**[2012] JMCA Civ 47**

**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO 126/2011**

**BEFORE: THE HON MR JUSTICE PANTON P**
**THE HON MISS JUSTICE PHILLIPS JA**
**THE HON MR JUSTICE BROOKS JA**

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| **BETWEEN** | **MICHAEL LEVY** | **APPELLANT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **1ST RESPONDENT** |
| **AND** | **JAMAICAN REDEVELOPMENT FOUNDATION INC** | **PARTY DIRECTLY AFFECTED/2ND RESPONDENT** |

**Raphael Codlin and Miss Melissa Cunningham instructed by Raphael Codlin & Co for the appellant**

**Lackston Robinson and Miss Alicia McIntosh instructed by the Director of State Proceedings for the 1st respondent**

**Mrs Sandra Minott-Phillips QC and Gavin Goffe instructed by Myers Fletcher and Gordon for the party directly affected/2nd respondent**

**13, 14, 15 June and 12 October 2012**

**PANTON P**

[1] I have read, in draft, the judgment of Brooks JA and agree with him that this appeal ought to be dismissed. I have nothing to add to what he has written.

**PHILLIPS JA**

[2] I too have read the draft judgment of Brooks JA. I entirely agree with his reasoning and conclusion.

**BROOKS JA**

[3] In the 1990s, there was a devastating meltdown of a large portion of the island's financial sector. A number of the institutions, therein, failed. On 30 January 2002, Jamaican Redevelopment Foundation Inc (JRF) acquired the bad-debt portfolios, or at least portions thereof, of some of the financial institutions that had experienced financial difficulties.

[4] The Minister of Finance gave his blessing to the acquisition. On 25 June 2002, in demonstration of his approval, the minister granted JRF exemption from the provisions of the Moneylending Act (the Act). That exemption particularly allowed JRF, not only to charge interest rates above that which the Act sought to constrain, but also to charge compound interest. JRF was, thereby, in that regard, placed on equal footing with the institutions that it replaced. The Minister of Finance granted further exemptions annually, thereafter, to JRF, from 2003 through 2008.

[5] Mr Michael Levy was one of the 23,000 debtors affected by JRF's acquisitions. In November 2008, he filed a claim in the Supreme Court asking for judicial review of the exemption orders. He sought to have them quashed on the basis that they were

unlawful. His main contention was that the exemption orders were not in the interest of the public and were, therefore, *ultra vires* the minister's remit under the Act.

[6] Mr Levy named the Attorney General of Jamaica as the respondent to the claim, however, the JRF was allowed to intervene as a party directly affected by the claim. Both resisted Mr Levy's claim.

[7] P. A. Williams J heard the application for judicial review and, on 6 October 2011, refused it. The learned judge ruled that the exemption order that affected Mr Levy was that granted on 25 June 2002. Accordingly, she ruled that his application had been made several years late. She found that he was not entitled to any relief by way of judicial review, as that would cause substantial hardship to JRF, which had relied on the validity of the order over the course of six years and had acted thereon.

[8] Mr Levy is aggrieved by that ruling and has appealed. The resolution of the appeal turns on the question of whether the annual exemption orders were by way of renewals of previous orders, or were in respect of transactions that were to have been conducted by JRF during the year for which each order was granted.

**The grounds of appeal**

[9] Learned counsel for Mr Levy argued six grounds of appeal. They are:

> "(a) The learned trial Judge erred, in law in allowing [JRF] to make use of and rely on Affidavits and exhibits which were handed to her ladyship at the hearing despite the Order of the Honourable Mrs. Justice N. McIntosh [as she then was] dated December 3, 2009

which gave [JRF] a right to make oral submissions when the matter came on for trial but bestowed on it no right to file documents in the proceedings. This was prejudicial to the other parties who had no opportunity to respond to the documents and Affidavits.

(b) The learned judge erred in finding that only the 2002 Exemption Order affected the Appellant in circumstances where it is clear from the wording of the exemption and the subsequent actions of both [JRF] and the Minister that the clear intention was for each exemption to span the course of one year…

(c) The learned judge erred when she found that [the order] in referring to 'loans made or acquired' sufficiently specified the loans to satisfy the requirements of section 14 of the Act which confers on the Minister a duty to specify the loan or contract that is being exempted in the Order granting the exemption….

