EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

MONTSERRAT

MNIHCVAP2014/0004

BETWEEN:

SYLVESTER SOLOMON

Appellant

and

HIS HONOUR SENIOR MAGISTRATE ROBERT SHUSTER

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

On written submissions:

Dr. David Dorsett, instructed by Cassell & Lewis, for the Appellant
Ms. Sheree Jemmotte-Rodney, Principal Crown Counsel, for the Respondent

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2015: August 11.

Interlocutory appeal – Natural justice – Judicial review – Right to fair hearing – Whether learned judge erred in dismissing appellant's application for leave to file and serve originating motion without giving appellant opportunity to be heard –Whether appellant's legal representative had right to be heard by court – Whether principles of natural justice breached by learned judge because of refusal to hear appellant or his legal representative – Whether learned judge erred in dismissing application to file and serve originating motion when it was the case that no leave was required to file originating motion and application was not frivolous or vexatious

An 'information on oath' filed on 9th May 2014, required that the appellant's two minor children be brought before the Juvenile Court. This led to a series of hearings before the respondent. At the conclusion of the hearings, the respondent ordered, inter alia, that the appellant be precluded from any further contact with his minor children until further order of the court. The appellant subsequently contended that the 'information on oath' should have led to hearings in a Juvenile Court and that on no occasion during the proceedings was the respondent sitting as a lawfully constituted Juvenile Court. Accordingly, the appellant filed an application in the High Court for leave to file and serve an originating

motion under rule 56(3)(1) of the Civil Procedure Rules 2000, in which he sought various orders and declaratory relief, on the ground that he was at all material times entitled to constitutional status and protection by the provisions of section 7(8) of the Montserrat Constitution Order 2010 ("the Constitution") and that the respondent had caused that provision to be breached.

Counsel who represented the appellant in the High Court, Mr. Warren Cassell, had recently been convicted of various offences, two of which had been upheld by the Court of Appeal. Mr. Cassell had appealed to the Privy Council, but at the time when he represented the appellant in the High Court, the appeal had not yet been determined. Mr. Cassell having been convicted of the offences, the Bar had moved the court to have him disbarred. However, because his appeal against the convictions was still pending, the disbarment application had been adjourned.

When the application for leave to file the originating motion had come on for hearing before the learned judge in the High Court, the judge refused to hear Mr. Cassell. The learned judge's reason for the refusal was that Mr. Cassell was a convicted felon and that a matter concerning his disbarment was before the court and had been adjourned for the determination of his appeal by the Privy Council. The learned judge further went on to dismiss the appellant's application for leave to file an originating motion, without hearing from the appellant, or from anyone on his behalf, indicating that the decision with which the appellant was dissatisfied was a decision from a magistrate and that the next stage should have been an appeal to the Court of Appeal rather than an application seeking leave to file an originating motion.

The appellant appealed the learned judge's decision. The issues raised by his grounds of appeal can be summarised as follows: (1) whether the learned judge acted in breach of natural justice by refusing to hear the appellant or his legal counsel; (2) whether the learned judge acted contrary to and in breach of section 7(8) of the Constitution by failing to hear the appellant or his legal counsel; and (3) whether the learned judge erred in dismissing the application to file and serve an originating motion when: (i) it was the case that no leave was required to file and serve an originating motion and (ii) it was not the case that the application to file and serve the originating motion was frivolous or vexatious.

Held: allowing the appeal and awarding costs to the appellant assessed in the sum of $2,000.00, that:

1. Mr. Cassell, not having been struck off the Court Roll at the time when he appeared before the learned judge, had a statutory right to practice and appear before the learned judge, notwithstanding that there were disbarment proceedings against him before the court. Since the disciplinary proceedings had been adjourned pending determination of Mr. Cassell's appeal to the Privy Council, there was no basis upon which the learned judge could have refused to hear Mr. Cassell since he had neither been suspended nor disbarred. Accordingly, the learned judge erred in refusing to hear Mr. Cassell and exercised his discretion improperly in doing so.

Section 71(2) of the **Supreme Court Act** applied.

2. An unfair hearing will result in a breach of the principles of natural justice. The right to a fair hearing entails each party being given an opportunity to put his own case before a decision is reached. The learned judge's refusal to hear the appellant's legal representative and the subsequent dismissal of his application without hearing the appellant or anyone on his behalf, denied the appellant the fair opportunity to be heard. The learned judge therefore erred in not allowing the appellant to be heard on his application.

   Board of Education v Rice and Others [1911] AC 179 applied; **Regina v Secretary of State for the Home Department, Ex parte Doody** [1994] 1 AC 531 applied; **B. Surinder Singh Kanda v Government of the Federation of Malaya** [1962] AC 322 considered; **R v Panel on Take-overs and Mergers, ex parte Datafin plc and Another** [1987] 1 All ER 564 considered.

3. A court must seek to do justice between the parties. Part 26 of CPR 2000 gives judges wide case management powers. In particular, pursuant to CPR 26.9, the court has a discretion to make an order to put matters right if there has been an error of procedure or a failure to comply with a rule, practice direction, court order or direction. Therefore, the learned judge having concluded that the appellant should have appealed the learned senior magistrate's decision to the Court of Appeal, it was clearly open to him to hear from the parties and make an order to put matters right instead of taking the drastic step of dismissing the appellant's application, which essentially amounted to striking out his claim for administrative and constitutional relief.

