixed Date Claim was filed out of time.
- [76] Further, the Defendants/Applicants failed to include this Ground in their Application.
- [77] At all times the Court retains the Inherent Power to do Justice, whether or not that Power is supplemented by Statute or Regulation, or by the Rules of Court.
- [78] It would be a flagrant injustice to permit the Fixed Date Claim Form to die because of innocent and consented to non-compliance with Rule 56.4 (11).
- [79] Notwithstanding the death knell pronounced upon the Fixed Date Claim Form by Rule 56.4 (11), the Court has the inherent power to resurrect it. Such resurrection can be retroactive.
- [80] *In the circumstances of this case* I deem the Fixed Date Claim Form to have been duly made within 14 days of the receipt of the Order granting leave to make the claim for judicial review.

ORDER

- 1) The Affidavits filed by the Claimants/Respondents in support of their Application for Leave to apply for Judicial Review, and having being duly served upon all Defendants in this matter, and it having being expressly stated in the Fixed Date Claim Form that those said

Affidavits are to be the evidence on affidavit upon which the Claimants/Respondents rely, the Claimants/Respondents are in compliance with CPR Rule 56.7 (3).

- 2) Alternatively, the said affidavits are hereby deemed to have been duly filed in accordance with CPR Rule 56.7 (3).
- 3) The Claimants/Respondents having not properly pleaded the Constitutional Grounds at all, all references in the Fixed Date Claim Form to the Constitution, Constitutional Rights and Constitutional Relief are hereby Struck Out.
- 4) The Fixed Date Claim Form filed on 30th July 2012, is hereby deemed to have been filed within 14 days of receipt of the Order granting the Claimants/Respondents Leave to make the claim for Judicial Review.
- 5) All Parties are to bear their own Costs.



Thomas W.R. Astaphan
High Court Judge [Ag.]