

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

ANTIGUA AND BARBUDA

ANUHCVP2015/0014

BETWEEN:

**[1] THE HON. ATTORNEY GENERAL
[2] THE HON. MICHAEL BROWN**

Appellants

and

D. GISELE ISAAC

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mde. Louise Esther Blenman

Chief Justice
Justice of Appeal
Justice of Appeal

On written submissions:

Sir Gerald Watt, QC, with him, Dr. David Dorsett for the Appellants
Mr. Justin L. Simon, QC for the Respondent

2016: March 11.

Interlocutory appeal – Part 56 of the Civil Procedure Rules 2000 –Application for administrative orders – Claimant seeking declarations – Whether leave of the court ought to have been obtained – Whether trial judge erred in not striking out the fixed date claim on the basis that no leave of the court was obtained – Defective affidavit in support of fixed date claim – Award of costs – Exercise of judge’s discretion – Whether trial judge erred in the exercise of discretion in awarding costs against the appellants

Ms. D. Giselle Isaac was appointed to the position of Executive Secretary Board of Education of Antigua and Barbuda by the Cabinet of the Government Antigua and Barbuda

pursuant to section 11 of the Board of Education Act, 1994.¹ Ms. Isaac was later suspended from the position and on her return to work following the suspension she was prevented from entering the office. As a result, Ms. Isaac filed a fixed date claim together with an affidavit in support seeking a number of reliefs in the form of declarations, damages and costs against the Attorney General and Minister Michael Brown (“the Minister”). The Attorney General and the Minister filed an acknowledgement of service of the fixed date claim but subsequently applied to the court for leave to withdraw it. The Attorney General and the Minister also sought an order to strike out the fixed date claim on the basis that it was a nullity since Ms. Isaac had not obtained leave of the court to file the fixed date claim, as well as an order for costs.

The application by the Attorney General and the Minister was vigorously opposed by Ms. Isaac. She contended that she was seeking administrative orders in the form of declarations pursuant to rule 56.1 of the Civil Procedure Rules 2000 (“CPR 2000”) as opposed to judicial review and was not seeking any coercive orders against the State; therefore, there was no need to obtain the leave of the court in order to file the fixed date claim.

The trial judge agreed with Ms. Isaac’s arguments and refused to strike out her fixed date claim. She found that Ms. Isaac only sought declarations and damages and that despite the language of the declarations sought, the claim did not seek coercive remedies and was not one for judicial review. She held that there was no requirement for Ms. Isaac to first obtain leave to bring the claim and that CPR 56.3 and 56.4 were inapplicable. The judge was also of the opinion that although the affidavit which was filed in support of the fixed date claim was not in compliance with CPR 56.7(4), the omissions in the affidavit did not warrant dismissal of the proceedings as they were at an early stage. The judge also refused to grant leave to the Attorney General and the Minister to withdraw the acknowledgment of service and she awarded costs against them.

The Attorney General and the Minister, being very aggrieved by the learned judge’s decision, have appealed.

Held: dismissing the appeal; awarding Ms. Isaac the costs in the court below and on the appeal in accordance with CPR 2000; and remitting the fixed date claim to the High Court to proceed in accordance with the rules, that:

1. Under CPR 2000, applications for declarations are regarded as a distinct category from applications for judicial review even though they are both applications for administrative orders. In contrast to an application for judicial review where the leave of the court first has to be obtained, there is no requirement for a claimant who wishes to make an application for other types of administrative orders apart from judicial review to first seek the leave of the court. CPR 56.7(1) is clear in that regard. The rules do not stipulate that a claimant who wishes to obtain a

¹ Act No. 11 of 1994, Laws of Antigua and Barbuda.

declaration must first obtain the leave of the court. If the rule makers wished to require a claimant who seeks an administrative order in the nature of a declaration to first obtain the leave of the court they would have said so clearly.

2. In our jurisdiction, a court must look to CPR 2000 to ascertain the procedure a claimant must follow in order to obtain a declaration and not the English Civil Procedure Rules which are not in pari materia with CPR 2000 in so far as administrative orders are concerned. Part 56 of the English CPR provides that declarations may be sought by way of judicial review whilst, in CPR 2000, applications for declarations are regarded as a distinct category from applications for judicial review. In this case, due to the difference in the two sets of rules on the issue of declaratory orders, the rule in **O'Reilly v Mackman** which the Attorney General and the Minister relied on was not applicable.

Christopher Noel O'Reilly and Others v Eric Wilson Mackman and Others
[1982] 3 WLR 1096 distinguished.

3. An applicant who seeks judicial review can also seek declarations in such an application. However, there is nothing to prevent claimant from simply filing an application for a declaration coupled with a claim for damages. Such an application would be consistent with a claim under CPR 2000 for an administrative order. If, however, an applicant files an application for judicial review seeking an administrative order for declarations and damages, a judge has power under CPR 2000 to treat the application for judicial review as an application which would be consistent with the declarations (administrative order) which is being sought. This was the state of affairs in this case, and as such these applications ought not to have been considered a nullity because of such an irregularity to the extent that the trial judge, at the first hearing, has the jurisdiction to treat a judicial review claim as an administrative claim. Accordingly, the learned trial judge was correct in refusing the application to strike out the fixed date claim which had been based on the fact that leave was not obtained.
4. An award of costs by a judge is premised on an exercise of discretion. An appellate court will only interfere with the exercise of a trial judge's discretion if it can be shown that the judge took into account irrelevant factors or that the judge failed to take into account relevant factors or that the judge committed an error of principle.
5. It is trite that costs follow the event. In this case, the Attorney General and the Minister were unsuccessful on their application to have Ms. Isaac's claim struck out on the basis that it was a nullity. Therefore, in so far as Ms. Isaac was successful in the court below, she was entitled to have her costs. There was no evidence to suggest that the trial judge failed to exercise her discretion without taking all of the relevant circumstances into consideration. There was no error in

the learned judge's exercise of her discretion in the costs order that she made; accordingly, there was no basis to interfere with the exercise of her discretion.