4. The appellant sought to challenge the constitutionality of the court that dealt with his matter and also the correctness of the orders that were made, and he did so by seeking leave to file a claim for judicial review and constitutional relief in the same proceedings. While CPR 56.3(1) provides that a person wishing to apply for judicial review must first obtain leave, CPR 2000 has no requirement for leave to file an originating motion for relief under a relevant Constitution. There is also no provision in the rules which indicates whether or not a person who wishes to bring a hybrid claim is debarred from obtaining leave. It was therefore open to the appellant to seek leave to file his claim for judicial review.

5. The appellant's application to file a claim for judicial review and to file and serve an originating motion being at the leave stage, the learned judge was not expected, at this point, to engage in a detailed review of the facts of the case, but he had to be satisfied, based on the grounds and facts before him, that the applicant had an arguable ground for bringing the claim, which had a realistic prospect of success. However, the learned

judge failed to properly consider the merits of the application before him and as a result of this, wrongly exercised his discretion in striking out the application for leave to file a claim for judicial review and to file and serve the originating motion.

Sharma v Browne-Antoine and Others (2006) 69 WIR 379 applied.

JUDGMENT

Introduction

[1] **BLENMAN JA:** This is an interlocutory appeal by Mr. Sylvester Solomon against the order of the learned judge in the court below whereby the judge refused to allow Mr. Solomon's legal representative to be heard and dismissed Mr. Solomon's application for leave to file and serve an originating motion. Mr. Solomon, being aggrieved by the learned judge's decision, has appealed against the judge's order. The Crown vigorously opposes the appeal on the ground that the judge was correct to dismiss Mr. Solomon's application.

Background

[2] On 9th May 2014 an 'information on oath' was filed requiring that Mr. Solomon's two minor children be brought before the Juvenile Court. The 'information on oath' led to a series of hearings before the learned Senior Magistrate Robert Shuster ("His Honour Magistrate Shuster"). At the end of the hearings, His Honour Magistrate Shuster ordered, amongst other things, that Mr. Solomon be precluded from any further contact with his minor children until further order of the court.

[3] Mr. Solomon contends however that the 'information on oath' should have led to hearings in a Juvenile Court and that on no occasion during the proceedings was His Honour Magistrate Shuster sitting as a lawfully constituted Juvenile Court. Mr. Solomon, being dissatisfied with the proceedings before His Honour Magistrate Shuster, filed an application to the High Court for leave to file and serve an originating motion under rule 56(3)(1) of the **Civil Procedure Rules 2000** ("CPR 2000") in which he sought various orders and declaratory relief on the ground that, inter alia, he was at all material times entitled to constitutional status and

protection by the provisions of section 7(8) of the **Montserrat Constitution Order 2010**[1] and that His Honour Magistrate Shuster had caused that provision to be breached.

[4] Indeed, on 24th June 2014, Mr. Solomon applied to the High Court for the following constitutional and judicial relief:

> "1. Leave to file and serve an originating motion and supporting affidavits under Rules 56 (3)(1) of the Eastern Caribbean Supreme Court Civil Procedure Rules seeking:
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> (i) An Order quashing the Order of [His Honour Magistrate Shuster] dated the 16th day of May 2014;
>
> (ii) An Order quashing the Order of [His Honour Magistrate Shuster] dated the 21st day of May 2014;
>
> (iii) A Declaration that the hearings of the matter before [His Honour Magistrate Shuster] on the 9th, 16th and 21st of May 2014 were unfair so as to amount to an abuse of power on the part of [His Honour Magistrate Shuster].
>
> (iv) An Order declaring that the hearings held on 9th, 16th and 21st day of May before [His Honour Magistrate Shuster] were ultra vires the law and therefore were nullities.
>
> (v) An Order declaring that the hearings held on 9th, 16th and 21st day of May before [His Honour Magistrate Shuster] were in breach of section 7 (8) of the Montserrat Constitution Order in that it was neither independent, impartial nor fairly determined.
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> (vi) An order that damages be assessed and paid to [Mr. Solomon] for breach of his rights, constitutional and/or otherwise.
>
> (vii) Such orders or directions as may be necessary or appropriate to secure redress by [Mr. Solomon] for contravention by the Respondents or either of them of fundamental and other rights and freedoms guaranteed to [Mr. Solomon].
>
> (viii) That the Respondents or either of them pay [Mr. Solomon's] costs of this application."

[1] SI No. 2474 of 2010.

[5] It is noteworthy that Mr. Warren Cassell was the legal counsel who appeared on behalf of Mr. Solomon, however, Mr. Cassell had been convicted of various offences and while he was successful in relation to one of the offences, two of his convictions were upheld by the Court of Appeal. He has however appealed his convictions to Her Majesty's Privy Council but the appeal has not yet been determined.

[6] Apparently, Mr. Cassell having been convicted of the offences, the Bar had moved the court to have him disbarred. However, in consequence of his appeal against the convictions, the disbarment application has been adjourned.