(d) The learned judge erred in making a finding that there was undue delay in bringing the application for which no good reason for doing so was shown….

(e) The learned judge erred in concluding that only the 2002 exemption applied to the Appellant and that there was undue delay in bringing the application....

(f) That the learned judge in evaluating the evidence before her failed to take into account important and unchallenged evidence that would have invariably lead [sic] to a conclusion contrary to the findings of the learned judge."

As grounds (b) and (e) overlap, those will be considered together.

**Ground (a) – Allowing JRF to use affidavits and exhibits**

[10] The essence of the complaint made by this ground is that whereas rule 56.13(2) of the Civil Procedure Rules 2002 (CPR) allows an interested party to either make

submissions by a written brief or make oral submissions, Williams J, in disregard of the rule, allowed JRF to both rely on affidavits filed in the claim and make submissions. Mr Levy further complains that the use of the affidavits was in breach of rule 39.1(6) of the CPR. That rule stipulates the contents of the bundle that a claimant is to prepare for use by the judge at a trial.

[11] Rule 56.13 speaks to the procedure to be utilised at the first hearing of fixed date claims in claims for judicial review. In addressing the procedure concerning interested parties, the relevant portions of the rule state:

> "56.13 (1) At the first hearing the judge must give any directions that may be required to ensure the expeditious and just trial of the claim **and the provisions of Parts 25 to 27 of these Rules apply**.
>
> (2) In particular the judge may -
>
> (a) make orders for -
>
> (i) witness statements or affidavits to be served;
> (ii) cross-examination of witnesses;
> (iii) disclosure of documents; and
> (iv) service of skeleton arguments;
>
> (b) …
>
> (c) allow any person or body appearing to have sufficient interest in the subject matter of the claim to be heard whether or not served with the claim form;
>
> (d) direct whether any person or body having such interest-

(i) is to make submissions by way of written brief; or
(ii) may make oral submissions at the hearing; and…" (Emphasis supplied)

[12] Parts 25 through 27, referred to in rule 56.13, include the procedure relating to first hearings. The relevant powers granted to the court in these parts, include the power to make such orders as are necessary to ensure "full disclosure of all relevant facts prior to the [hearing of the fixed date claim]" (rule 25.1(m)). Rule 27.2(7) stipulates that, "[a]t the first hearing, in addition to any other powers that the court may have, the court shall have all the powers of a case management conference". Those latter powers are detailed in part 26. Of particular relevance, in this regard, is rule 26.1(v), which allows the court, as part of its case management powers, to "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". It will be seen from this selection of the rules, that the Supreme Court has wide powers in managing fixed date claims in preparation for the final hearing.

[13] It is in this context that the orders made, as case management orders, must now be examined. On 3 December 2009, N.E. McIntosh J (as she then was) granted JRF permission to participate at the hearing of the fixed date claim. Her Ladyship went on to order as follows:

"7. [JRF] to make **oral submissions** at the hearing.

8. [JRF] to seek to be heard on its application dated December 3, 2009 before the Judge hearing the judicial review." (Emphasis supplied)

Mr Codlin, on behalf of Mr Levy, laid great stress on the fact that oral submissions were authorised. In light of rule 56.13, learned counsel argued that this authorisation precluded the tendering of affidavits and written submissions.

[14] Mr Codlin's submissions do not, however, take into account that other orders were made by way of case management. Rattray J, on 25 January 2010, among other orders, granted JRF permission to file and serve affidavits and written submissions in advance of the hearing of the fixed date claim. The relevant orders are:

> "2. Permission granted to [JRF] and Kenneth Tomlinson [the receiver appointed by JRF in respect of Mr Levy's property] to take part in [sic] Application.
>
> 3. Permission granted to [the Attorney General] and to [JRF] and Kenneth Tomlinson to file and serve Affidavits herein if necessary on or before 29th January 2010, by 3:00 pm.
>
> 4. ...
>
> 5. Written submissions together with list of authorities being relied on to be filed and served on or before February 5th 2010 by 3:00 p.m."

