IN THE COURT OF APPEAL OF BELIZE, A.D. 2008

CIVIL APPEAL NO. 18 OF 2007

THE BELIZE BANK LIMITED **(INTERESTED PARTY)**	**Appellant/** **Interested Party**
AND	
THE ASSOCIATION OF CONCERNED BELIZEANS **THE MEDICAL AND DENTAL OFFICERS UNION OF BELIZE** **GODWIN HULSE** **NATIONAL TRADE UNION OF BELIZE**	**Claimants/Respondents**
THE PRIME MINISTER AND MINISTER OF FINANCE **THE ATTORNEY GENERAL OF BELIZE**	**Defendants/Respondents**
UNIVERSAL HEALTH SERVICES LTD	**Interested Party/Respondent**

BEFORE:

The Hon. Mr. Justice Sosa	**-**	**Justice of Appeal**
The Hon. Mr. Justice Carey	**-**	**Justice of Appeal**
The Hon. Mr. Justice Morrison	**-**	**Justice of Appeal**

Mr. Nigel Plemming, Q.C. with Mr. E. Andrew Marshalleck for the appellant.
Ms. Lois Young, S.C. for the Association.
Mr. Edwin Flowers, S.C., Solicitor General for the Prime Minister and Minister of Finance and the Attorney General.
Mr. Derek Courtenay, S.C. for Universal Health Services Ltd.

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22, 23, 26 October 2007 & 13 March 2008.

CAREY JA

THE APPEAL

1. This appeal is against an order of Arana J dated 20 June 2007 whereby the claimants/respondents were given leave to add two additional prayers for relief as follows:

"(iv) A Declaration that the Settlement Agreement dated the 23rd March 2007 and the Loan Note under the terms of which the 2nd Defendant was to pay Belize Bank Limited BZ$33,545,820.00 are unlawful as being contrary to the Finance & Audit Reform Act, No. 10 of 2005.

(v) A Declaration that the loan facility of BZ $12 million procured by the first and second Defendants from the Belize Bank Ltd on the 29th day of March 2007 is unlawful as being contrary to the Finance & Audit Reform Act, No. 10 of 2005.

The ground of appeal was that the judge erred in law and misdirected herself in finding that the claimants, having sought declaratory relief in relation to public law issues, did not have to proceed by way of judicial review and comply with the requisite procedural steps set out in part 56 of the Rules in that regard. It is to be noted that the appeal is brought by an interested party, joined by leave of the Court on 14 May 2007.

THE PLEADINGS

2. The claimants/respondents filed a Fixed Date claim against the defendants/respondents for the following relief:

(a) A Declaration that the Guarantee and Postponement Agreement dated the 19th day of December 2004 (the Guarantee) is unlawful as being contrary to section 44 of the Belize Constitution and sections 78, 79, 80, 81 and 119 of the Belize Constitution, taken together;
(b) A Declaration that the decision of the Prime Minister and Minister of Finance to satisfy the payment of monies allegedly due under the Guarantee, is unlawful;
(c) A Declaration that the provisions of section 114 of the Constitution of Belize, and section 3 of the Finance & Audit Reform Act, No. 12 of

2005, must be complied with before proceeding to satisfy the Guarantee by way of payment from the Consolidated Revenue Fund; and

(d) An injunction restraining the First and Second Defendants from satisfying the Guarantee without the authority of the National Assembly duly given in accordance with the Constitution of Belize.

By way of comment, it is to be observed that no objections have been taken by the defendants/respondents to the amendments sought and obtained by the claimants/respondents. The protagonists before us have been the Belize Bank as appellant and the claimants/respondents.

THE APPELLANT'S CASE

3. The leitmotif of the submissions meticulously deployed by Mr. Plemming, Q.C. is that where a claim is pursued only on the basis of an alleged breach of public law rights, such claim must be made by way of judicial review proceedings and the claimants' failure to do so, is an abuse of process and should be struck out. He relied on *O'Reilly v. Mackman [1983] 2 AC 237* where it was held, that: "as a general rule (it would) be contrary to public policy, and as such an abuse of process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under the public law to proceed by way of ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities". The House of Lords he argued considered that the specific protections for example, the need to seek permission to apply for judicial review, for the benefit of public authorities, made the imposition of this general exclusivity rule desirable. In this way, unmeritorious and frivolous claims were filtered out. Lord Diplock in *O'Reilly v. Mackman (supra)* had given illustrations of the type of situation where the exceptions would apply. Mr. Plemming, Q.C. cited *Roy v. Kensington and Chelsea Family Practitioners Committee [1992] 1 AC 624 and British Steel plc v*

Commissioners of Customs & Excise [1997] 2 ALL ER 366 as such examples. It is enough to say that the instant case does not come within their ambit and would not qualify as an exception. Another imposition under the Rules governing judicial review is the time limit of three months within which to apply for this remedy although the court does have the power to extend the deadline for good reason.