[7] The application for leave to file the originating motion came on for hearing before the learned judge and he refused to hear Mr. Solomon's legal representative, Mr. Cassell. The learned judge's reason for refusal was that Mr. Cassell was a convicted felon and that a matter concerning his disbarment was before the court and had been adjourned for the determination of his appeal by the Privy Council. The learned judge also went on to dismiss Mr. Solomon's application for leave to file an originating motion without hearing from Mr. Solomon, or anyone on his behalf, indicating that the decision with which Mr. Solomon was dissatisfied was a decision from a magistrate and that the next stage should have been an appeal to the Court of Appeal as distinct from seeking leave to file an originating motion.

Learned Judge's Order

[8] At the end of the hearing of Mr. Solomon's application, the learned judge made the following order:

> "(1) Court will not hear Mr. Warren Cassell.
>
> (2) Application for Leave to file and serve an Originating Motion is hereby dismissed."

Grounds of Appeal

[9] Mr. Solomon has appealed against the learned judge's decision on two grounds, however, for the sake of convenience they can they can be easily compartmentalised into the following three grounds:

(1) Whether the learned judge acted in breach of natural justice by refusing to hear Mr. Solomon or his legal counsel;

(2) Whether the learned judge acted contrary to and in breach of section 7(8) of the **Montserrat Constitution Order 2010** by failing to hear Mr. Solomon or his legal counsel; and

(3) Whether the learned judge erred in dismissing the application to file and serve an originating motion when: (i) it was the case that no leave was required to file and serve an originating motion and (ii) it was not the case that the application to file and serve the originating motion was frivolous or vexatious.

Law

[10] It is convenient to state at this point that section 7(8) of the **Montserrat Constitution Order 2010** provides as follows:

> "(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be determined fairly within a reasonable time."

[11] I now propose to deal with each ground of appeal in turn.

Ground 1 – Whether the learned judge acted in breach of natural justice by failing to hear Mr. Solomon or his legal counsel

Appellant's Submissions

[12] Learned counsel, Dr. Dorsett, submitted that in order for Mr. Solomon's case to have been determined fairly, he ought to have been granted the opportunity to be heard, whether by a legal representative or otherwise. This he contended is basic

natural justice. Dr. Dorsett relied on **B. Surinder Singh Kanda v Government of the Federation of Malaya**[2] in support of his proposition.

[13] Learned counsel, Dr. Dorsett, conceded that there are no hard and fast rules as to what is needed in order for a hearing to be fair and that the requirements of the duty to be fair will depend on the circumstances of the case. He referred the Court to **Lloyd and Others v McMahon**[3] where Lord Bridge of Harwich enunciated the following principles:

> "My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when anybody, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on anybody the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

[14] However, learned counsel, Dr. Dorsett, argued that there is a minimum requirement that a party against whom an adverse decision is to be made must be given an opportunity to be heard, and relied on **Regina v Secretary of State for the Home Department, Ex parte Doody**[4] in support of this contention. Dr. Dorsett contended therefore that the order and the actions of the learned judge denied Mr. Solomon an opportunity to be heard. He conceded that there is no general rule that fairness requires legal representation but submitted that it all depends on the circumstances of a case. Learned counsel, Dr. Dorsett, relied on the case of **Regina v Secretary of State for the Home Department and Another, Ex parte Tarrant**,[5] where Webster J detailed the circumstances which give rise to the need for legal representation (albeit in the context of a board of visitors at a prison):

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[2] [1962] AC 322 at 337.
[3] [1987] AC 625 at 702.
[4] [1994] 1 AC 531 at 560.
[5] [1985] QB 251 at. 285B-286E.

> "As it seems to me, the following are considerations which every board should take into account when exercising its discretion whether to allow legal representation or to allow the assistance of a friend or adviser. (The list is not, of course, intended to be comprehensive: particular cases may throw up other particular matters.)
>
> "(1) The seriousness of the charge and of the potential penalty.
>
> "(2) Whether any points of law are likely to arise. …
>
> "(3) The capacity of a particular prisoner to present his own case. …
>
> "(4) Procedural difficulties. …
>
> "(5) The need for reasonable speed in making their adjudication, which is clearly an important consideration.
>
> "(6) The need for fairness as between prisoners and as between prisoners and prison officers."

[15] Dr. Dorsett further maintains that Mr. Cassell, Mr. Solomon's legal representative in the court below, was a barrister who was not struck off the roll and that an enrolled barrister is entitled to practice as a barrister as provided by section 71 of the **Supreme Court Act**.[6] Learned counsel submitted that once Mr. Solomon's barrister appeared in court on behalf of Mr. Solomon, the learned judge was bound to hear him. He argued that a barrister's statutory right to practice cannot be extinguished by a side wind.

Respondent's Submissions

[16] Learned Principal Crown Counsel, Ms. Jemmotte-Rodney, submitted that there is no general right for a party to be legally represented when appearing before the court and a judge has discretion to determine whether or not to permit legal representation. No authority was provided for this proposition.