[15] These orders amply demonstrate that JRF was entitled to make written submissions and to adduce evidence at the hearing of the fixed date claim. Mrs Minott-Phillips QC, for JRF, has also correctly pointed out that rule 56.15(1) and (2) of the CPR authorises an interested party to make written submissions. Rule 56.15(2) preserves the right of the court to make orders concerning the form that the submissions may take.

[16] It is also noted that the documents admitted by Williams J, at the request of JRF, were certified copies of certificates of title and the relevant registered mortgage instruments signed by Mr Levy. The documents were admissible by virtue of section 13 of the Registration of Titles Act. That section mandates that all documents bearing the seal of the Registrar of Titles "shall be admissible in evidence without further proof". The documents were highly relevant to the substantive issue. Williams J cannot be faulted for having admitted them into evidence.

[17] In the circumstances, ground (a) must fail.

**Grounds (b) and (e) – The relevant order for calculating the time for making the application for review.**

[18] These grounds encompass the crux of this appeal. Rule 56.6(1) of the CPR stipulates that applications "for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose". After her analysis of the exemption orders, Williams J concluded that the order, which affected Mr Levy, was made in 2002 and, therefore, Mr Levy was several years late in applying.

[19] Mr Codlin argued that the learned judge erred in that regard. He submitted that, in construing the minister's order, especially with regard to the tenure of its effect, "the court should give regard to the object and intent of the Minister as stated in the Order". Learned counsel argued that if the court was unclear as to the meaning of the order,

"then assistance can be gathered from secondary sources as to what [the minister's intent] was" (page 5 of his written submissions).

[20] Mr Codlin pointed to certain factors which, he submitted, would aid interpretation of the order:

(1) JRF only acquired loans in 2002, no loans were acquired between 2003 and 2008, being the period covered by the subsequent orders.

(2) The minister did not intend to exempt any transaction falling outside the sale of [the bad debts].

(3) The minister, who granted the exemptions up to 2007, stated under oath, during a 2009 commission of enquiry, that he had granted the yearly exemptions on the basis that the exemptions had to be renewed.

(4) JRF's "application to the [m]inister was for a one-year exemption and thereafter it applied for extensions of the said exemptions on a yearly basis" (page 5 of his written submissions).

[21] The starting point of the analysis of this ground is an examination of the relevant portion of the exemption order that was gazetted on 25 June 2002. It states:

> "2. Loans or contracts entered into or security given for repayment thereof, being loans made or acquired by [JRF] or contracts entered into thereby or security given thereto (respectively) **within** one (1) year from and including that date [30 January 2002], are hereby declared **to be exempt from the provisions of the Moneylending Act**." (Emphasis supplied)

[22] The minister's reason for granting the original exemption was stated by the then minister at page 142 of the transcript of the commission of enquiry held in 2009:

> "Q: When you grant[ed] the exemption sir, I ask if you knew then that [JRF] was or was not a money lender?
>
> A: I granted the exemption on the advice that JRF had purchased the portfolio [of] bad debts.
>
> Q: Thank you, sir.
>
> A: No, I wasn't finished, sir. Having carried out their due diligence as to the bid they would put in, the offer they would make as to the portfolio which was held by FINSAC, FIS, Refin: That assessment was essentially based on the assumptions that whatever held for those institutions would hold for them."

[23] This reason was supported in an affidavit filed in this claim by Ms Nadine Wilkins, the senior legal officer at the Ministry of Finance. The relevant paragraphs are set out at page 200 of the record:

> "6. On May 8, 2002 Nunes Scholefield DeLeon & Co., Attorneys-at-Law acting on behalf of JRF wrote to the Financial Secretary requesting that JRF be exempted from the provisions of the [Act] pursuant to powers vested in the Minister under section 14 of the said Act.
>
> 7. The exemption was sought on the ground that most, if not all, the loans acquired were originally made on terms which did not comply with the [Act] as the original lenders were all automatically exempted under the Act by virtue of being licensed bankers and financial institutions.
>
> 8. In addition the exemption was sought on the ground that in order to obviate any challenges in the court to the acquisition and renegotiation of the loans and other receivables it was necessary that JRF be given

adequate protection from any claims by borrowers arising in relation to the requirements of the [Act]….