Charles Osten and Company v Johnson [1942] AC 130 applied, **Attorney General et al v Geraldine Cabey** MNIHCVAP2008/0008 (delivered 12th January 2009, unreported) applied, **Dufour and Others v Helen Air Corporation Ltd and Others** (1996) 52 WIR 188 applied.

6. In this case, even though the affidavit in support of the fixed date claim failed to comply with CPR 56.7(4), the omissions could be remedied by the filing of a supplemental affidavit. It would have been draconian for the judge to accede to the Attorney General's and Minister's request to strike out on the basis of a deficient affidavit. Accordingly, the trial judge was correct in holding that omissions in the supporting affidavit did not make the proceedings a nullity.

Real Time Systems Investment Limited v Renraw Investments Limited and Others [2014] UKPC 6 applied.

JUDGMENT

- [1] **BLENMAN JA:** This is an appeal against the decision of the learned judge who refused an application made by the Attorney General and Minister Michael Brown ("the Minister") to strike out the fixed date claim and affidavit in support filed by D. Gisele Isaac, on the basis that it was a nullity. The judge also refused to grant leave to the Attorney General and the Minister to withdraw their acknowledgment of service which they had filed. In addition, the judge ordered them to pay Ms. Isaac's costs. They are both dissatisfied with the judge's orders and have appealed.

- [2] Ms. Isaac resists their efforts.

Background

- [3] I propose to briefly refer to the relevant background of the Board of Education of Antigua and Barbuda. Ms. Isaac was appointed to the position of Executive Secretary by the Cabinet of the Government of Antigua and Barbuda, acting

pursuant to section 11 of the **Board of Education Act, 1994**.² For reasons which are not germane to this appeal, she was suspended from the position of Executive Secretary and on her return to work following her suspension, she was prevented from entering the office. As a consequence, Ms. Isaac filed a fixed date claim together with an affidavit in support in which she sought a number of reliefs in the nature of declarations, damages and costs against the Attorney General and the Minister.

- [4] Both the Attorney General and Minister filed an acknowledgment of service to the fixed date claim. Subsequently, the Attorney General and Minister applied to the court for leave to withdraw the acknowledgment of service which had been filed on their behalf. They also sought an order of the court to strike out the fixed date claim on the basis that it was a nullity since Ms. Isaac had not obtained the leave of the court and for costs to be granted to them. I propose to briefly refer to the application below.

The Application Below

- [5] The crux of the Attorney General and the Minister's application was that Ms. Isaac in her fixed date claim was seeking judicial review of the actions of the cabinet and therefore ought to have obtained the leave of the court in order to be able to institute the fixed date claim. Their contention was that she failed to do so and as a consequence the fixed date claim that she filed was a nullity. They further argued that the acknowledgment of service which was filed on their behalf ought not to have been filed since the claim was a nullity.

Fixed Date Claim

² Act No. 11 of 1994, Laws of Antigua and Barbuda.

- [6] Ms. Isaac through her counsel strenuously opposed the application on the basis that what she sought were administrative orders in the form of declarations pursuant to rule 56.1 of the **Civil Procedure Rules 2000** (“CPR 2000”) as distinct from judicial review. Learned counsel argued that in so far as Ms. Isaac was not seeking any coercive orders against the State, there was no need for her to have obtained the leave of the court in order to be able to file the fixed date claim.

The Judgment Below

- [7] Ms. Isaac’s arguments found favour with the learned trial judge who refused to strike out her fixed date claim. Indeed, the judge held that Ms. Isaac only sought declarations and damages. Therefore, the court was of the view that despite the language of the declarations sought, the claim seeks no coercive remedy and consequently was not one for judicial review. The learned judge also held that there was no requirement to first obtain the leave of the court in order to be able to prosecute the claim and that CPR 56.3 and CPR 56.4 are inapplicable. The judge also observed that the affidavit that was filed in support of the fixed date claim was not in compliance with CPR 56.7(4), however, the judge felt that the omissions in the affidavit did not warrant dismissal of the proceedings in so far as the proceedings were at an early stage. The first hearing had not taken place. The judge opined that to have dismissed the proceedings at this stage would have been draconian. The judge noted that CPR 56.11 provides that at the first hearing the court may allow the claimant to amend any claim for an administrative order and the omissions could have been rectified with an appropriate order.
- [8] In addition, the learned judge refused to grant the Attorney General and the Minister leave to withdraw the acknowledgment of service. Costs were awarded

against the Attorney General and the Minister. I propose now to address the grounds of appeal.

Grounds of Appeal

[9] The Attorney General and the Minister have filed six grounds of appeal as follows:

- “1. The learned judge erred in law when she held that an application for judicial review is identified by the type of remedies sought in the application rendering an in-depth analysis of the nature of the claim unnecessary as an examination of the remedies sought will identify whether the claim is one for judicial review or not.
2. The learned judge erred in law when she failed to consider the nature and substance of the claim which was one that was devoid of any element of public law but one that concerned a claim relating to a complaint of breach of an employment contract, a private law matter for which there was alternative remedies in a forum specifically constituted to deal with the Respondent’s complaint, and in so doing effectively denied the Appellants access to the court prescribed by law to determine the subject matter of the claim.
3. The learned judge erred when she characterised the order sought by the Appellants as draconian when the action of the Respondent in filing an amended affidavit, subsequent to the hearing of the application, was a telltale sign that there was recognition on the part of the Respondent that the affidavit that she had filed was fatally defective and could not satisfy the purpose for which it was intended.
4. The learned judge erred when she failed to find that the application was a proper one and not one that ought to be condemned in costs as the application provoked the Respondent into amending her originating affidavit thereby bringing herself into compliance with the rules and thereby averting a situation where the application for the administrative order would have proceeded in circumstances where neither the court nor the Appellants would be aware of the grounds upon which the application for an administrative order was brought.
5. The learned judge erred in the exercise of her discretion when she failed to offer the Respondent an opportunity to amend a manifestly defective and groundless affidavit, which would then have allowed the Appellants an opportunity to consider whether to proceed with or withdraw their application, bearing in mind the attendant risk.