[17] Learned Principal Crown Counsel, Ms. Jemmotte-Rodney, argued that the fact that a barrister, solicitor or attorney-at-law is listed on the roll does not deprive a judge of the discretion to determine whether or not he will permit a particular legal

[6] Cap 2.01 of the Revised Laws of Montserrat 2008.

representative to appear before him. In any event, learned Principal Crown Counsel submitted that the refusal of the learned judge to hear Mr. Solomon's legal representative does not mean that his application was not determined fairly, that the application was determined contrary to section 7(8) of the **Montserrat Constitution Order 2010** and that Mr. Solomon was denied of opportunity to be heard. It is noteworthy that learned Principal Crown Counsel, Ms. Jemmotte-Rodney, did not provide any authorities in support of these submissions.

Discussion and Analysis

[18] In essence there are two limbs to be considered which arise from this ground of appeal. The first is whether the learned judge erred in refusing to hear Mr. Solomon's legal representative. The second is whether the learned judge's refusal to hear Mr. Solomon or his legal representative on his application was in breach of the principles of natural justice.

[19] I propose to first deal with the issue of the learned judge's refusal to hear Mr. Solomon's legal representative, Mr. Cassell. From the transcript of the hearing of the application, it is clear that it was on the basis of Mr. Cassell's conviction and the ongoing disbarment proceedings against him that the learned judge refused to hear Mr. Cassell. Also, Mr. Solomon, in his affidavit,[7] deposed to the reason given by the learned judge for not hearing his counsel and this has been uncontroverted by the Crown.

[20] In order to determine the lawfulness or otherwise of the judge's actions, a convenient starting point is the **Supreme Court Act**, the provisions of which govern the practice of barristers and solicitors in Montserrat. I will now set out the relevant provisions below:

> "**Enrolment of Barristers and Solicitors**
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> **71. (1)** Every person admitted as a barrister or solicitor of the court shall cause his name to be enrolled in a book to be kept for the purpose by the Registrar and to be called the Court Roll, and, upon his

[7] The affidavit was in support of Mr. Solomon's application for leave to appeal the order of the learned judge (filed 28th July 2014).

name being so enrolled, shall be entitled to a certificate of enrolment under the seal of the High Court.

(2) Every person, whose name is so enrolled, shall if enrolled as a barrister, be entitled to practice as a barrister, and, if enrolled as a solicitor, be entitled to practice as a solicitor in every court in the Montserrat." (My emphasis).

The Act further provides, at section 75, that barristers and solicitors may be suspended or struck off the roll:

"**75. (1)** Any two Judges of the High Court may, for reasonable cause, suspend any barrister or solicitor from practicing in Montserrat during any specified period, or may order his name to be struck off the Court Roll."

[21] Learned counsel, Dr. Dorsett, submitted, and it has not been refuted by learned Principal Crown Counsel, Ms. Jemmotte-Rodney, that Mr. Solomon's legal representative in the court below, Mr. Warren Cassell, was a barrister who had not been struck off the Court Roll. Accordingly, in accordance with the provisions of the **Supreme Court Act**, Mr. Cassell, not having been struck off the Court Roll, had the right to practice and appear before the learned judge, notwithstanding that there were disbarment proceedings against him before the court.[8] The fact was that Mr. Cassell has not been disbarred – there was no order that Mr. Cassell had been struck off the Court Roll. Accordingly, he was still on the Court Roll and entitled to practice as a barrister under the laws of Montserrat.

[22] At common law, judges have a right to suspend or prohibit barristers and solicitors from practice for reasonable cause.[9] Section 75 of the **Supreme Court Act** appears simply to be a codification of the common law except that this power must be exercised by two judges. It may well be that a criminal conviction against a barrister, depending on the nature of the conviction, is reasonable cause to

[8] However, it must be stated that perhaps as a matter of personal ethics, Mr. Cassell ought not to have appeared before the learned judge given that there were disbarment proceedings against him before the court, even though, legally, he had a right to appear. It must be remembered that the legal profession is a noble and an honourable profession.

[9] See: Attorney-General of the Gambia v Pierre Sarr N'Jie [1961] AC 617 at 630-631; In Re The Justices of the Court of Common Pleas at Antigua (1830) 1 Knapp 267 at 268.

suspend or prohibit a barrister from practice, but this must be done during disciplinary proceedings in accordance with section 75.

[23] Since the disciplinary proceedings had been adjourned to await the determination of Mr. Cassell's appeal to the Privy Council, there was no basis upon which the learned judge could have refused to hear Mr. Cassell since he had neither been suspended nor disbarred. Therefore, Mr. Cassell, not having been struck off the Court Roll, had a statutory right to appear before the learned judge. Accordingly, the learned judge erred in refusing to hear Mr. Cassell and exercised his discretion improperly in doing so.

[24] I come now to consider the second limb of this ground of appeal, namely, the learned judge's failure to hear Mr. Solomon or his legal representative. Even though the learned judge had wrongly refused to hear Mr. Cassell, his next course of action, at the very least, should have been to adjourn the hearing of the application so as to give Mr. Solomon the opportunity to seek alternative counsel. Perhaps, the learned judge could have expressed his concern to Mr. Cassell for appearing before the court and adjourn the application in order for Mr. Cassell to advise himself on the way forward. In any event, Mr. Solomon's application should not have been prejudiced by his choice of counsel.