9. By Order published in the Jamaica Gazette dated May 30, 2002 the Minister granted the exemption for a period of one year retroactive to 30th January, 2002. The Order is the Money Lending (Exemption) (Jamaican Redevelopment Foundation Incorporation [sic]) Order, 2002…"

For completeness, I should point out that the 30 May 2002 order was replaced by the 25 June 2002 order, mentioned above. The difference between the two orders is that the latter mentioned acquisitions by JRF. That aspect had been omitted from the former order. Acquisitions were mentioned in all the subsequent orders.

[24] There are two competing interpretations of the 25 June 2002 order. The first, as advanced by Mr Codlin, is that the loans and contracts, made or acquired etc by JRF, were exempt for a period of one year as designated by the order. The second, as advanced by Mrs Minott-Phillips as well as Mr Robinson for the Attorney General, is that the loans and contracts, made or acquired during the course of the year covered by the order, were permanently exempt.

[25] I find that the plain meaning of the order is that set out in the latter interpretation. The order does not state that the loans etc are to be exempt from the provisions of the Moneylending Act for one year from the effective date of the order. It states, instead, that the loans etc transacted within the year are to be exempt. No limit is placed on the exemption.

[26] Admittedly, the order does not specifically state that the transactions are permanently exempt, but a fair reading of the order would give that interpretation. In addition, the nature of, at least some of, the transactions involved, do not lend themselves to short terms. In the instant case, Mr Levy first secured a loan from Eagle Commercial Bank Ltd in 1992. The mortgage securing that loan was up-stamped on a regular basis, because of his further indebtedness to the bank. That debt was among JRF's acquisitions in 2002.

[27] It would be naïve, at best, for the minister to have intended to place JRF on the same footing as Eagle Commercial Bank, insofar as interest factors were concerned, yet restrict that benefit to a year at a time. If renewal was uncertain, on Mr Codlin's interpretation, JRF's position would have been radically altered in the event, as occurred in 2009, that renewal was denied.

[28] No one could reasonably expect that individuals, who had such long-standing mortgage debts, would repay them in short order. It is more likely that those debts would be re-negotiated. It is the individual re-negotiations, as the years went by, which would have been the transactions that would benefit from the annual exemption orders. Mrs Minott-Phillips brought that latter concept to our attention during the course of oral submissions. I find it eminently sensible and a complete answer to Mr Codlin's aids to interpretation, with the exception of that concerning the former minister's testimony at the commission of enquiry.

[29] With respect to the former minister's testimony, the critical portion, for these purposes are the following questions and answers from the commission of enquiry. They are recorded at page 138 of the record of appeal:

> "Q: Thank you sir. Do you have any reason why you granted seven and not one [exemption order]?
>
> A: I gather – the lawyers told me that it's an annual exemption, it had to be renewed."

[30] The first renewal had been triggered by a letter from JRF's attorneys-at-law. That letter is dated 12 December 2002. It stated in part:

> "On behalf of [JRF] we are enclosing an application for the [25 June 2002] Order to be renewed for a further period of one (1) year from and including the 30th January, 2003."

The application itself said nothing more than the letter did. It was signed on behalf of JRF and simply applied "for the [25 June 2002] Order to be renewed for a further period of one (1) year from and including the 30th day of January 2003".

[31] The Ministry's legal officer, Ms Wilkins, in her affidavit, simply stated that "subsequent exemptions were granted on the application of JRF" (paragraph 11 of her affidavit mentioned above). She mentioned that JRF had applied for renewal of the order.

[32] Mr Codlin placed much store by the use of the concept of "renewal" by JRF, the legal officer and the former minister. His conclusion, in his oral submissions, was that "[e]ach order lasted for just one year and the minister and all the players concluded that the order lasted just for one year". I respectfully disagree with Mr Codlin that the

use of the concept of "renewal" by the "players", in their correspondence, derogated from the interpretation, which I have accepted, of the 25 June 2002 order. The concept of renewal, in respect of that order, could equally apply to the transactions that JRF envisaged that it would negotiate in the ensuing year. I find, on the basis of a fair interpretation of the exemption order, that grounds (b) and (e) should fail.