4. He urged very strongly as well, that it would be surprising indeed, if the Rules Committee intended the judicial review protections to be so readily avoided.

5. It was further submitted that Rule 56.1(1)(c) which I will set out hereafter, contrary to the arguments of the claimants/respondents does not create a right independent of the judicial review procedure, to seek a declaration as to public law rights. If it did, he contended, all prospective claimants could avoid the safeguards for defendants and affected third parties which the judicial review procedure provided. Rule 56.1 (1)(c) governs declaration against public bodies where the issue concerns private law rights as opposed to public law rights. He supported this thesis by providing us with a historical background to the judicial review procedure in England which he said introduced the right to seek declaratory relief as to the public law rights. It was the introduction of the judicial review procedure which enabled a litigant to seek a declaration in regard to public law issues. Proposals by the English Law Commission Report on Remedies (No. 73, March 1976) were eventually enshrined in the English Rules; RSC Ord. 53 and in Supreme Court Act 1981. The English Rules made it clear that an application for judicial review was intended to include all the prerogative orders as well as declaratory and injunctive relief where a claimant brought claims for breach of his public law rights.

6. Mr. Plemming also submitted that assuming Rule 56.1(1)(c) allows applications for a declaration as to private law rights, a claimant must satisfy the old test of standing, that is, “a person who applies for a declaration mush have a personal

legal right or interest which the alleged illegal action or decision infringes or threatens to infringe. The rationale for this is in the private nature of declaratory relief". We were referred to the observations of Rawlins JA in *The Attorney General v. Francois (unreported)*, Court of Appeal, St. Lucia judgment dated 29 March 2004. (para 147) It follows, he contends, that the claimant must plead and lead evidence to show that he or she is personally adversely affected by the decision challenged. It was not sufficient for the claimants to assert that he is a taxpayer or contributor to the Consolidated Fund. The Claimants have failed to meet the test.

THE CLAIMANTS' RIPOSTE

7. Ms. Lois Young, S.C. contended that Part 56 of the Civil Procedure Rules, 2005 (CPR) is clear and unambiguous. There was no provision in the Part which prohibited the granting of a declaration challenging public law actions even though private law rights are not at stake. Claimants seeking declarations determining questions of public law, were obliged to bring their claim under Part 56. Judicial Review is specifically defined in Rule 56.1(3). The declarations which the claimants sought to add related to two agreements involving the appellant and the defendants/respondents as the claimants were not seeking to quash any act or decision of those respondents. They were content to seek declarations regarding the illegality of the Government's action in borrowing 33 million dollars, and nothing else. She noted parenthetically that neither defendants/respondents had objected to the amendments nor had they appealed the order.

AN ANALYSIS

8. In considering the helpful submissions addressed to us, it is important to keep in mind, what is the nature of the matter before us. The order from which this appeal originates is the grant of permission to amend a Fixed Date claim by the

addition of two prayers. It must be borne in mind that this appeal is being heard at an interlocutory stage of the proceedings and we are not determining the merits of the originating proceedings. It is necessary also to remind ourselves that we are construing the Belizean Supreme Court Civil Procedure Rules which in common with similar rules in other Caribbean countries, albeit informed by the Woolf Reforms in England, are not replicas of the English Rules (RSC Ord. 53).

9. A convenient starting point in this matter is part 56 of the Supreme Court Rule which is headed "Constitutional and Administrative Law" which deals with four discrete categories of cases as under:

> 56.1(1) This part deals with applications
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> (a) for judicial review;
>
> (b) for relief under the Constitution;
>
> (c) for a declaration in which a party is the Crown, a court, a tribunal or any other public body; and
>
> (d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, or any decision of a Minister of Government or Government Department or any action on the part of a Minister or Government Department.
>
> (2) In this part such applications are referred to generally as **"applications for an administrative order" (Emphasis supplied)**

In my view, any comparison of Part 56 with Order 53 of the English Rules will show a difference which necessarily I would suggest, creates disparate effects. The administrative applications are of course a much wider grouping than Order

53 which essentially is concerned with judicial review. Part 56 relates to four discrete categories of applications. Declarations other than those spelled out in 56.1(c) are dealt with in a separate and distinct rule, viz. Part 8 of the Supreme Court Rules. A litigant who seeks a declaration in which the other party is as set out in the Rule, has a right to do so in virtue of this rule and in common with any other litigant applying for an administrative order he must have standing, which means, he must show that he has a "sufficient interest" in the matter under challenge. Rule 56.13(1) provides:

> (1) At the hearing of the application, the judge may allow a person or body which appears to have a sufficient interest in the subject matter of the claim to make submissions whether or not served with the claim form.