[25] It must be remembered that after refusing to hear Mr. Cassell, the learned judge quickly dispensed with Mr. Solomon's application without hearing from Mr. Solomon or anyone on his behalf. He did however indulge input from the Crown. The judge ought to have inquired of Mr. Solomon whether he needed an adjournment in order to be able to properly represent himself or obtain alternative legal representation.

[26] In relation to the principles of natural justice, **B. Surinder Singh Kanda v Government of the Federation of Malaya** is quite instructive. In this case, their Lordships stated at page 337 that:

> "The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called

> natural justice. They are the twin pillars supporting it. The Romans put them in the two maxims: Nemo judex in causa sua: and Audi alteram partem. They have recently been put in the two words, Impartiality and Fairness. But they are separate concepts and are governed by separate considerations."

[27] It is apparent therefore that natural justice is rooted in fairness. In **R v Panel on Take-overs and Mergers, ex parte Datafin plc and Another**[10] Sir John Donaldson MR described a failure to observe the basic rules of natural justice as 'fundamental unfairness'. It flows from this that an unfair hearing would result in a breach of the principles of natural justice.

[28] It is well established that a 'body determining a justiciable controversy between parties must give each party a fair opportunity to put his own case'.[11] This principle was laid down by the House of Lords in **Board of Education v Rice and Others**.[12] Lord Loreburn LC, in referring to a decision of a Board of Education stated:

> "In the present instance, as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. **I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon everyone who decides anything**. … They can obtain information in any way they think best, **always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view**." (My emphasis).

[29] It is the law that the right to a fair hearing entails giving each party an opportunity to put its side of its case before a decision is reached. I am fortified in my view by the case of **Regina v Secretary of State for the Home Department, Ex parte Doody**, where Lord Mustill expressed the requirements of fairness:

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[10] [1987] 1 All ER 564.
[11] Halsbury's Laws of England, (4th edn. reissue, 1989) vol. 1(1)), para. 96.
[12] [1911] AC 179 at 182.

> "My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) **Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both**. (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."[13] (My emphasis)."

[30] Having regard to the above principles, I am satisfied that the learned judge's refusal to hear Mr. Solomon's legal representative and subsequent dismissal of his application without hearing Mr. Solomon, or any one on his behalf, denied Mr. Solomon the fair opportunity to be heard. Whilst I accept, as submitted by learned Principal Crown Counsel, Ms. Jemmotte-Rodney, that the court did not hear any formal submissions from the Crown, the Crown was still given an opportunity to be heard in opposition to the application. Mr. Solomon however was given no opportunity to be heard in support of his application.

[31] In the circumstances, I am of the view that Mr. Solomon should have been given an opportunity to be heard on his application and that the actions of the learned judge denied him that opportunity. Accordingly, for the reasons I have outlined above, I will allow the appeal on this ground.

[13] At p. 560D.

Ground 2 – Whether the learned judge acted contrary to and in breach of section 7(8) of the Montserrat Constitution Order 2010 by refusing to hear Mr. Solomon or his legal counsel

[32] In view of that fact that ground 1 is dispositive of the entire appeal, it is not necessary for me to go on to deal with the second ground as it has become otiose. Nevertheless, I propose to address the third ground of appeal.

Ground 3 – Whether the learned judge erred in dismissing the application to file and serve an originating motion when it was the case that (i) no leave was required to file and serve an originating motion and (ii) it was not the case that the application to file and serve the originating motion was frivolous or vexatious

Appellant's Submissions

[33] Learned counsel, Dr. Dorsett, argued that the learned judge erred in dismissing Mr. Solomon's application for leave to file and serve an originating motion when it was the case that no leave was required and it was not the case that the application was frivolous or vexatious. He referred the Court to part 56 of CPR 2000 which governs applications for administrative orders and specifically to CPR 56.3 which provides that applicants applying for judicial review must first obtain leave. Dr. Dorsett submitted that the application before the learned judge was not an application for judicial review, which does require the leave of the court, but rather, an application by way of originating motion which does not require leave. Dr. Dorsett explained that Mr. Solomon's application involved a claim in which Mr. Solomon was seeking constitutional relief and therefore the application did not require the leave of the court.

[34] Dr. Dorsett argued that at the heart of Mr. Solomon's application before the learned judge was his claim that, His Honour Magistrate Shuster, in deciding the matter involving his minor children, contravened section 7(8) of the **Montserrat Constitution Order 2010** which provides that:

> "Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before

such a court or other adjudicating authority, the case shall be determined fairly within a reasonable time."

The contravention of the above section, he argued, arose because his matter involving his minor children should have proceeded in a Juvenile Court and not before His Honour Magistrate Shuster in the Magistrates' Court.