**Ground (c) - Whether the order sufficiently specified the transactions to satisfy the requirements of section 14 of the Act**

[33] The essence of Mr Codlin's complaint in this ground is that the failure of the exemption order, to identify the loans affected by it, meant that the order failed to comply with the provisions of section 14 of the Act. That failure, learned counsel submitted, meant that the exemption order was void. The defect in the 25 June 2002 order and its successors, Mr Codlin submitted during his oral submissions, was that, unlike a predecessor order, concerning the same failed institutions mentioned above, they did not allow a layman to "determine whether the order applied to him".

[34] The predecessor order was gazetted on 20 November 2001. It stated, in part:

> "2. Loans or contracts entered into or security given for repayment thereof, being loans made by Blaise Building Society, Blaise Trust Company and Merchant Bank Limited and Consolidated Holdings Limited assigned to Financial Institutions Services Limited in accordance with the Schemes of Arrangement entered into by the said Blaise Building Society, Blaise Trust Company and Merchant Bank Limited and Consolidated Holdings Limited and their respective creditors and approved by the Supreme Court of Judicature of Jamaica on the 26th day of October 1995 pursuant to Suit No. E303 of 1995 and Suit No. E.305 of 1995 respectively, or contracts entered into thereby or security given thereto

> (respectively) within one year from the coming into operation of this Order are hereby declared to be exempt from the provisions of the [Act]."

The references to specific institutions, on Mr Codlin's submission, allow persons to ascertain whether they were affected by that exemption order.

[35] Section 14(1) of the Act authorises the minister to issue exemptions. It states:

> "Where the Minister is satisfied that it is in the public interest so to do, he may by order declare-
>
> (a) any loan or contract or security for the repayment of a loan specified in that order; or
>
> (b) any loan made, or any contract entered into, or any security for the repayment of a loan given by any person specified in that order,
>
> to be exempt from the provisions of this Act, subject to such terms and conditions as may be specified in the order."

[36] There is nothing in that section, which requires an exemption order to identify, individually, the loans that the order affects. It can readily be seen from paragraph (b) thereof, that transactions may be identified by way of the party giving the loan or entering into the contract. The exemption order dated 25 June 2002 identifies the approximately, 23,000 loans, falling within its ambit, by way of reference to the entity to which the debt was then assigned. There is no requirement in the section for any greater specificity. I respectfully agree with the finding of Sykes J when he stated, at paragraph 13 of his judgment in **Jamaica Beach Park Ltd (In Receivership) and Another v Jamaica Redevelopment Foundation Inc and Another** 2005 HCV 01319 (delivered 17 June 2005), in respect of these exemption orders:

> "…I conclude that paragraph two of the orders clearly identifies the loans. In this case, it is not disputed that the loans made by [the failed financial institution] to [the claimant] have been acquired by JRF. No one was misled or confused or unable to identify the loans to which the order refers."

In the instant case, JRF had also informed Mr Levy that it had acquired his debt. He received notice of that acquisition in or about February 2002. This ground must fail.

[37] Although ground (c) fails, the question of when Mr Levy became aware of the existence of the exemption order also has relevance in respect of Mr Levy's delay in applying for judicial review. His reason for making his application so late was that he did not know, until 2008, that the debt had been exempted. The issue of delay will be considered in the analysis of ground of appeal (d).

**Ground (d) - Whether the learned trial judge erred in finding that Mr Levy's application was unduly delayed**

[38] Having determined that the learned trial judge was correct in finding that the order which affected Mr Levy, was that made on 25 June 2002, the issue of delay becomes ripe for discussion. As was outlined above, rule 56.6(1) requires applications for judicial review to be made promptly. It states:

> "An application for leave to apply for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose"

[39] It is beyond dispute that Mr Levy's application, being made, as it was, in 2008, was, therefore, very late. He has complained that the learned judge erred in finding that the delay was "undue". Two issues arise from this complaint. The first is whether

it was open to the learned judge to consider the matter of delay and the second is whether, in arriving at her decision concerning the delay, her analysis of the evidence was flawed.

