

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

MONTSERRAT

CLAIM NO. MNI HCV 2013/0022

IN THE MATTER of the decision of the Government of Montserrat not to ratify
"Montserrat, My Country" as the National Song of Montserrat

IN THE MATTER of an application for Judicial Review

IN THE MATTER of an application for an Administrative Order

BETWEEN:

DENZIL EDGECOMBE

Applicant

and

(1) THE PREMIER

(2) THE HONOURABLE ATTORNEY GENERAL

Respondents

Appearances:

Mr. David Dorsett for the Claimant/Applicant

Ms. Karen Reid with Mrs Sheree Jemmotte-Rodney for the Defendants /Respondents

2014: December 19

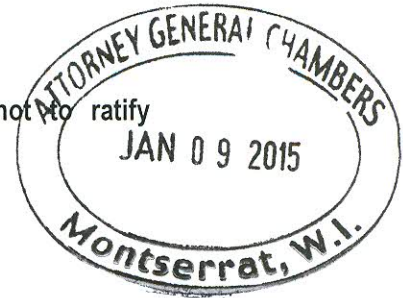
2015: January 9th

DECISION

- [1] COMBIE MARTYR, J. [Ag.]: By an Order of the Court of Appeal made in MNI HCV AP 2013/0003 on the 27th October 2014, setting aside the decision of the court below on the basis that there was an error of law, leave was granted to the Claimant/Applicant to apply for judicial review on the limited ground namely ***"whether he had a legitimate expectation that his song would have been ratified as the national song of Montserrat after its selection in 1995...."*** (the Order)

THE FIXED DATE CLAIM FORM

- [2] Pursuant to the Order, the Claimant on the 14th November 2014 filed a Fixed Date Claim Form in which he seeks judicial review of the decision of the



Government of Montserrat not to ratify the Claimant's song 'Montserrat My Country' as the National Song of Montserrat.

[3] The Fixed Date Claim Form is supported by an Affidavit of the Claimant in which the Claimant/Applicant seeks the following remedies:

- (1) A Declaration that the Applicant had a legitimate expectation that the song composed by him and titled "Montserrat My Country" would have been ratified by the Legislative Council and become the national song.
- (2) A Declaration that the legitimate expectation of the Applicant was unlawfully and unfairly frustrated by the 1st Respondent so as to amount to an abuse of power on the part of the 1st Respondent.
- (3) Damages
- (4) Costs pursuant to CPR 2000 r 56.13 (5).
- (5) Interest pursuant to section 7 of the Judgments Act.
- (6) Any other relief that the court deems fit pursuant to section 20 of the Supreme Court Act.

THE APPLICATION OF THE DEFENDANTS/RESPONDENTS FILED 26TH NOVEMBER 2014

[4] Service of the claim was duly acknowledged by the Defendants by the filing of an Acknowledgement of Service on the 26th November 2014 and by an Application of the Defendants presented to this Court on 19th December 2014, the Defendants seek to strike out certain of the remedies sought by the Claimant as set out in paragraphs 2, 3, 5, and 6 of the Fixed Date Claim Form, pursuant to **CPR 26.3 (1) (a) and or (c)** and more specifically set out hereunder:

- **A Declaration that the legitimate expectation of the Applicant was unlawfully and unfairly frustrated by the 1st Respondent so as to amount to an abuse of power on the part of the 1st Respondent.**
- **Damages**
- **Interest pursuant to section 7 of the Judgments Act.**
- **Any other relief that the court deems fit pursuant to section 20 of the Supreme Court Act.**

[5] The Grounds for the Application can be summarized as follows:

- (1) The Court of Appeal having found that the issue of delay had to be approached differently and had to be considered against the background of all the relevant circumstances brought out in the evidence before the court and the relief that is being sought in this case.
- (2) The grant of leave to seek a declaration in relation to the Claimant's legitimate expectation would not be detrimental to good administration or cause substantial hardship or prejudice the rights of any person, the court

exercised its discretion under CPR 62.2A (3) to give leave to the applicant to apply for judicial review on the limited ground namely “**whether he had a legitimate expectation that his song would have been ratified as the national song of Montserrat after its selection in 1995.**”

- (3) The Claimant must therefore be limited to leave granted by the Court of Appeal and can only seek the declaration that the Claimant had a legitimate expectation that his song would have been ratified by the Legislative Council as the national song of Montserrat and Costs.
- (4) Any other inquiry would exceed the Order and ought to be struck out on the procedural rules as aforementioned.