[35] Dr. Dorsett submitted that the proceedings were initiated by an 'information on oath' as prescribed by section 26(1) of the **Juveniles Act**.[14] This section, he submitted, requires that a juvenile be brought before a Juvenile Court.[15] He contended that His Honour Magistrate Shuster did not bring the matter before a Juvenile Court duly established by section 4 of the **Juveniles Act**, rather he retained the matter and dealt with it in the Magistrates' Court. Dr. Dorsett submitted that because the matter was not brought before a properly constituted Juvenile Court, the Magistrates' Court had no jurisdiction in the matter; accordingly, Magistrate Shuster's orders with regard to Mr. Solomon's children were ultra vires.

[36] Dr. Dorsett submitted that the application by way of originating motion raised serious constitutional issues, including the protection of one's family life as provided by sections 2 and 9(1) of the **Montserrat Constitution Order 2010**.

[37] Section 2 provides that:

> "2. Whereas the realisation of the right to self-determination must be promoted and respected in conformity with the provisions of the Charter of the United Nations;
>
> Whereas every person in Montserrat is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, without distinction of any kind, such as sex, sexual orientation, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—
>
> (a) ...

[14] Cap 2.11 of the Revised Laws of Montserrat 2008.
[15] Section 26(1)(b)(ii) of the Juveniles Act.

(b) ...

(c) protection for his or her private and family life, the privacy of his or her home and other property and from deprivation of property save in the public interest and on payment of fair compensation, the subsequent provisions of this Part shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and related rights and freedoms, subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

[38] Section 9(1) states:

> "**Protection of private and family life and privacy of home and other property**
>
> 9.—(1) Every person has the right to respect for his or her private and family life, his or her home and his or her correspondence."

[39] Learned counsel, Dr. Dorsett, further argued that the learned judge made no findings that the application was frivolous, in the circumstances, he submitted, the learned judge erred in dismissing Mr. Solomon's application.

Respondent's Submissions

[40] Learned Principal Crown Counsel, Ms. Jemmotte-Rodney, submitted that the application before the learned judge was an application for leave to bring a claim for judicial review and was not, as learned counsel Dr. Dorsett contends, an application for a claim by way of originating motion for relief under the **Montserrat Constitution Order 2010**. This, learned Principal Crown Counsel argues, is evident on the face of the application and affidavit in support of the application, the application being headed 'application seeking leave' and including the statement:

> "In the matter of an application for leave to file claim seeking declaratory and other relief by Applicant SYLVESTER SOLOMON under part 56 (3) (1) of the Eastern Caribbean Supreme Court Civil Procedure Rules."

Ms. Jemmotte-Rodney emphasised that CPR 56.3(1) provides that a person wishing to apply for judicial review must first obtain leave.

[41] Learned Principal Crown Counsel, Ms. Jemmotte-Rodney, posited that the contents of Mr. Solomon's application evidenced that the application was one for leave to file a claim for judicial review, as Mr. Solomon was seeking declarations and orders on the basis that the hearings before His Honour Magistrate Shuster were unfair; amounted to an abuse of process; and were ultra vires, unlawful and unreasonable; which, she submits, are classic tenets of a judicial review claim.

[42] Learned Principal Crown Counsel, Ms. Jemmotte-Rodney, argued that judicial review is generally to be sought as a last resort and that in the absence of exceptional circumstances, permission to proceed by way of a judicial review claim will be refused where a claimant has failed to exhaust other possible remedies. She submitted that judicial review is to be used where there is no right to appeal, where all avenues of appeal have been exhausted or where there are no other safeguards provided. In support of her submission, learned counsel referred to the case of **R v Epping and Harlow General Commissioners, ex parte Goldstraw**[16] where Sir John Donaldson MR stated:

> "It is a cardinal principle that, save in the most exceptional circumstances, the judicial review jurisdiction] will not be exercised where other remedies were available and have not been used".

Accordingly, learned Principal Crown Counsel, Ms. Jemmotte-Rodney, submitted that, where there is an appeal process available, the court would not generally entertain an application for leave to apply for judicial review of a decision which can be appealed. Ms. Jemmotte-Rodney argued therefore that the judge's indication that there was an alternative remedy by way of an appeal of the decision of His Honour Magistrate Shuster to the Court of Appeal was a valid basis for dismissing the application.

[43] Ms. Jemmotte-Rodney posited that, in any event, the learned judge was justified in dismissing Mr. Solomon's application for leave to file a judicial review claim because the application before the court did not meet the test for the granting of

[16] [1983] 3 All ER 257 at 262J.

leave as set out by the Privy Council in the case of **Sharma v Brown-Antoine and Others**[17] which states:

> "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 … But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application … It is not enough that a case is potentially arguable; an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen'…."[18]

Learned Principal Crown Counsel, Ms. Jemmotte-Rodney, contended that although at the leave stage the court is not expected to engage in detailed review of the facts of the case, the court must still be sufficiently satisfied, based on the grounds and the facts available at this stage to conclude that there is a case fit for further investigation at a full inter partes hearing of a substantive application for judicial review.

[44] Learned Principal Crown Counsel, Ms. Jemmotte-Rodney, argued that Mr. Solomon was expected to set out a detailed statement of the grounds for bringing the judicial review claim in respect of which leave was being sought and set out fully and fairly all material facts that he knew or ought to have known. In support of her position, learned Principal Crown Counsel relied on the case of **R v Lloyd's London Ex p. Briggs**.[19] Learned Principal Crown Counsel submitted that Mr. Solomon failed to set out his claim, accordingly, the learned judge was justified in dismissing the application.