I would suggest that sufficient interest "for purposes of judicial review as defined in Rule 56.2 is no different for purpose of an administrative application as is contemplated in Rule 56.13(1). One of the sets of persons who has sufficient interest is to be found at 56.2(2)(e):

> "any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application";

Mr. Plemming, Q.C. pinned a deal of his submissions to the mast of *O'Reilly v. Mackman [1981] A.C. 237* where it was held that where a litigant is seeking to enforce public law rights, it is an abuse of process not to proceed by way of judicial review. At p.285 it was stated that:-

> "as a general rule be contrary to public policy, and as such an abuse of process of the court to permit a person seeking to establish that a decision of a public authority infringed rights to

which he was entitled to protection under public law to proceed by way of ordinary action and by this means to evade the provisions of Ord. 53 for the protection of such authorities".

It is plain that *O'Reilly v. Mackman (supra)* was decided with Ord. 53 in mind. Of course, it is as well to remind, that, that decision was arrived at well before the Woolf Reforms took effect in England. The winnowing or filter process which it is argued, is demonstrated by the leave process to which judicial review applications are initially subject, is not absent from administrative applications under Belizean Rules. Such applications are the subject of a case management process which serves the like process of filtering out frivolous or unmeritorious applications. It is of course, true that there is no three months time limit for bringing such applications. But declaratory orders being discretionary, the court might refuse to grant the declaration if it served no useful purpose. I venture to think that a claim made after protracted delay, is unlikely to serve any useful purpose for any sense of grievance would have long dissipated, and in point of fact, Rule 56.5(1) accords the power to refuse relief in case of unreasonable delay.

10. There is I think, very good reason not to seek to assimilate the Belizean and English positions, an exercise which Mr. Plemming, Q.C. wishes us to perform. In England, there is no written Constitution, but there is in Belize. The effect of the written Constitution is that an application for an administrative order can be made either by judicial review or constitutional motion. Consequently the rules do not require leave in one but they do in the other. The significance of what I have stated thus far is to demonstrate that the Belizean and English positions are divergent. Ms. Lois Young, S.C. is correct when she argues that Part 56 gives the court great flexibility in dealing with claims for administrative orders. The former situations are gone and the court has a wide selection of remedies and combination of remedies to choose from. This can be seen by a reference to

Rules 56.1(4); 56.8(2); 56.6(3); 56.13(3). The New Rules should be given a liberal rather than a restrictive interpretation.

CONCLUSION

11. I conclude therefore that the amendments were properly granted. They allow the parties who have a real interest in the Fixed Date claim namely the claimants and the defendants, to have the issues between them decided without prejudice to either. In my opinion, the claim should be allowed to proceed and not brought to an end at the instance of a party whose interest, as I am presently advised, cannot be adversely affected by these proceedings. Finally, I would wholly reject the suggestion made by Mr. Plemming, Q.C. that unless the declaration remedy is limited to private rights, the judicial review process would become redundant. As Ms. Lois Young observed in her skeleton argument, the aspect of judicial review which no other remedy possesses is, that the decision can be questioned and the claimant not left to depend on the goodwill of the public authority to respect the court's declaration. An order under Part 56, of a declaration, suits the claimant's purposes admirably. In my judgment the defendants/respondents for the reasons I have set out above, are justified in that view. It is for these reasons that I agreed with other members of the court, that the appeal be dismissed, the order of the court below affirmed and the claimant/respondents to have the costs of the appeal to be taxed, if not agreed.

CAREY JA

SOSA JA

On 26 October 2007 I agreed with the other members of this Court that the appeal should be dismissed, that the portion of the order of the court below appealed from, namely that which is numbered 2, should be affirmed and that the respondents should have their costs of the appeal, to be taxed if not agreed. I wish further to say only that I concur in the reasons for judgment given by Carey JA in his judgment, which I have been able to read in draft.

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SOSA JA

MORRISON, JA

Introduction

12. This is an appeal from an order of Arana J made on 20 June 2007 granting leave to the claimants/respondents to amend their fixed date claim in claim no. 218 of 2007 to add two additional prayers for relief to the four originally asked for.