ORAL SUBMISSIONS OF COUNSEL

- [6] Counsel for the Defendants reiterated and sought to expound on the grounds and issues set out in the Notice of Application and Affidavit in support of Amelia Daley by submitting that the Court of Appeal granted leave on the basis of the limited ground and only after the court considered the issue of delay and all relevant matters and circumstances. Counsel stated further that paragraphs 2, 3, 5, and 6 of the Fixed Date Claim Form constitute remedies outside the limited ground granted by the Court of Appeal for founding the claim for judicial review and as such should be struck out.
- [7] Counsel cited the Court of Appeal case from Saint Lucia HCVAP 2012/006-***General Aviation Services Ltd et al v The Director General of the Eastern Caribbean Civil Aviation Authority et al*** as authority for asserting that permission was only granted where the Court of Appeal was satisfied that an arguable case of **only one** ground for seeking judicial review existed which merited investigation at a full oral hearing with all the parties and all the relevant evidence, the Claimant ought not be allowed to pursue any other ground, relief or remedy for which permission or leave was not granted.
- [8] In response to Speaking Points and authority filed by Counsel for the Claimant on the 18th December 2014, Counsel for the Defendants submitted that the Court of Appeal in the exercise of its discretion in granting leave to the Claimant limited to that one ground only, the court considered all matters alleged and complained of by the Claimant, the issue of delay, its jurisdiction under Section 20 of the Supreme Court Act to grant the relief and remedies sought, including damages, all of which were canvassed by the Claimant before the Court of Appeal.
- [9] Counsel asserted that the Court must give permission for the Claimant to include those remedies or relief as set out in paragraphs 2, 3, 5, and 6 of the Fixed Date Claim Form. According to Counsel the Fixed Date Claim Form for

judicial review must be confined to the limit of the ground upon which permission or leave was given and that is, the declaration in respect to legitimate expectation only, costs and nothing else. It is not open to the Claimant to add any other relief, remedy or ground.

- [10] Counsel for the Claimant relying on his Speaking Points and authority, in resisting the Application, submitted that the Certificate of Results of the Court of Appeal crystallizes the outcome of what occurred in the Court of Appeal. Leave was granted on the limited ground of legitimate expectation only, because the Claim before the court raised eight grounds (14-21) as detailed on page 3 of the Notice of Application filed by the Defendants. According to Counsel, some of the grounds became groundless and pointless to pursue by the time the matter came before the court. The Court of Appeal identified one limited ground (No. 16) as the ground which survived the onslaught of the other side.
- [11] Counsel asserted that the leave granted was limited to that 'one ground' but leave was not prescribed or limited to 'one remedy' only. Counsel pointed out that the Fixed Date Claim Form only addresses the certain 'ground' relating to legitimate expectation and identified 'some' of the remedies and other relief arising therefrom which were before the court as detailed on page 2 (4- 13) of exhibit 'A' to the Application filed by the Defendants herein and which the Claimant may or may not be able to establish at the judicial review hearing. Counsel explained that should the Court hold that the ground of legitimate expectation of the Claimant is established, the court would be invited to craft the remedies sought as set out in paragraphs 2, 3, 5, and 6 of the Fixed Date Claim Form.
- [12] Counsel posited that the remedies which the Claimant seeks are consistent with a finding that the Claimant had a legitimate expectation which was frustrated or denied by the public body, the non-fulfillment of which could amount to an abuse of power and which remedies the Claimant is entitled to claim in this Fixed Date Claim Form. No practical purpose could be served says Counsel if the court makes a declaration that the ground of legitimate expectation is established and fails to consider the remedies or relief that the Claimant is or appears to be entitled to.
- [13] Counsel cited the following to wit:

(1) Section 20 of the Supreme Court Act Cap 2.01 Revised Edition of the Laws of Montserrat (the Act) which states that “

The High Court and Court of Appeal respectively in exercise of the jurisdiction vested in them by this Act, shall, in every cause or matter pending before the court grant either absolutely or on such terms and conditions as the Court may think just, all such remedies whatsoever as any of the parties thereto may appear to be entitled in respect of any legal or equitable claim or matter so that, as far as possible, all matters

in controversy between the parties may be completely and finally determined, and all multiplicity of proceedings concerning any of these matters avoided” and

(2) the dictum of Mitchell JA (Ag) in ANUHCVP 2012/0042 at paragraph 17 -***Watt v The Prime Minister*** as authority which established the principle that the Claimant /Applicant is entitled under Section 20 of the Act in a suitable case to expect that the Court will exercise its jurisdiction to grant the Claimant /Applicant such remedies as he “**appears**” entitled to, so that all matters in controversy between the parties may be completely and finally determined.

- [14] Such remedies Counsel for the Claimant asserts can include the grant of a declaration which is within the courts’ discretion when the court considers it just and convenient to do so. Counsel referred to various well established grounds on which the courts grant and will refuse the grant of a declaration as set out in paragraphs 30.21 et seq – Judicial Review Principles and Procedure by Jonathan Auburn et al.
- [15] In response to the issue of delay which was addressed by the Court of Appeal in paragraph 33 of its Judgment, Counsel posited that the court was of the view that different considerations apply depending on what form of relief is being sought whether it be a relief in the form of a stay or relief in the form of a Declaration. On consideration of the evidence that was before the Court, it could not be said that the Claimant was not prompt in making his application for leave.
- [16] In reply, Counsel for the Defendants reiterated that not only did the Court of Appeal limit the ground for a claim for judicial review but also the claim was limited to that one Declaration only. Counsel stated further that paragraph 36 of the Judgment does not give the Claimant the right to add the Declaration at paragraph 2 of the Claim relating to abuse of power. Counsel relies on CPR 56.3 which mandates that leave must first be obtained and that the Claimant is not authorised to enlarge that leave if granted on a certain ground only.

LAW AND ANALYSIS

- [17] The Application before the court was made pursuant to CPR 26.3 (1) (a) and /or (c) which state as follows:

CPR 26.3 (1) : In addition to any other power under these rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that

- (a) there has been a failure to comply with a rule, practice direction, or order or direction given by the court in the proceedings;***

(b)

(c) ***The statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;***

- [18] Counsel for the Defendants did not provide any guidance to the court as regards the limb of 26.3 (1) (c) under which the application is made and neither Counsel assisted the court regarding a consideration of the rules and in providing any authority in support of or in opposition to the application to strike.
- [19] Under CPR 26.3 (1) (a) and/or 26.3 (1) (c), a judge has an unqualified discretion to strike out a statement of case or part of a statement of case, where there has been a failure to comply with an order of the Court or where the statement of case or part of the statement of case is an abuse of process of court or is likely to obstruct the just disposal of the proceedings.
- [20] In the case at bar the court is being asked to strike out certain remedies sought at paragraphs 2, 3, 5 and 6 of the Claimant's Fixed Date Claim Form as specifically set out in paragraph [4] above, so that the Claimant's claim is limited to seeking the declaration sought at paragraph 1 of the Claimant's Fixed Date Claim Form and costs. The basis advanced for the application is a failure by the Claimant to comply with the Order by failing to confine his claim for judicial review within the limited ground as set out in the Order and/or that the parts being asked to be struck out is an abuse of process of court or is likely to obstruct the just disposal of the proceedings.
- [21] CPR Part 1.1 provides that the overriding objective of these rules is to enable the court to deal with cases justly and the court must seek to give effect to the overriding objective when it (a) exercises any discretion given to it under the CPR or (b) interprets any rules.
- [22] As stated in the case of ***Bigazzi v Rank Leisure PLC 1999) EWCA Civ 1972***: a (case which considered the application of the English CPR Part 3.4(c) which is para materia with our CPR 26.3 (1) (a) and therefore applicable): The fact that a judge has that power does not mean that in applying the overriding objective the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly **without taking the draconian step of striking the case or parts of the claim** (my emphasis).