[45] Learned Principal Crown Counsel, Ms. Jemmotte-Rodney, submitted that in determining whether an applicant for leave to apply for judicial review had presented an arguable ground having a realistic prospect of success, it is only necessary for the court to ascertain whether the applicant had presented sufficient

[17] (2006) 69 WIR 379.
[18] At pp. 387-388.
[19] [1993] 1 Lloyd's Rep 176.

material to the court to assess the nature and gravity of any alleged breach of the legality of the decision-making process. She submitted that there was no material before the learned judge which would have revealed any basis upon which the learned judge could find that Mr. Solomon had an arguable case for judicial review on any ground and therefore the court was justified in dismissing Mr. Solomon's application.

Discussion and Analysis

[46] It is trite law that a court must seek to do justice between the parties and to this end, Part 26 of CPR 2000 gives judges wide case management powers. Specifically, CPR 26.1(2)(w) provides that:

> "(2) Except where these rules provide otherwise, the court may –
>
> …
>
> (w) take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective."

[47] CPR 26.9 also gives the court very broad discretionary powers. Subsections (2) and (3) of the rule provide that:

> "(2) An error of procedure or failure to comply with a rule, practice direction, court order or direction does not invalidate any step taken in the proceedings, unless the court so orders.
>
> (3) If there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right."

[48] It is therefore unfortunate, in light of the above provisions, particularly CPR 26.9(2) and (3) that the learned judge opted to dismiss Mr. Solomon's application on a technicality, which was, as far as the learned judge was concerned, that Mr. Solomon should have appealed the magistrate's decision to the Court of Appeal. It was clearly open to the learned judge to hear from the parties and make an order, given his broad case management powers under CPR 2000, to put matters right instead of taking the drastic step of dismissing Mr. Solomon's application, which, in the circumstances, was essentially the striking out of his claim for administrative and constitutional relief.

[49] I will address very shortly the learned judge's view that the gravamen of Mr. Solomon's application should form the basis of an appeal. With the greatest of respect, it is clear that Mr. Solomon, as alluded to earlier, was seeking to bring both a constitutional claim and a judicial review claim. In this regard, the learned judge misconstrued the true nature of Mr. Solomon's complaint, the thrust of which was the lack of constitutionality in the court that heard his case. In any event the learned judge ought not to have employed the nuclear option of striking out his claim. It must be remembered that striking out is a draconian step and where a court has available to it alternatives, it should consider whether those alternatives are more appropriate actions to take. This was made clear by the Privy Council in **Real Time Systems Limited v Renraw Investments Limited and Others**[20] in relation to a strike out application. Lord Mance, at paragraph 17 of the Board's judgment stated that:

> "The court has an express discretion under rule [26.3] whether to strike out (it 'may strike out'). It must therefore consider any alternatives, and rule 26.1(1)(w) enables it to 'give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective', which is to deal with cases justly."

[50] Accordingly, I have no doubt that the learned judge ought not to have dismissed Mr. Solomon's application on a technicality, but rather, in furtherance of the overriding objective of seeking to deal with the case justly,[21] he ought to have given directions and heard the parties with a view to put matters right.

[51] In any event, I am not of the considered view that Mr. Solomon made any procedural error in making his application to the learned judge. It is important to understand the nature of the application before the judge. Mr. Solomon's application stated that it was 'an application for leave to file [a] claim seeking declaratory and other relief … under part 56 (3) (1) of the Eastern Caribbean Supreme Court Civil Procedure Rules'. The first ground of the application in essence was that Mr. Solomon was afforded constitutional status and protection

[20] [2014] UKPC 6 at para. 17 (Lord Mance).
[21] See CPR 1.1.

by the provisions of section 7(8) of the **Montserrat Constitution Order 2010** and that the actions of His Honour Magistrate Shuster caused the provision to be breached.

[52] A perusal of the application before the learned judge clearly shows that it was a hybrid application for leave to file and serve a claim for judicial review and to seek constitutional reliefs. CPR 2000 permits this. Indeed CPR 8.4 provides that:

> "**Right to make claim which includes two or more claims**
> 8.4 A claimant may use a single claim form to include all or any other claims which can be conveniently disposed of in the same proceedings."

CPR 56.8 also states that:

> "**Joinder of claims for other relief**
> 56.8 (1) The general rule is that, where permitted by the substantive law, an applicant may include in an application for an administrative order a claim for any other relief or remedy that –
> (a) arises out of; or
> (b) is related or connected to;
> the subject matter of an application for an administrative order."

[53] Mr. Solomon was clearly seeking to challenge the constitutionality of the court that dealt with his matter and also the correctness of the orders that were made and he did so by seeking leave to file a claim for judicial review and to seek constitutional relief in the same claim.

[54] It is worth noting that CPR 56.3(1) provides that a person wishing to apply for judicial review must first obtain leave. Conversely, CPR 2000 has no requirement for leave to file an originating motion for relief under a relevant Constitution.[22] There is also no provision in the rules which indicates whether or not a person who wishes to bring a hybrid claim is debarred from obtaining leave.