13. When the appeal came on for hearing on 22 October 2007, Ms. Lois Young SC, counsel for the claimants/respondents, took a preliminary objection to the appeal proceeding, on grounds which are not now relevant. The court ruled that the appeal was properly constituted and the hearing proceeded to a conclusion on 26 October 2007, when the appeal was dismissed and the order of Arana J affirmed, with costs to the claimants/respondents to be taxed if not agreed. These are my reasons for joining in that decision.

The parties

14. The appellant is a commercial bank, which is a party to the following commercial agreements/arrangements between itself and the Government of Belize:

(a) a Guarantee and Postponement Agreement dated 9 December 2004 between the Government of Belize and the Bank (the Guarantee);

(b) a Settlement Deed and Loan Note dated 23 March 2007 between the Government of Belize and the Bank (the **March Settlement Agreement and Loan Note**); and

(c) a loan facility dated 29 March 2007 between the Bank, Universal Health Services Limited, Universal Specialist Hospital Company Limited, Belize Medical Engineering Company Limited, Integral Health Care Limited, the Pathology Laboratory Limited and the Government of Belize (the **Loan Facility**).

15. The first named claimant/respondent, the Association of Concerned Belizeans, is a not-for-profit company limited by guarantee, the broad objective of which is to watch over and safeguard the interests of the public of Belize in a wide range of matters concerning the economic, social, cultural, and/or spiritual affairs of the nation. In the proceedings in the Supreme Court it has been appointed as a representative party for 1,667 individuals who have indicated their wish to be represented in the proceedings by the first named claimant/respondent.

16. The second named claimant/respondent is a trade union representing medical officers concerned about the level of government expenditure or public health care in Belize

17. The third named claimant/respondent is a citizen, taxpayer and a Senator in the National Assembly of Belize, representing the business community.

.18. The fourth named claimant/respondent is a confederation of trade unions in Belize.

19. The defendants/respondents are sued in their official capacities as ministers and representatives of the Government of Belize.

20. The second interested party/respondent, the Universal Health Services Ltd. is a party to the Loan Facility referred to at paragraph 14(c) above.

The claim

21. In claim no. 218 of 2007, the claimants/respondents seek the following reliefs:

(a) a declaration that the Guarantee and Postponement Agreement dated the 9th day of December 2004 (the Guarantee) is unlawful as being contrary to section 44 of the Belize Constitution, and sections 78, 79, 80, 81 and 119 of the Belize Constitution, taken together;

(b) a declaration that the decision of the Prime Minister and Minister of Finance to satisfy the payment of monies allegedly due under the Guarantee, is unlawful;

(c) A declaration that the provisions of section 114 of the Constitution of Belize, and section 3 of the Finance & Audit Reform Act, No. 12 of 2005, must be complied with before proceeding to satisfy the Guarantee by way of payment from the Consolidated Revenue Fund; and

(d) an injunction restraining the First and Second Defendants from satisfying the Guarantee without the authority of the National Assembly duly given in accordance with the Constitution of Belize.

22. Despite objection from the appellant, Arana J by her order dated 20 June 2007, granted leave to the claimants/respondents, to amend the fixed date claim form in claim no. 218 of 2007 to add the following additional prayers for relief:

(iv) a Declaration that the March Settlement Agreement and Loan Note under the terms of which the Second Defendant was to pay the Bank BZ$33,545,820.00 are unlawful as being contrary to the Finance & Audit (Reform) Act, No. 12 of 2005; and

(v) a Declaration that an additional loan facility of BZ$12 million procured by the First and Second Defendants from the Bank on the 29 March 2007 are unlawful as being contrary to the Finance & Audit (Reform) Act, No. 12 of 2005.

23. On 28 June 2007, the appellant gave notice of its intention to challenge Arana J's order on appeal to this court. On 6 July 2007, the appellant filed another application in the Supreme Court, by which it sought an order pursuant to Rules 26.3(1) and 26.3(1)(c), and/or the inherent jurisdiction of the court, striking out the claimants/respondents' statement of claim. The grounds of this application were in effect an amplification of the grounds upon which the appellant had opposed the amendment referred to in the previous paragraph and the appellant was in due course joined in this application by the defendants/respondents and the second interested party/respondent.

24. When this application came on for hearing before Arana J on 27 July 2007, the learned judge imposed a stay on the proceedings pending the outcome in this court of this appeal, "as that … will determine the manner in which this case is to proceed."

The appeal

25. This appeal challenges the order of Arana J granting leave to amend, on the single ground of appeal, that the learned trial judge erred in law and misdirected herself in finding that the claimant, having sought declaratory relief in relation to public law issues, did not have to proceed by way of judicial review and comply with the requisite procedural steps set out in Part 56 of the Supreme Court (Civil Procedure Rules) 2005 ("the CPR") in that regard. The appellants sought an order from this court setting aside the order of Arana J granting leave to the

claimants/respondents to amend their claim form in the manner indicated at paragraph 22 above.