6. The learned judge erred in the exercise of her discretion when she awarded costs against the Appellants in circumstances where the Appellants had by their application strenuously objected to the non-compliant affidavit of the Respondent which had been filed in the matter and which affidavit had been subsequently amended³] thereby satisfying the several valid objections raised by the Appellants.”

Issues

[10] The issues that arise from the grounds of appeal can be crystallised as follows:

- (1) whether the trial judge erred in not striking out the fixed date claim on the basis that no leave of the court was obtained;
- (2) whether the learned trial judge erred in refusing to grant the appellants leave to withdraw their acknowledgment of service; and
- (3) whether the learned trial judge erred in the exercise of her discretion when she awarded costs against the appellants.

Refusal to Strike Out Fixed Date Claim on the Basis that No Leave of the Court was Obtained

Appellants Submissions

[11] Learned Queen’s Counsel, Mr. Watt, submitted that the learned judge fell into serious error on this point. Judicial review, Mr. Watt, QC said, is a matter of substance and is not defined by the form of relief that is sought in the fixed date claim. He posited that a claim for a coercive order does not make a matter a judicial review matter. Mr. Watt, QC submitted that in the opening paragraph of the legal text **Judicial Review: Principles and Procedure**,⁴ the learned authors state that ‘Judicial review involves the courts reviewing the lawfulness of an enactment or a decision, action, or failure to act in relation to the exercise of a

³ It is to be noted however that an affidavit cannot be amended.

⁴ Jonathan Auburn, Jonathan Moffett and Andrew Sharland (Oxford University Press 2013) p. 3.

public function.’ Judicial review is a challenge to a decision made by a public body to determine whether or not the decision is lawful. Mr. Watt, QC further submitted that judicial review provides the means by which judicial control of administrative action is exercised and is a judicial invention to ensure that decisions are made by the executive or by a public body according to law. He contended that judicial review is quite different from an appeal. It involves a challenge to the legal validity of the decision of a public body and is concerned with the legality rather than the merits of the decision, with the jurisdiction of the decision-maker and with the fairness of the decision-making process rather than whether the decision was correct as held in **Kemper Reinsurance Co. v Minister of Finance and Others**.⁵

[12] Mr. Watt, QC reminded the court that judicial review is the court’s way of enforcing the rule of law. As was stated in **R (on the application of Cart) v Upper Tribunal**:⁶

“...the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law – that is to ensure that, within the bounds of practical possibility, decisions are taken in accordance with the law, and in particular the law which Parliament has enacted, and not otherwise. Both tribunals and the courts are there to do Parliament’s bidding. But we all make mistakes. No-one is infallible. The question is, what machinery is necessary and proportionate to keep such mistakes to a minimum?”

At paragraph 64 of the judgment, Lord Phillips opined as follows:

The rule of law requires that the laws enacted by Parliament, together with the principles of common law that subsist with those laws, are enforced by a judiciary that is independent of the legislature and the executive.

Lord Dyson at paragraph 122 postulated that:

“Prima facie, judicial review should be available to challenge the legality of decisions of public bodies. Authority is not needed (although much exists) to show that there is no principle more basic to our system of law than the maintenance of rule of law itself and the constitutional protection

⁵ [2000] 1 AC 1 at 14G-H.

⁶ [2011] UKSC 28 at para. 37 (Baroness Hale).

afforded by judicial review. But the scope of judicial review should be no more (as well as no less) than is proportionate and necessary for the maintaining of the rule of law.”

- [13] Learned Queen’s Counsel, Mr. Watt, submitted that the learned judge was wrongly persuaded by arguments presented by Queen’s Counsel for Ms. Isaac which were based on the law as it was prior to the 1977 reforms of the judicial review procedure. Mr. Watt, QC said that the learning as found in Sir Clive Lewis’

Judicial Remedies in Public Law⁷ is instructive:

“...Prior to the 1977 reforms of the judicial review procedure, there were two separate procedural routes by which the invalidity of a decision or action by a public authority could be established: an individual could either seek one of the prerogative remedies following the special procedure applicable to such remedies, or he could seek a declaration or injunction in an ordinary claim. The two procedures were entirely separate.

Following the 1977 reforms, declarations and injunctions in public law cases may now be sought alongside the prerogative remedies in an application for judicial review. A claimant may also include a claim for damages or restitution.”

- [14] Mr. Watt, QC referred to the case of **Christopher Noel O’Reilly and Others v Eric Wilson Mackman and Others**⁸ which gave rise to the rule in **O’Reilly v Mackman**. In this seminal case, the House of Lords was called upon to consider the exclusivity of judicial review. The House of Lords held in very clear terms (as disclosed in the head note) as follows:

“...that since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule it would be contrary to public policy and an abuse of the process of the court for a plaintiff complaining of a public authority’s infringement of his public law rights to seek redress by ordinary action and that, accordingly, since in each case the only claim made by the plaintiff was for a declaration that the board of visitors’ adjudication against the plaintiff was void, it would be an abuse of the process of the court to allow

⁷ (5th edn., Sweet & Maxwell 2015) 3-001 – 3-002.