[55] In light of my conclusion above on the nature of Mr. Solomon's application, it seems to me that it was open to Mr. Solomon to seek leave to file his claim for

[22] See CPR 56.7.

judicial review. I will address the matter of Mr. Solomon's application for leave in this regard to the judicial review claim.

[56] As a general rule, at common law, judicial review is not available where there is an alternative remedy by which an aggrieved party can seek recourse. One of the leading authorities on this point is **In re Preseton**[23] where Lord Scarman stated:

> "A remedy by way of judicial review is not to be made available where an alternative remedy exists. This is a proposition of great importance. Judicial review is a collateral challenge: it is not an appeal. Where Parliament has provided by statute appeal procedures … it will only be very rarely that the courts will allow the collateral process of judicial review to be used to attack an appealable decision."[24]

[57] However, Lord Scarman further stated that:

> "But cases for judicial review can arise even where appeal procedures are provided by Parliament … I accept that the court cannot in the absence of special circumstances decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. But circumstances can arise when it would be unjust, because it would be unfair to the taxpayer, even to initiate action under Part XVII of the Act of 1970. For instance, as my noble and learned friend points out, judicial review should in principle be available where the conduct of the commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of a representation giving rise to an estoppel. Such a decision could be an abuse of power: whether it was or not and whether in the circumstances the court would in its discretion intervene would, of course, be questions for the court to decide."[25]

[58] It is important to emphasise what the substance of Mr. Solomon's application before the learned judge was: he was raising a jurisdictional point; in essence his application was to seek declaratory and constitutional relief on the basis that His Honour Magistrate Shuster had no jurisdiction to hear the matter involving his minor children as the hearings did not take place in a properly constituted Juvenile Court. Also, Mr. Solomon was not only seeking to challenge the judge's decision but he was also seeking to challenge the jurisdiction of the court to hear the

[23] [1985] AC 835.
[24] At 852C.
[25] At 852E.

matter[26] and the leave application clearly indicated that he was seeking both constitutional and judicial relief remedies.

[59] It is correct that judicial review proceedings should not normally arise where a properly constituted authority is properly exercising its discretionary powers and reaches a decision. However, where the process by which the decision has been made is unlawful or ultra vires, it is open to a litigant to seek judicial review. As Lord Brightman noted in **Chief Constable of the North Wales Police v Evans**:[27]

> "Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

[60] This point was also made in the seminal case of **Inland Revenue Commissioners v National Federation of Self-Employed and Small Business Ltd.**,[28] Lord Diplock stated:

> "… judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful, but not for acts done lawfully in the exercise of an administrative discretion which are complained of only as being unfair or unwise …".

[61] It is noteworthy that Mr. Solomon's application to file a claim for judicial review and to file and serve an originating motion, as I have found, was at the leave stage. Accordingly, the learned judge at this point was not expected, as was rightly submitted by learned Principal Crown Counsel, Ms. Jemmotte-Rodney, to engage in a detailed review of the facts of the case, but had to be satisfied, based on the grounds and facts before him, that Mr. Solomon had an arguable ground for bringing the claim, which had a realistic prospect of success.[29] However, in this case, the learned judge did not even consider the merits of the application before him, and in my view, wrongly exercised his discretion.

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[26] See: Moses Hinds and Others v R (1975) 24 WIR 326 (PC).
[27] [1982] 1 WLR 1155 at 1173F.
[28] [1982] AC 617 at 637E.
[29] See: Sharma v Browne-Antoine and Others (2006) 69 WIR 379.

[62] I will briefly deal with the aspect of Mr. Solomon's application as it relates to the filing of a constitutional motion. As I have already indicated, Mr. Solomon was challenging the jurisdiction of His Honour Magistrate Shuster to hear the matter involving his minor children in the Magistrates' Court, when the matter ought to have been heard in a Juvenile Court as provided for by section 26(1) of the **Juveniles Act**. This, Mr. Solomon stated in his application, was a contravention of section 7(8) of the **Montserrat Constitution Order 2010**. Accordingly, based on the application that was before the learned judge, the learned judge erred in his discretion in dismissing the application without considering its merits. To the contrary, Mr. Solomon's complaint may well fall squarely within the separation of powers principles that were enunciated in **Moses Hinds and others v R**.[30]

[63] In view of the reasons I have given above, the learned judge ought not to have dismissed Mr. Solomon's application but rather he ought to have considered it on its merits. The appeal is therefore also allowed on this ground.

Costs

[64] Mr. Solomon has prevailed in this appeal and is entitled to have his costs which are assessed in the sum of $2,000.00.

Conclusion

[65] (1) Mr. Solomon's appeal against the order of the learned judge is allowed.

(2) The learned judge's order is set aside and the matter is remitted to the High Court to be dealt with in accordance with CPR 2000.

(3) Costs to Mr. Solomon in the sum of $2,000.00.

[30] (1975) 24 WIR 326 (PC).

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

Louise Esther Blenman
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Gertel Thom
Justice of Appeal