FAILURE TO COMPLY

- [23] The first issue to be determined is whether the remedies sought are outside the ground or beyond the scope of the limited leave granted to the Claimant.

- [24] The court does not accept that the inclusion of these remedies constitute a failure to comply with the Order. The court holds the view that the Claimant has confined his claim to the limited ground identified by the Court of Appeal and the remedies sought are consequent on a successful claim if so established by the Claimant at the substantive hearing of the claim.
- [25] In order for the court to properly address whether the remedies are within or without the Order, it would require the court to embark on a detailed enquiry into the merits of the claim relating to legitimate expectation by examination of the evidence. This course is beyond the scope of this application under consideration. In keeping with the overriding objective and in particular, dealing with the case justly, these are substantive matters which are best addressed at a full judicial review hearing.
- [26] The court agrees with counsel for the Claimant that the remedies which the Claimant seeks would be consistent with a finding that the Claimant had a legitimate expectation which was frustrated or denied by the public body, the non-fulfillment of which could amount to an abuse of power. Such remedies the Claimant is entitled to claim in this Fixed Date Claim Form. The court is satisfied that those remedies flow directly from the limited ground stated in the Order.
- [27] This court accordingly holds that there has been no failure by the Claimant to comply with the Order and the court therefore declines to grant an order striking out the remedies sought in paragraphs of the Claimant's Fixed Date Claim Form as identified in paragraph [4] hereof.

ABUSE OF PROCESS OF COURT

- [28] This court holds the view that where there is a defined or established rule, practice direction, order or process by which a Claimant is expected to move the court, an attempt to engage the court without adhering to the rule, practice direction, order or process, can amount to an abuse of process.
- [29] It was argued before the court that the Claimant seeks to expand or enlarge the scope of the leave granted and if so would amount to an abuse of process. However as has been found previously, the court does not accept that the remedies are not within the scope of the Order and holds that the remedies sought are consequential and within the scope of the ground identified in the Order. As such does not amount to abuse of process of court.

IS LIKELY TO OBSTRUCT THE JUST DISPOSAL OF THE PROCEEDINGS

- [30] In an application of this nature, the court does not explore a detailed examination of the merits of the claim or consideration of the evidence relating

to the substantive issues. The court must be mindful that in the exercise of its power to strike out the statement of case or part, that it does not itself contribute to the obstruction of the just disposal of the proceedings or even a denial of the Claimant's just relief.

- [31] The court does not agree with the Defendants that if the claim remains as pleaded that it is likely to obstruct the just disposal of the proceedings. In fact the court is not prepared to exercise its discretion at this stage of the proceedings, to excise parts of the claim which may have the effect of denying the Claimant an opportunity to be fully heard and to explore all remedies that may be available to him or to which he may be or appear to be entitled: Section 20 of the Supreme Court Act refers.
- [32] On that basis therefore the court again declines to grant an order striking out the remedies sought by the Claimant at the said paragraphs of the Fixed Date Claim Form.

IT IS ORDERED

1. Application by the Defendants to strike out the remedies sought in paragraphs 2, 3, 5 and 6 of Claimant's Fixed Date Claim Form filed herein on the 14th November 2014 is dismissed.
2. Costs to the Claimant to be agreed or otherwise assessed.

Cynthia Combie Martyr



High Court Judge (Ag.)