⁸ [1982] 3 WLR 1096.

the actions to proceed and thereby avoid the protection afforded to statutory tribunals.”⁹

- [15] Queen’s Counsel submitted that an application for a declaration that the action of a public body is void (as was the declaration sought by Ms. Isaac in the instant case) must proceed by way of judicial review so that the public body is not deprived of the protection afforded it by the judicial review procedure – to include the requirement for the applicant for a declaration to obtain leave – so that it cannot be said that the case has, through the backdoor, ‘evaded the safeguards imposed in the public interest against groundless, unmeritorious or tardy attacks upon the validity of decisions made by public authorities in the field of public law’.¹⁰
- [16] Mr. Watt, QC submitted that it would be impossible for the court to declare that the decision of Cabinet to suspend Ms. Isaac from her position is wrong in law unless the court conducts a judicial review of the decision. In the circumstances, Mr. Watt, QC submitted that the learned judge fell into error when she found that ‘an in-depth analysis of the nature of the claim is not necessary, an examination of the remedies sought will identify whether the claim is one for judicial review or not’.¹¹ He said that the judge was wrong to hold that no leave was required before Ms. Isaac could have filed her fixed date claim.
- [17] Mr. Watt, QC stated that Ms. Isaac was appointed by Cabinet to the position of Executive Secretary of the Board of Education pursuant to section 11 of the **Board of Education Act, 1994**. By virtue of section 18(1)(a) of the **Interpretation Act**, it is Cabinet that is vested with the power to remove or suspend Ms. Isaac from her position. Ms. Isaac alleged that her suspension by Cabinet was illegal and that further she was constructively dismissed from her position as Cabinet Secretary and that her dismissal was unfair. Indeed, Ms. Isaac has commenced

⁹ At. p. 1097.

¹⁰ O’Reilly v Mackman at p. 1107B-C (Lord Diplock).

¹¹ Decision of the learned judge (delivered 29th April 2015) at para. 12.

proceedings with respect to her constructive dismissal in the Industrial Court, asserting that she was unfairly dismissed by the Board of Education. The Board of Education has applied to strike out the Industrial Court proceedings against it on the ground that an entity cannot be a party to an action for unfair dismissal when as a matter of law that party is not vested or endued with the power to dismiss the aggrieved party. The case of the Board of Education is simply this: (1) an action for unfair dismissal can only lie against the Board of Education where it is the case that the Board of Education can dismiss and (2) by the conjoint effect of section 11 of the **Board of Education Act, 1994** and section 18 of the **Interpretation Act**, it is Cabinet, and not the Board of Education that has the power to dismiss or remove Ms. Isaac from her position of Executive Secretary of the Board of Education.

- [18] Mr. Watt, QC posited that the subject matter of her complaint against the Cabinet is one of private law. He referred to Sir Clive Lewis' **Judicial Remedies in Public Law** at paragraph 2-156 and 2-157:

"It is well established that the mere fact that a person is employed "by a public authority does not per se inject any element of public law" into the relationship.

...

Disputes arising out of the employment relationship will be private law disputes. Thus claims to enforce a right derived from the contract⁴⁸⁸ [*R. v East Berkshire Area Health Authority Ex p. Walsh* above, fn. 471; *R. v London Borough of Lambeth Ex p. Thompson* [1996] C.O.D. 217; *R. v British Broadcasting Corporation Ex p. Lavelle* [1983] 1 W.L.R. 23; *R. (Arthurworrey) v London Borough of Haringey* [2002] I.C.R. 279 and *Evans v University of Cambridge* [2003] E.L.R. 8.] (or from statutory requirements which have been incorporated into the contract⁴⁸⁹ [*Ex. P. Walsh* [1985] Q.B. 152.]) are private law claims enforceable by ordinary action for damages or a declaration or injunction. A dispute arising out of the termination of a contract of employment or service will be treated as a private law dispute, even if the claimant is seeking to have principles normally seen as public law principles (such the obligation to observe procedural fairness or natural justice) grafted on the employment

relationship⁴⁹⁰ [*R. v Derby County Ex p. Noble* [1990] I.C.R. 808 (termination of the appointment of a police surgeon was private law only). *R. v East Berkshire Area Health Authority Ex p. Walsh* above, fn. 449.]. The courts still view this as an essentially private law dispute and, it seems, either the claimant will only be able to claim the benefit of these principles on the grounds that there is an implied obligation in the contract to observe them (such as an implied obligation to act in accordance with natural justice) or he will be unable to claim the benefit of these principles.⁴⁹¹ [See per Woolf LJ in *R. v Derby County Council Ex p. Noble* above, fn. 490.]. The fact that an employer is a public body,⁴⁹² [*R. East Berkshire Area Health Authority Ex p. Walsh*, fn 471 above.] or that there is a degree of public interest in the activities performed by the individual,⁴⁹³ [*R. v Derby County Council Ex p. Noble* above, fn. 490.] is not sufficient to make the matter a public law one.”

[19] Mr. Watt, QC argued that with regards to the determination of the existence or extent of a party’s right to lawfully dismiss an employee, the court ‘prescribed by law’ for the determination of this civil right is the Industrial Court. The instant matter relates to a ‘trade dispute’ and is a matter that is properly referable to the Industrial Court.

[20] Mr. Watt, QC submitted that there is no need for Ms. Isaac’s case to be litigated as a public law matter by the filing of an application for an administrative order (whether in judicial review or otherwise). It would be in the interest of all that the parties concentrate on the main issue – one of private law – which is, did the suspension and subsequent constructive dismissal (alleged by Ms. Isaac) violate Ms. Isaac’s right under section C56 of the **Antigua and Barbuda Labour Code**¹² not to be unfairly dismissed from employment?

Discretion to Award Costs Against the Appellant’s Wrongly Exercised

[21] Turning next to the costs order, Mr. Watt, QC acknowledged that the award of costs is an exercise of a judicial discretion. The exercise of a judicial discretion

¹² Cap. 27, Revised Laws of Antigua and Barbuda 1992.

must be on a principled basis failing which an appellate court may interfere so as to ensure adherence to settled principles and/or to avoid a miscarriage of justice. He commended the learning in the Privy Council case of **Thamboo Ratnam v Thamboo Kumarasamy and Kumarasamy Arimany D/O Kumarasa**:¹³

“The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion: see *Osenton (Charles) & Co. v. Johnston*¹ [1942] A.C. 130, 148; 57 T.L.R. 515, 521; [1941] 2 All E.R. 245, 257, H.L. (E). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice...”