Part 56 of the CPR

26. Before going to the submissions made on behalf of the appellant, it may be helpful to set out those parts of the rule that are of immediate relevance to this appeal:

> 56.1 (1) This Part deals with applications –
>
> (a) for judicial review;
>
> (b) for relief under the Constitution;
>
> (c) for a declaration in which a party is the Crown, a court, a tribunal or any other public body; and
>
> (d) where the court has power by virtue of any enactment to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a Minister or Government Department or any action on the part of a Minister or Government Department.
>
> (2) In this Part such applications are referred to generally as **"applications for an administrative order".**
>
> (3) **"Judicial Review"** includes the remedies (whether by way of writ or order) of -
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> (a) *certiorari*, for quashing unlawful acts;
>
> (b) *prohibition,* for prohibiting unlawful acts; and
>
> (c) *mandamus*, for requiring performance of a public duty, including a duty to make a decision or determination or to hear and determine any case.

(4) 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) restitution or damages; or

(c) an order for the return of any property, real or personal.

56.2 (1) An application for judicial review may be made by any person, group or body which has *sufficient interest* in the subject matter of the application.

56.3 (1) A person wishing to apply for judicial review must first obtain permission.

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

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

(a) cause substantial hardship to, or substantially prejudice, the rights of any person, or

(b) be detrimental to good administration.

(3) An application for permission to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the court considers that there is good reason for extending the period within which the application shall be made.

56.7 (1) An application for an administrative order must be made by a fixed date claim in Form 2 identifying whether the application is -

(a) for judicial review;

(b) for relief under the Constitution;

(c) for a declaration; or

(d) for some other administrative order (naming it),

(3) The claimant must file with the claim form evidence on affidavit.

The appellant's submissions

27. This court was fortunate to receive from Mr. Plemming QC a detailed and thoughtful presentation in his skeleton argument and oral presentation on behalf of the appellant. I hope that I do his efforts no disservice by attempting to summarize his submissions in my own words.

28. The appellant's basic contention is that in the light of the incontrovertible fact that the claimants/respondents do not rely on any private law rights, but pursue the claim only on the basis of an alleged breach of public law rights, such a claim must be made by way of judicial review proceedings and the necessary procedural safeguards which attach to such proceedings followed. As public interest elements seeking to challenge alleged breaches of public law rights, a failure to proceed by way of judicial review is an abuse of process liable to attract the sanction of striking out. To allow the claimants/respondents to do otherwise is to permit them to circumvent the requirement to seek leave, to make a timely application and otherwise to conform with the mandatory provisions of Rule 56.3. This conclusion flows inevitably, Mr. Plemming QC submits, from an application of the decision of the House of Lords in **O'Reilly v Mackman [1983] 2 AC 237**, which provides the context within which Part 56 must be read.

29. But in the event that the court were to take the view that Part 56 of the CPR does entitle the claimants/respondents to bring proceedings such as these for a declaration independently of a claim for judicial review, Mr. Plemming submitted further, then they cannot have the benefit of the generous approach to the question of standing permitted in judicial review ("sufficient interest"), but must in that case satisfy the "old test of standing" laid down in **Gouriet v Union of Port**

Office Workers **[1978] AC 435**. That is, such a claimant for a declaration would have to demonstrate that he or she has a particular personal interest to protect, which is patently not the case in the instant proceedings.

The claimants/respondents' submissions

30. Ms. Lois Young SC for the claimants/respondents disagreed. The court was also greatly assisted by her pointed and perceptive submissions. The provisions of Part 56 are clear and unambiguous, she said, with no rule in this part prohibiting the grant of a declaration challenging public law actions even though private law rights are not at stake. Claimants can at their option seek a declaration, rather than judicial review, in a case, such as the instant case, where they do not seek to quash any decision or action of the defendants, but are content to obtain a declaration of the illegality of government action, in which case the jurisdiction to make declaratory judgment has its own limits. Part 56 gives the court "great flexibility in dealing with claims for administrative orders: the "old strictures" (by which I took Ms. Young SC to mean **O'Reilly v Mackman**, **Gouriet**, and so on) are gone and the court has a wide selection of remedies and combination of remedies to choose from. The Belize rules are differently structured from the UK rules and describe a new regime, "a clear break".

31. On the issue of standing, Ms. Young SC contended that this was premature at this stage, not having been canvassed at all in the court below and no ruling having been made on it. In any event, she submitted further, the issue of standing is not one to be determined at this very preliminary stage of the proceedings.