[40] It is to be noted that Mr Levy had, previously to the hearing before Williams J, been granted permission to apply for judicial review. The permission was granted pursuant to rule 56.6(2) of the CPR. That rule allows the court to "extend the time [to apply for judicial review] if good reason for doing so is shown". The granting of permission restricts, somewhat, the jurisdiction of the judge hearing the resultant application. **R v Criminal Injuries Compensation Board, ex parte A** [1999] 2 AC 330 is authority for the principle that if permission to apply for judicial review has been granted, it does not fall to the judge hearing the application, to re-open the question of whether the time for applying should be extended.

[41] In **Criminal Injuries Compensation Board**, Lord Slynn of Hadley, with whom the rest of the House of Lords agreed, considered the issue in the context of rules and legislation, similar in effect to rule 56.6 of the CPR. In order to better appreciate His Lordship's comments, it is necessary to quote rule 56.6(5):

> "When considering whether to refuse leave **or to grant relief** because of delay the judge must consider whether the granting of leave 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." (Emphasis supplied)

The learned Law Lord, first, identified the relevant English rule (RSC 53 r 4) which provides, in part:

> "(1) An application for leave 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."

The similarity of that rule to rules 56.6(1) and (2) of the CPR is striking. Thereafter, he quoted section 31(6) and (7) of the English Supreme Court Act 1981:

> "(6) Where the High Court considers that there has been undue delay in making an application for judicial review, the court may refuse to grant - (a) leave for the making of the application; or (b) any relief sought on the application, if it considers that the granting of the relief sought would be likely to cause substantial hardship to, or substantially prejudice the rights of, any person or would be detrimental to good administration.
>
> (7) Subsection (6) is without prejudice to any enactment or rule of court which has the effect of limiting the time within which an application for judicial review may be made."

[42] In addressing the effect of these provisions, Lord Slynn of Hadley said, at page 341 of the report, that the issue of the grant of leave to apply does not fall to be assessed at the substantive hearing. It is, however, open to the court, at the substantive hearing, to refuse relief. He said:

> "It seems to me that the two provisions produce the following result. (a) On an ex parte application, leave to apply for judicial review out of time can be refused, deferred to the substantive hearing or given. (b) Leave may be given if the court considers that good reason for extending the period

> has been shown. The good reason on an ex parte application is generally to be seen from the standpoint, as here, of the applicant....It is possible (though it would be unusual on an ex parte application) that if the court considers that hardship, prejudice or detriment to good administration have been shown, leave may still be refused even if good reason for an extension has been shown. (c) If leave is given, then an application to set it aside may be made, though as the Court of Appeal stressed, this is not to be encouraged. (d) **If leave is given, then unless set aside, it does not fall to be reopened at the substantive hearing on the basis that there is no ground for extending time under Ord. 53, r. 4(1)**. At the substantive hearing there is no 'application for leave to apply for judicial review,' leave having already been given. (e) Nor in my provisional view, though the matter has not been argued and the question does not arise here, is there a power to refuse 'to grant … leave' at the substantive hearing on the basis of hardship or prejudice or detriment to good administration. The court has already granted leave; it is too late to 'refuse' unless the court sets aside the initial grant without a separate application having been made for that to be done. **What the court can do under section 31(6) is to refuse to grant relief**. (f) If the application is adjourned to the substantive hearing, the question under both Ord. 53, r. 4(1) (good reason for an extension of time) and section 31(6) (hardship, prejudice, detriment, justifying a refusal of leave) may fall for determination." (Emphasis supplied)

[43] The judge, at the substantive hearing, may, therefore, consider the delay when deciding whether to grant the relief requested and may refuse the relief claimed, if the grant is likely to cause undue hardship or prejudice or would be detrimental to good administration (see rule 56.6(5) of the CPR). In **Caswell and Another v Dairy Produce Quota Tribunal for England and Wales** [1990] 2 AC 738, the House of Lords also considered the issue in the context of the very rule and legislation cited by Lord Slynn of Hadley.

[44] In **Caswell**, the court refused the relief claimed, in circumstances where the application had been made after "undue delay" (some 32 months). Although permission to apply had been granted, the judge, who made the grant, informed the applicants that the issue of delay would have to be dealt with at the hearing. The judge who heard the substantive application ruled that there had been a breach of the applicants' rights as they had complained. He, however, refused them the relief of *certiorari* and *mandamus* and limited the relief to a declaration. He did so because the relief claimed would have caused severe disruption to a number of other people who had benefited from other decisions that had been made subsequently to the impugned decision. The House agreed that a "very real problem" would have resulted if the relief claimed had been granted. It, therefore, saw no reason to interfere with the first instance judge's decision.