- [22] Mr. Watt, QC stated that it had been argued by the Attorney General and the Minister that Ms. Isaac’s affidavit in support of her application for an administrative order was not in compliance with CPR 56.7(4).¹⁴ Among other things, the affidavit did not disclose any grounds supporting the application.
- [23] Queen’s Counsel said that it is beyond doubt that Ms. Isaac was obliged to accept that her affidavit was manifestly non-compliant with the rules of court in that subsequent to the hearing of the appellants’ application – but prior to the handing down of the decision of the learned judge – Ms. Isaac filed an amended affidavit to make it compliant with the rules of court and to meet the objections of the appellants.
- [24] He went on say that whilst striking out on account of a deficient affidavit that is amenable to correction might be a draconian move, it cannot be right as a matter of principle for a party that correctly submits that certain matters are procedurally improper and has been found to be correct in those submissions to be condemned in costs. The submissions and application of the appellants may not have resulted

¹³ [1965] 1 WLR 8 at 11G-H.

¹⁴ See paragraph 14 of the decision of the learned judge.

in the draconian measure of striking out, but it cannot be said that the application and submissions were a waste of the court's time or otherwise frivolous and vexatious as the submissions and application resulted in Ms. Isaac's attention being brought to the error of her ways and her need to amend accordingly. To impose a cost order on the appellants in such circumstances constitutes a miscarriage of justice contended Mr. Watt, QC.

- [25] In the circumstances, Mr. Watt, QC submitted that on the matter of costs the learned judge did not properly exercise her discretion and this warrants intervention from this Honourable Court.

Respondent's Submissions

- [26] It was submitted on behalf of Ms. Isaac that her fixed date claim which was filed pursuant to CPR 56.7 and which is the bone of contention on this appeal, did not seek any coercive remedy in relation to either her suspension or her alleged dismissal, which are private law issues. Ms. Isaac simply sought declaratory relief, that is, a judicial declaration of the law as applicable between the parties upon a proper interpretation of the **Board of Education Act, 1994**; and damages for breach of natural justice. Queen's Counsel, Mr. Simon submitted that no order was sought directing the appellants to do or not to do any specified act; no order was sought compelling the performance by the appellants of any public duty; and no order was sought quashing any determination made by the appellants.
- [27] Mr. Simon, QC said that the fact that Cabinet has the legal right to suspend Ms. Isaac is not disputed taking into consideration the conjoint effect of section 11(1) of the **Board of Education Act, 1994** and section 18(1)(a) of the **Interpretation Act**.¹⁵ What is in issue is whether or not on its true construction, the **Board of Education Act, 1994** gives the Minister of Education the authority or power (i) to issue

¹⁵ Cap. 224, Laws of Antigua and Barbuda 1992.

instructions to the Executive Secretary of the Board of Education; and (ii) to make a recommendation to Cabinet for the suspension of the Executive Secretary in the absence of an adverse report from the Executive Secretary's employer, the Board of Education; and additionally, (iii) whether the Executive Secretary was entitled to be heard before the publication of an adverse investigatory report on her performance of her duties as an employee.

[28] Mr. Simon, QC submitted that when a person institutes civil proceedings, he or she will usually hope to obtain an authoritative declaration of his or her rights coupled with the award of a judicial sanction against the defendant. If the court's judgment is executory and the defendant does not comply with it, coercive action may follow. But it is sometimes neither necessary nor desirable for a legal dispute to be settled by the threat of coercion. In such cases it is highly advantageous for the courts to have the power to make binding declarations of the rights and duties of the parties, without the necessity of decreeing any consequential relief.

[29] Mr. Simon, QC said that a declaratory judgment differs from other judicial orders in that it declares the law without pronouncing any sanction directed against the defendant. What is significantly important is that the issue determined by a declaratory judgment becomes *res judicata*, and the judgment forms a binding precedent, so that although non-compliance with a declaratory order does not evoke any direct legal sanction, acts done in defiance of its terms may well be held to be devoid of legal effect if their validity is challenged in subsequent proceedings.

Judicial Review Considered

[30] Mr. Simon, QC respectfully submitted that judicial review, whilst an administrative order application, is defined in CPR 56.1(3) by the nature of the remedies sought, and the decision of Madam Justice Clare Henry so holds after an exhaustive review of Ms. Isaac's and the appellants' objection.

[31] Mr. Simon, QC said that Part 56 of CPR 2000 addresses "administrative order" applications, of which there are four, as enumerated under CPR 56.1(1) (a) to (d), and specifically includes an application for a declaration, and an application for judicial review as two separate and distinct applications. CPR 56.1(3) specifically and clearly states that:

"The term "**judicial review**" includes the remedies (whether by way of writ or order) of –

- (a) certiorari, for quashing unlawful acts;
- (b) mandamus, for; requiring performance of a public duty...;and
- (c) prohibition, for prohibiting unlawful acts".

Mr. Simon, QC contended that one of these remedies must be sought in the relief claimed, if the application is to be considered as one for judicial review.

[32] Mr. Simon, QC submitted that CPR 56.3 is captioned 'Judicial review - application for leave', and provides that: 'A person wishing to apply for judicial review must first obtain leave'. No other administrative order application is subject to that stringent rule. CPR 56.7(1) provides that: 'An application for an administrative order must be made by a fixed date claim...' and again enumerates the four separate and individual applications to specifically include declaration, and judicial review. Judicial review is, therefore, only one of the reliefs sought by way of administrative order application.

[33] Mr. Simon, QC submitted that only judicial review applications (as defined by Part 56 of CPR 2000) necessitate the grant of leave before a fixed date claim can be filed; and, to the extent that an application is made which purports to be an application for a declaration, but is in reality an application for an order of certiorari or mandamus or prohibition, leave must first be obtained. **Re Blake** is the authority for this proposition submitted Queen's Counsel.¹⁶ Likewise, to the extent that in

¹⁶ [1994] 47 WIR 174.

seeking declaratory relief, an order of certiorari or mandamus or prohibition is sought, leave must first be obtained as stated in **Ivan O'Neal et al v The Supervisor of Elections of St. Vincent & The Grenadines et al and the Attorney General of St. Vincent & the Grenadines**.¹⁷

- [34] Mr. Simon QC said no such or similar complaint is made or can be made of Ms. Isaac's fixed date claim.