The English Order 53 and O'Reilly v Mackman

32. The well known decision of the House of Lords in **O'Reilly v Mackman**, is the cornerstone of the appellant's principal submission. It is important to an

understanding of that decision, I think, to bear in mind that the judicial review rules in the United Kingdom were substantially recast in 1977 by what was still being described five years later as "the new Order 53" (see the judgment of Lord Diplock, at page 283). In 1981, the new rules were given statutory force by section 31 of the Supreme Court Act 1981, producing a "new streamlined machinery" (see the judgment of Lord Denning MR in the Court of Appeal in **O'Reilly v Mackman**, at page 258). These developments are well summarized in "Judicial Remedies in Public Law", by Clive Lewis (3rd edition, 2004) at paragraph 3-005 as follows:

> "First, prior to the 1977 reforms, there were certain defects inherent in the procedure for seeking the prerogative remedies, which made it necessary and reasonable to use the alternative procedure of seeking a declaration by ordinary action. In particular, there was no power to grant disclosure. Evidence was provided by affidavit and cross-examination and such evidence was virtually unknown. Provision is made [in the new Order 53] for disclosure and for cross-examination on affidavit evidence, which although not automatic, as in ordinary proceedings, is governed by similar principles. In addition, it is now possible for a claim for a prerogative remedy to be coupled with a claim for a declaration or injunction, and, if appropriate, damages or restitution, in the same application. Thus, all the remedies that might prove necessary could be sought within one and the same procedure."

33. It is against this background that the House of Lords decided in **O'Reilly v Mackman** that, since the old disadvantages had now been removed and 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 by this means evade the provisions of Order 53 for the

protection of such authorities. To this general rule, Lord Diplock (who delivered the single judgment) recognized that there might be exceptions and identified at least two, firstly, where "the invalidity of the decision arises as a collateral issue in a claim for infringement of a [private law] right" and, secondly, where the parties do not object to resort being had to the then usual originating processes. The development of other exceptions was expressly left "to be decided on a case by case basis" (see page 285).

34. Lord Diplock's primary exception was more fully developed in **Roy v Kensington and Chelsea F.P.C. [1982] 1 AC 624** (a case also referred to by Mr. Plemming) in which it was held that a litigant possessed of a private law right could seek to enforce that right by ordinary action, notwithstanding that the proceedings would involve a challenge to a public law act or decision. But in the present context (where, as Mr. Plemming correctly observes, there is no question of a private law right being asserted by the claimants/respondents), the case is perhaps of greater significance for the comment by Lord Bridge, who had himself been a party to the decision in **O'Reilly v Mackman**, that while it was important "to maintain the principle" of that decision, "it is certainly no less important that its application should be confirmed within proper limits" (see page 628). To not dissimilar effect is the comment of Lord Slynn in **Mercury Communications Ltd. v Director General of Telecommunications and another [1996] 1 All ER** 576 that it is "of particular importance … to retain some flexibility, as the precise limits of what is called "public law" and what is called 'private law' are by no means worked out" (page 581).

35. These dicta both suggest, even in the context of Order 53, judicial reluctance at the highest level to apply **O'Reilly v Mackman** as if the decision had legislative effect. In his "Judicial Remedies in Public Law" (supra), Lewis also makes the point that one unwelcome result of the rule in **O'Reilly v Mackman** "has been a large amount of litigation dealing solely with the question of whether proceedings are to be characterized as public law proceedings and whether the claims have

been brought in the right forms rather than following on the legal merits of the claims." As a result of judicial criticism of the proliferation of this kind of litigation, Lewis concludes as follows (at paragraph 3-007):

> "For these reasons, the courts are in general less willing at present to allow claims to be struck out on the purely procedural ground that they should not have been brought by an ordinary claim and should have been brought by way of judicial review. They are more prone to emphasise as a minimum that the rule in O'Reilly v Mackman is subject to exceptions and there is a need to retain flexibility in applying the rule and, more importantly, to suggest that the scope of the rule still needs to be clarified."

The meaning of Part 56

36. Part 56, Mr. Plemming QC submitted, must be read in its context, a highly relevant aspect of which is the watershed in the development of modern administrative law that **O'Reilly v Mackman** describes. Ms. Young SC for her part relied heavily on the actual language of the rules, referring us to **Buckland and others v Secretary of State for the Environment, Transport and the Regions [2000] 3 All ER 205** for the proposition that the interpretation of a statute by means other than the language of the section only becomes permissible when the language is not clear and unambiguous (per Kay J, at page 209).