[45] Although in **Caswell**, the learned judge at first instance had considered the merits of the application prior to considering the matter of the appropriate relief, it appears that there is no obligation to consider the merits, if it is apparent from the circumstances that the issues of prejudice, hardship or good administration would preclude any relief being granted. No authority specifically addressing that point has been cited to us, nor has any come to my attention. As will be shown by the cases discussed immediately below, the approach has not been consistent.

[46] Mr Codlin, for example, cited the case of **R v Secretary of State for Foreign Affairs ex parte World Development Movement** [1995] 1 WLR 386; [1995] 1 All

ER 611 in support of the proposition that the merits of the application should at least be balanced against the issue of delay (page 11 of the written submissions). In that case Rose LJ addressed the issue of delay at page 627 of the latter report, thus:

> "The final question is as to relief. It is not suggested by Mr Richards that delay is a bar.…**In any event, the general importance of the matter may itself be a reason for resolving the substantive issues, even where there has been delay** (see **R v Secretary of State for the Home Dept, ex p Ruddock** [1987] 2 All ER 518, [1987] 1 WLR 1482 per Taylor J).
>
> For my part, I am entirely satisfied that there was good reason within Ord 53, r 4 for extending time, and that **the delay here provides no basis in itself for refusing relief under s 31(6) of the 1981 Act**…." (Emphasis supplied)

[47] It does not appear that His Lordship excluded the possibility that delay could trump the consideration of the substantive issues. What he did indicate is that the circumstances of that case required a resolution of the substantive issues, despite the delay. In **R v North West Leicestershire District Council and another, ex parte Moses** [2000] All ER (D) 526 a different approach was used, albeit at the stage of application for leave. In that case, in coming to the conclusion that delay precluded the consideration of the merits of the application, the court distinguished the **World Development Movement** case on the basis of the absence of prejudice. Simon Brown LJ said:

> "So far as domestic law is concerned, there are of course cases which recognise that the importance of the substantive issue raised is material to the exercise of the court's discretion with regard to delay. The well known cases of **R v Secretary of State for the Home Department ex parte Ruddock** [1987] 1 WLR 1482 and **R v Secretary of**

> **State for Foreign and Commonwealth Affairs ex parte World Development Movement** [1995] 1 WLR 3 86 are two such. In neither, however, was the delay remotely as long as here and nor was there any prejudice resulting from it."

[48] It is to be emphasised, however, that **North West Leicestershire**, which was cited by Mrs Minott-Phillips, was not a hearing of the substantive application, but the consideration of whether leave to apply should have been granted. There is no dispute that, at the leave stage, the issue of delay could preclude the consideration of the substantive issues. To that extent the case may be considered distinguishable.

[49] A reading of rule 56.6(5) does not seem to support Mr Codlin's position. The rule does not require the court to consider the merits of the application before deciding that the delay in applying prevents the grant of any relief. Indeed, it may be said that there are circumstances where, although leave to apply was granted, the prejudice, hardship or harm to good administration is so apparent that it would be a waste of the court's time to consider the merits of the application.

[50] In the instant case, Williams J considered rule 56.6(5), considered the decision in **Caswell**, considered the hardship that the belated grant of *certiorari* would cause and considered Mr Levy's explanation for the delay in applying. Having done so, she dismissed the application.

[51] It seems that the learned judge considered that the delay precluded the grant of any relief whatsoever and, on that basis, refused to consider the merits of Mr Levy's

application. I am led to that opinion by her reasoning at paragraph 109 of her judgment. There she said:

> "Mrs Minott-Phillips has noted that the relief sought would adversely affect the rights of [JRF]. They have carried out their mandate to recover the monies due under the loans and debt portfolios they had acquired.
> They acted in the belief that the exemptions afforded the original lenders would be passed on to them. If some six (6) years after they had first been given protection from claims by borrowers arising from the requirements of the Act they were to lose such protection, they would be exposed to substantial hardship.
> The argument is compelling and convincing."