Declaratory Relief v Judicial Review

- [35] Mr. Simon, QC said that the appellants had submitted 'that the learned judge was wrongly persuaded by arguments presented by the respondent which was based on the law as it was prior to the 1977 reforms of the judicial review procedure'. Queen's Counsel at paragraph 13 of the appellant's submissions then quoted paragraph 3-002 of Judicial Remedies in Public Law, which reads: 'Following the 1977 reforms, declarations and injunctions in public law cases may now be sought alongside the prerogative remedies in an application for judicial review. A Claimant may also include a claim for damages or restitution.'
- [36] Mr. Simon, QC in reply made three very important points. Firstly, the 1977 reforms in the United Kingdom were not imported into Antigua and Barbuda law, whether substantively, or in procedural rules. Secondly, the reforms made it permissible - not mandatory - for declarations to be sought in an application for judicial review. Thirdly, the reforms did not make declarations a prerogative remedy.
- [37] Mr. Simon, QC argued that unlike this jurisdiction, the **Supreme Court Act, 1981**¹⁸ in the United Kingdom provides, in section 31, that applications for an order of mandamus, prohibition, or certiorari; a declaration or injunction under subsection (2); or an injunction under section 30 restraining a person not entitled to do so from

¹⁷ SVGHCV2009/0349 (unreported).

¹⁸ The Act has been renamed as the Senior Courts Act 1981.

acting in an office to which that section applies, 'shall be made in accordance with rules of court by a procedure to be known as an application for judicial review'.

[38] Mr. Simon, QC said that prior to that statute, Order 53 of the **UK Supreme Court Practice 1979** was amended on the recommendation of the UK Law Commission's Report on 'Remedies in Administrative Law', whose main recommendation was that a new form of procedure should be introduced to be known as an 'application of judicial review', which would enable a person seeking to challenge an administrative act or omission to apply to the High Court either for one of the prerogative orders of mandamus, prohibition, or certiorari, or in appropriate circumstances, a declaration or an injunction or damages.

[39] Mr. Simon, QC said an application for declaratory relief constituted a separate application, and Order 15 rule 16 of the **UK Supreme Court Practice 1979** provided that: 'No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.'

[40] Mr. Simon, QC stated that judicial review in the UK is now addressed in their Civil Procedure Rules, Volume 1, and rule 54.2 speaks to when the judicial review procedure must be used, namely where the claimant seeks a mandatory order; a prohibition order; a quashing order; or an injunction in specified circumstances and as well as when it may be used.

[41] According to Mr. Simon, QC, rule 54.3(1) of the English CPR speaks to when the judicial review procedure may be used:

“(1) The judicial review procedure may be used in a claim for judicial review where the claimant is seeking –

(a) a declaration; or

(b) an injunction^(GL).

(Section 31(2) of the Supreme Court Act 1981 sets out the circumstances in which the court may grant a declaration or injunction in a claim for judicial review)

(Where the claimant is seeking a declaration or injunction in addition to one of the remedies listed in rule 54.2, the judicial review procedure must be used)”

[42] Mr. Simon, QC posited that the seminal case of **O'Reilly v Mackman** on which the appellants rely, specifically dealt with the provisions of the former **UK Rules of the Supreme Court** Order 53 in respect of which the relevant provisions of the current UK CPR Part 54 are materially identical. Both of these court rules provide that declarations may be made by way of judicial review, and the House of Lords' ruling is to the effect that that is the preferable route in respect of certain applications for a declaration.

[43] Mr. Simon, QC submitted that that House of Lords decision can be distinguished and cannot be followed since the court rules applicable in this jurisdiction are not in pari materia with either the 1977 or the current UK court rules. Nowhere in CPR 2000 does it provide that declarations may be sought by way of judicial review applications. Declarations constitute a stand-alone administrative order application.

Affidavit Amendment

[44] Mr. Simon, QC stated that the issue of the faulty affidavit filed by Ms. Isaac was not a ground of the application filed by the appellants on 27th October 2014. It was raised in oral submissions and Ms. Isaac respectfully submitted that the omissions in her affidavit did not go to the claim of nullity raised by the appellants and could be cured by an amendment at an appropriate stage in the proceedings and referred the court to CPR 20.1 (as amended).

[45] Mr. Simon, QC contended that the subsequent amendment by Ms. Isaac (after the hearing of the appellants' application, but before the delivery of the judgment), ought, therefore, not to affect costs upon the dismissal of the appellant's application to deem the fixed date claim a nullity.

Discussion and Conclusion

[46] I propose to briefly refer to the nature of the claim below. A perusal of the fixed date claim and the affidavit in support makes it patent that Ms. Isaac is seeking to obtain relief based on alleged public law infractions by Cabinet.

[47] On this aspect, I find very attractive and persuasive the arguments that have been advanced by Mr. Simon, QC.

[48] An examination of the issues that are joined between the parties reveal that they are as follows:

- (a) Whether on the true construction of the **Board of Education Act, 1994** the Minister of Education is authorised to: (i) issue instructions to the Executive Secretary of the Board of Education; and (ii) make a recommendation to Cabinet for the suspension of the Executive Secretary in the absence of an adverse report from the Board of Education and (iii) whether the Executive Secretary was entitled to be heard before the publication of an adverse investigatory report on her performance of her duties.

I have no hesitation in agreeing with Mr. Simon QC that these are all public law issues.

[49] I propose to address the relevant law.

Law

[50] Part 56 of CPR 2000 is headed “Administrative Law”. CPR 56.1(1) delineates the scope of Part 56 and indicates that there are four types of applications namely:

- (a) by way of originating motion or otherwise for relief under the Constitution;
- (b) for a declaration in which a party is the state, a court, a tribunal or any other public body;
- (c) for judicial review; and
- (d) where the court has power by virtue of any enactment or at common law to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any discussion of a minister or government department or any action on the part of a minister or government department.