37. Rule 56(1), in describing the scope of Part 56, states that it deals with applications (described as applications for administrative orders) for (a) judicial review (b) relief under the Constitution (c) a declaration in which a party is the Crown, a court, a tribunal or any other public body, and (d), decisions of ministers or government departments in certain circumstances. The structure of this rule certainly does not suggest that applications for declarations can only be made in the context of applications for judicial review; indeed, it suggests the opposite.

All of the provisions to which the appellant points as hallmarks of modern judicial review (liberal standing, the need to obtain permission and the limiting impact of delay) relate explicitly in Part 56 to applications for judicial review and not to any of the other listed types of application for administrative orders (see Rules 56.2, 56.3 and 56.5). In other words the rules do not appear in terms to restrict applications for any of the administrative orders, save for judicial review, with regard to any of these factors. On the face of it, the language chosen by the framers of the rules appears to be plain and unambiguous.

38. To read the rules so as to sanction an application for a declaration under Rule 56.1(3) outside of the context of judicial review, Mr. Plemming SC contends, is to assume that the rule makers have chosen "to sweep away years of learning." But this, it appears to me, is precisely what our rule makers have not only set out to do, but have achieved. In virtually identical language throughout the common law Caribbean (see the Eastern Caribbean Supreme Court CPR, 2000, the Jamaican CPR 2002, and the Trinidad & Tobago CPR 1998), Part 56 has, in my view, without any ambiguity whatever, conferred a free standing entitlement on litigants to move the court for a declaration, whether it be in respect of public or private law rights, in any case "in which a party is the Crown, a court, a tribunal or any other public body" (Rule 56.1(1)(c)).

38. Subject, therefore, to the question of standing, to which I now turn, I would conclude that the clear language of Part 56 of the CPR does not admit of the gloss for which the appellant contends, so as to oblige an applicant for a declaration to approach the court by way of the prescribed procedure for judicial review. I am consequently in full agreement with the learned judge's conclusion, in granting the amendments sought, that "the Claimants have utilized the proper procedure in bringing this application by way of a Fixed Date Claim Form as they are seeking an administrative order for declaratory relief." To this conclusion, I would only add that since preparing this judgment I have had the privilege of reading in draft the judgment of Carey JA in the matter, with which I am in full

agreement, and wish to associate myself in particular with his comments at paragraphs 9 and 10 on the efficacy of the case management process, the discretionary nature of declaratory relief and the significance of the fact that Belize has a written constitution.

The question of standing

39. Rule 56.2(1) provides that an application for judicial review may be made "by any person, group or body which has *sufficient interest* in the subject matter of the application." While there can be no fixed definition of "sufficient interest", it is common ground that the phrase describes a test of standing that is relatively easy to satisfy or, as Lord Wilberforce put it in **Gouriet v U.P.W.** (supra), "a generous conception of locus standi" (at page 482; and see generally the judgments of the House of Lords in **Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd. [1981] 2 WLR 722**).

40. The appellant contends, however, that if Rule 56.1(1)(c) does create a "free standing" right to seek declarations in respect of public law rights, independent of judicial review, then in the absence of a new test of standing being specified in relation to that relief, the traditional test of standing, as classically expounded in **Gouriet v U.P.W.** (supra) must apply. With regard to declarations, it will be recalled, Lord Diplock had observed that "the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not of anyone else" (at page 501).

41. Some support for the appellant's contention is to be found in some dicta in the St. Lucian case of **Attorney General v Francois** (Civil Appeal No. 37 of 2003, judgments delivered 29 March 2004). The case is of particular value because of the fact that, as already noted, Part 56 of the Eastern Caribbean Supreme Court

CPR 2000 is in almost identical terms to our Part 56. Rawlins JA, after referring to **Gouriet v U.P.W.**, restated the traditional private law test of standing and commented as follows:

> "[149] It is obvious that our 2000 Rules kept the distinction as it relates to declarations. Part 56.1(7) of the Rules requires an applicant for an administrative order to state whether he or she is applying for a declaration, judicial review, and relief under the Constitution or some other order. Under part 56.3 of the Rules, a person who applies for judicial review must first obtain leave. Part 56.3 defines "judicial review" to include the prerogative remedies, certiorari, mandamus and prohibition. Obviously, this would only include other remedies in the nature of the prerogatives, the relator action, for example. It certainly does not include the declaration in the light of Part 56.1(7) of the Rules.
>
> [150] It is noteworthy that Part 56.1(4) of the Rules empowers the Court, on an application for an administrative order, to grant an injunction, an order for the return of property or an order for restitution or damages instead of an administrative order without requiring the issue of further proceedings. It is clear that the intention is to keep some distinctions between the prerogatives and the private remedies, while facilitating the issue of private remedies in applications for judicial review.
>
> [151] Part 56.2 of the Rules then provides very liberal and relaxed rules of standing for application for judicial review. These, as we have seen, relate to applications for the prerogative orders. Interest groups and bodies are particularly facilitated. There is still a requirement that the person or body should be "adversely affected" by the decision. Interestingly, Part 56.2(d) of the Rules confers standing on a body or group that can show that the matter is complained of is of public interest, and the body or group possesses expertise in the subject matter of the application."

42. Ms. Young SC also found some solace in the judgment of Rawlins JA, referring us to his comment at paragraph 144 that, although historically locus standi has been a threshold issue in public law cases, "inexorable changes" in recent years "have sometimes resulted in the determination of substantive issues before locus standi is considered."

43. I have found this to be a more difficult point. For while I see the force of the argument that the specific reference in Rule 56.2(1) to standing in judicial review may point to an intention on the part of the rule makers to preserve a distinction between that test and the traditional test of standing in relation to actions for a declaration, I cannot ignore the movement in public law away from "technical restrictions on locus standi" (to borrow a phrase of Lord Diplock's in the **Inland Revenue Commissioners** case, at page 737).

44. It is also important to bear in mind, I think, Lord Diplock's subsequent comment, also in the **Inland Revenue Commissioners** case (at page 735) on the limits of the decision in **Gouriet v U.P.W.**:

> "As respects the claim for a declaration considerable reliance was placed upon the recent decision of this House in Gouriet v Union of Post Office Workers [1978] A.C. 435, which held that a private citizen, except as relator in an action brought by the Attorney-General, had no locus standi in private law as plaintiff in a civil action to obtain either an injunction to restrain another private citizen (in casu a trade union) from committing a public wrong by breaking the criminal law, or a declaration that his conduct is unlawful, unless the plaintiff can show that some legal or equitable right of his own has been infringed or that he will sustain some special damage over and above that suffered by the general public. This decision is, in my view, irrelevant to any question that Your Lordships have to decide today. The defendant trade union in deciding to instruct its members to take unlawful industrial action was not exercising any governmental powers; it was acting as a private citizen and could only be sued as such in a civil action under private law. It was not amenable to any remedy in public law. Lord Wilberforce and I were at pains to draw this distinction." (emphasis supplied).

45. What Rule 56.1(1)(c) entitles a claimant to do is to claim for a declaration in proceedings in which there is in fact a party which is "amenable to [a] remedy in public law", that is, the Crown, a court, a tribunal or any other public body. This as I understand it, is the point Ms. Young SC sought to make when she submitted that Part 8 of the CPR dealt with declarations sought in respect of purely private law rights, while Part 56 deals with the right to seek a declaration by way of an administrative order where public law rights are involved.

46. The editors of the 9th edition of Wade's Administrative Law, in a discussion on "the old law of standing", observe that the law of standing "has been passing through a transitional phase", from the days when there were different rules for different remedies "as might be expected in a system which operates with a mixture of private law and public law remedies" (page 680). They go on to recognize the transformative effect of the Order 53 procedure in 1977 (and its subsequent embodiment in the Supreme Court Act 1981) on the old law of standing with respect to the prerogative remedies. The introduction of the CPR in Belize in 2005 was as significant a watershed, making it strongly arguable, in my view, that, by structuring Part 56 in the way in which they did, the rule makers fully intended a further transformation of the old rules of standing with respect to declarations.

47. But, for the purposes of this appeal, I think it is unnecessary to express a concluded view on this aspect of the matter, for at least two reasons. Firstly, and importantly, nothing in relation to locus standi was canvassed before Arana J, as Ms. Young SC pointed out. Secondly, and of equal importance in my view, is that I think a final determination on the question of standing would be premature at what is still a very preliminary stage of these proceedings. In the **Inland Revenue Commissioners case** (supra), the House of Lords held that it was wrong for the courts below to have taken locus standi as a preliminary issue, which is effectively what the appellant asks us to do here, in a case in which that question had to be taken together with the legal and factual context of the

application. That was a case of judicial review, in which leave was required, which is not the situation in the instant case. That, in my view, makes that aspect of the **Inland Revenue Commissioners** case at least equally apposite to the instant case (see also the comment of Rawlins JA referred to at paragraph 42 above).

Conclusion

48. These are my reasons for agreeing with my brethren that this appeal should be dismissed and the portion of the order of Arana J appealed from affirmed, with costs to the respondents to be taxed if not sooner agreed.

MORRISON JA