[51] CPR 56.1(2) states that such applications are generally referred to as “applications for an administrative order”. The conjoint effect of CPR 56.1(1) and CPR 56.1(2) is that the nomenclature “administrative order” refers to a variety of applications which include both declarations and judicial review.

[52] CPR 56.1(3) stipulates that the term “judicial review” includes remedies whether by way of writ or order of:

- (a) certiorari, for quashing unlawful acts;
- (b) mandamus for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case, and
- (c) protection for prohibition for prohibiting unlawful acts.

[53] CPR 56.1(4) provides that in addition to or instead of an administrative order, the court may, without requiring the issue of any further proceedings, grant:

- (a) an injunction;
- (b) an order for the return of any property, real or personal, or

(c) restitution or damages.

[54] CPR 56.3 addresses the procedure to be followed in an application for leave for judicial review.

[55] CPR 56.3(1) states that a person wishing to apply for judicial review must first obtain leave.

[56] CPR 56.3(2) provides that an application for leave may be made without notice.

[57] It is clear that CPR 56.3 deals specifically with applications for administrative order in the nature of judicial review applications. The other types of administrative orders application are not cognisable under this section.

[58] Under the heading “how to make application for administrative order”, CPR 56.7(1) states that:

“An application for an administrative order must be made by a fixed date claim in Form 2 identifying whether the application is for –

- (a) a declaration;
- (b) judicial review
- (c) relief under the relevant Constitution; or
- (d) for some other administrative order (naming it); and must identify the nature of any relief sought.”

[59] Rule 56.7(3) indicates that: ‘the claimant must file with the claim form evidence on affidavit.’

[60] Rule 56.9(1) provides that:

“The claim form and the affidavit in support must be served on the defendants not less than 14 days before the date fixed for the first hearing.”

- [61] I have no doubt and agree with Mr. Simon, QC that the English rules of procedure are not in *pari materia* with CPR 2000 in so far as administrative orders are concerned. Further, it is to our rules of procedure (CPR 2000) that we must look to ascertain the procedure a claimant must follow in order to obtain a declaration.
- [62] Part 54 of the English CPR provides that declarations may be sought by way of judicial review. In contradistinction, in CPR 2000, applications for declarations are regarded as a distinct category from applications for judicial review, even though they are both applications for administrative orders.
- [63] I reiterate that we must be guided by our rules of procedure, CPR 2000. Caution should be taken particularly when our rules differ from the English CPR. Due to the difference in the two sets of rules on the issue of declaratory orders, I am not persuaded that **O'Reilly v Mackman** is applicable to the appeal at bar. I agree with Mr. Simon, QC in so far as he pointed out the differences in the two sets of rules. Further, I would state that there is great danger in relying on the English cases which interpret section 31 of the **UK Supreme Court Act 1981** which introduced far ranging reforms to the judicial review procedure and law. Indeed, great caution should be exercised in seeking to do so since in the Eastern Caribbean there is no similar legislative reform. Section 31 of the **UK Supreme Court Act 1981** provides that application for an order of mandamus, prohibition or certiorari; a declaration or injunction under subsection 2 or an injunction shall be made in accordance with rules of court by a procedure to be known as an 'application for judicial review'.
- [64] Further, the English CPR rules are very different from our rules on this aspect. Rule 54.2 of the English CPR states that the claim is for judicial review where the claimant is seeking:
- (a) a mandatory order;
 - (b) a prohibiting order;

- (c) a quashing order; or
- (d) an injunction.

[65] The English CPR also provides that declarations and injunctions may be sought in a claim for judicial review either alongside of or instead of the prerogative remedies.¹⁹

[66] Our reforms of the rules for the most part were by the rule making committee, so in the Eastern Caribbean we must look at our rules for the necessary guidance. In this regard, I entirely agree with Mr. Simon, QC.

[67] In determining whether the learned judge erred in her determination in relation to a declaration, great significance is placed on CPR 2000 which stipulates the procedure to be adopted if one seeks judicial review. It is clear that the leave of the court first has to be obtained.²⁰ There is common ground in relation to this aspect.

[68] It is incontrovertible that a claim for a declaration is a specie of administrative order as provided in CPR 56.1(1). However, there is no requirement for the claimant who wishes to make an application for the other types of administrative orders apart from judicial review to first seek the leave of the court. CPR 56.7(1) is pellucid in this regard. The rules do not stipulate that a claimant who wishes to obtain a declaration must first obtain the leave of the court. I am entirely in agreement with Mr. Simon, QC in this regard.

[69] To further buttress my opinion above, simply by way of analogy, a claimant who seeks to make an application for an administration order under the relevant Constitution is clearly not required to seek the leave of the court before doing so.

¹⁹ See English CPR schedule 1 Rules of the Supreme Court Order 15 rule 16.

²⁰ See CPR 56.3(1).

Such a claimant simply brings the claim as of right.²¹ This does not negate the fact that it is open to a defendant to file an application and seek to have the claim struck out on the usual grounds. I have no doubt that Queen's Counsel, Mr. Watt's submission that a claimant who seeks to obtain a declaration must first obtain the leave of the court is not borne out by the clear reading of the wording CPR 56.1(1).²² By parity of reasoning, there is nothing in CPR 56.4 which indicates that in order to bring an application for declaration the claimant must first obtain the leave of the court. If the rule makers wished to require a claimant who seeks an administrative order in the nature of a declaration to first obtain the leave of the court they would have said so clearly. I do not accept Mr. Simon, QC's contention that CPR 56.1(3) defines judicial review. I have no doubt that to the contrary it merely provides a list of remedies which can be obtained in a judicial review application. This list of remedies is by no means exhaustive since the word "includes" is used in relation to the remedies. If it were to the contrary the drafters of the rule would have said that judicial review "is defined as"; instead, it merely states that the remedies "includes". It is therefore quite possible for a court to provide other remedies on a judicial review application. It is clear that what the section does not do is to define judicial review.

[70] I agree with Mr. Simon, QC that an applicant who seeks judicial review can also seek declarations in that application. However, there is nothing to prevent an applicant from simply filing an application for a declaration coupled with a claim for damages. Such an application would be consistent with a claim under CPR 2000 for a claim for an administrative order. It is trite that a claim for a declaration alone can be pursued.

²¹ See CPR 56.7(1)(c).

²² CPR 56.2 and 56.3 address the procedure to be engaged if someone wishes to apply for judicial review but it does not refer to the procedure for applying for a declaration.

[71] The conjoint effect of CPR 56.1(1) and 56.1(2) shows that there are four types of administrative applications of which an application for a declaration, which is distinct from an application for judicial review, are but two of the four types. In any event, if an applicant files an application for judicial review seeking an administrative order for declarations and damages (which was the state of affairs that existed in the court below) the learned judge has plenitude of powers under CPR 2000²³ to treat the application for judicial review as an application which would be consistent with the declarations – administrative order, which was being sought. I am of the considered view these applications ought not to be considered a nullity because of such an irregularity in so far as the trial judge at the first hearing has the jurisdiction to treat a judicial review claim as an administrative claim.²⁴ Accordingly, the learned trial judge was correct in refusing the application to strike out on the basis that leave was not obtained.

[72] The term judicial review is not a term of art. As a general rule it is used to refer to a multiplicity of procedures in which the court is engaged. For example, it is used to refer to the court's review procedure when it is adjudging the challenge to the constitutionality of legislation in which the applicant seeks an administrative order. Equally, the term judicial review is used to refer to the court's supervisory jurisdiction of administrative bodies or tribunals. It is also used to refer to the court's power to review the constitutionality of Acts of Parliament and subsidiary legislation. For a bit of historical context, a claimant was always permitted at common law to file a statement of claim and seek declaration.

[73] While there is some truth in that judicial review can be determined by the remedy that is sought, the remedy is not necessarily conclusive. This does not negate the fact that judicial review can be identified by the remedies sought in the application. However, I do not hold the view that the prerogative orders of certiorari,

²³ See CPR 56.6(3) and 56.11(2)(c).

²⁴ See CPR 56.6(3) and 56.11(2)(c).

mandamus or prohibition are the only types of remedies that are available on a judicial review application under CPR 2000.

[74] In the case at bar, the learned trial judge was quite correct in concluding that an in-depth analysis of the nature of the claim is not usually necessary; an examination of the remedies sought will normally identify whether the claim is one for judicial review or not. Clearly, the claim was one for declaration and not for judicial review. Further, I have no doubt that the judge was correct to conclude that since the fixed date claim was merely seeking declarations and damages, it was not one for judicial review and that to make such a claim leave was therefore not required; the provisions of CPR 56.3 and 56.4 were not applicable.

[75] Accordingly, the appeal fails on this ground. I turn now to the second ground of appeal.

Whether the Judge Erred in Refusing to Grant the Appellants Leave to Withdraw their Acknowledgment of Service

[76] In view of my conclusion on the first ground which is determinative of the appeal it has become otiose to address the second ground of appeal. I come now to the third ground of appeal.

Whether the Learned Trial Judge Erred in Awarding Ms. Isaac Costs

[77] It must be borne in mind that the Attorney General and the Minister filed an application to have Ms. Isaac's claim struck out on the basis that it was a nullity. They were unsuccessful in persuading the court that the claim should be struck.

[78] En passant, I have already stated that the learned trial judge was quite correct in refusing to strike out the fixed date claim on the ground that Ms. Isaac ought to have obtained the leave of the court. In effect, refusing the Attorney General's

and the Minister's application to have her claim deemed a nullity and accordingly struck out. I propose now to examine the issue of costs.

Costs

- [79] It is trite that costs follow the event. In so far as Ms. Isaac prevailed in the court below she was entitled to have her costs.
- [80] The law is clear. An award of costs by the judge is premised on an exercise of discretion. The court of appeal will only interfere with the exercise of discretion in very limited circumstances.
- [81] The appellate court will only interfere with the exercise of the trial judge's discretion if it can be shown that she took into account irrelevant factors or that she failed to take into account relevant factors or that the judge committed an error of principle.²⁵
- [82] In the case at bar there is no evidence which suggests that the learned trial judge failed to exercise her discretion without taking all of the relevant circumstances into consideration. In my view, there is no error in the learned judge's exercise of her discretion in the costs order that she made. Accordingly, there is no basis to interfere with the exercise of her discretion. The court can only interfere with her exercise of discretion if it is shown that it exceeded the general ambit within which reasonable disagreement is possible.
- [83] For the sake of completeness, it is worthy to mention that the learned judge was quite correct in holding that any omissions in the supporting affidavit did not make the proceedings a nullity. Even though the affidavit failed to comply with CPR

²⁵ See *Charles Osten and Company v Johnson* [1942] AC 130, *Attorney General et al v Geraldine Cabey* MNIHCVAP2008/0008 (delivered 12th January 2009, unreported), *Dufour and Others v Helen Air Corporation Ltd and Others* (1996) 52 WIR 188.

56.7(4), the omission could have been remedied by the filing of a supplemental affidavit. Indeed, to accede to the Attorney General and Minister's request on this basis would have been draconian as opined by the judge.²⁶ The judge's exercise of discretion was within the generous ambit within which reasonable disagreement is possible. The threshold therefore has not been met. There is therefore no basis for interfering with the costs that are awarded to Ms. Isaac.

[84] The appeal also fails on this ground.

[85] For the reasons given above, I would dismiss the appeal and award Ms. Isaac the costs in the court below and on this appeal in accordance with CPR 2000.

Fixed Date Claim

[86] The fixed date claim is remitted to the High Court to proceed in accordance with the rules.

[87] I gratefully acknowledge the assistance of all learned counsel.

Louise Esther Blenman
Justice of Appeal

I concur.

Dame Janica M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

²⁶ See *Real Time Systems Investment Limited v Renraw Investments Limited and Others* [2014] UKPC 6.