[52] Those words are reminiscent of the following quote from the judgment in **R v Bassetlaw District Council ex parte Oxby** [1998] PLCR 283 that was cited in **North West Leicestershire**. In rejecting the arguments of developers, who stood to benefit from a certain planning approval, that they would be prejudiced by judicial relief quashing that approval, the court in **Bassetlaw District Council** stated, in part at pages 302 – 303 of the PLCR report:

> "The answer would be different if the planning consent was one which should in any event have properly been granted or where at least it appears that that might be the case. **Similarly, the position would be different if there had been a material change of position on the part of an affected party on the faith of the consent being valid**." (Emphasis supplied)

[53] Based on these principles, Williams J, having decided that the relevant order was that granted on 25 June 2002, was entitled to consider the following question: "Having regard to the delay, would the grant of relief produce such hardship or prejudice or be

so detrimental to good administration that the application ought to be refused?" That question could be asked in priority to any other question raised in the instant case. It need not have been the only question asked, but could be so if, on deciding that the claim had been filed very late, the learned judge was of the view that the consequences of delay would be such that no relief could properly be granted.

[54] I find that the circumstances of the instant case justified Williams J's approach. The situation is that for at least six years, up to the date of the filing of the claim, JRF had operated on the basis that the exemption orders were valid. There are some 23,000 debtors involved. Some of the debts must have been repaid. The properties of some debtors, such as Mr Levy, have been sold in an attempt to liquidate the debts. No further exemptions have been granted since 2008.

[55] It is patent, that even relatively minor relief, if relief were deserved, by way of a declaration that these exemption orders were invalid, would result in mammoth upheaval. It would most likely generate a tsunami of litigation that would engulf this country's already overburdened court system. Individuals who have been adversely affected over the past ten years, would sue seeking to recover money had and received or damages for the wrongful sale of their respective properties. The likely defendants would be JRF and the Minister of Finance. The resultant hardship and prejudice to those parties would be horrendous. The situation would cause substantial detriment to good administration. Those results would preclude the grant of any form of relief. In light of such calamitous consequences, why then would the court embark on a futile

exercise of considering the merits of the claim? For these reasons, I find that Williams J was entitled to consider the effect of the delay to the exclusion of the merits of the substantive application.

[56] In light of the finding that the relevant order was that made in 2002, I need not assess, in any detail, the learned judge's consideration of Mr Levy's attempt at convincing her that his application was not inordinately late. Mr Codlin had approached this aspect of his submissions on the platform that it was the 2008 exemption order that was relevant. On that basis, he argued that the learned judge's assessment of the evidence was incorrect and that Mr Levy was only a few months late.

[57] In the instant case, Mr Levy has asserted that he did not know that the exemption order affected him. He stated in his affidavit in support of the application that it was in or about February 2008 that he became aware of the existence of the exemptions.

[58] Finding, as I have, that Mr Levy was over six years late, the argument, concerning whether he knew or did not know of the exemption order by February 2008, becomes irrelevant. In my judgment, the long delay in this case is plainly inexcusable. Mr Levy knew, from as early as February 2002, that his loan had been acquired by JRF. He had been alerted that JRF was charging interest at the rate of 50 percent per annum compounded at monthly rests, he had been in communication with JRF though his attorneys-at-law since that time and the first relevant exemption order was gazetted on

25 June 2002. I, like Williams J, reject any proposition that Mr Levy's claim was not attended by undue delay.

[59] I find that Williams J was right to have rejected his explanation of ignorance. Based on the above, I need not discuss ground (f) concerning the findings, or lack thereof, based on the merits of the claim.

**Conclusion**

[60] A fair construction of the exemption orders granted by the Minister of Finance is that the exemption order that affected Mr Levy was that dated 25 June 2002. As a result, his application for leave to claim judicial review was several years in excess of the three months allowed, by rule 56.6(1) of the CPR, for bringing such claims. The fact that Mr Levy had been granted leave to file his claim for judicial review prevented the learned judge, at the hearing of the substantive application, from considering whether leave should have been granted. It did not, however, prevent that judge from finding that the delay was such that no relief should be granted. She was entitled to do so, on the basis that relief would have caused severe substantial hardship or substantial prejudice to a person affected or would have been detrimental to good administration (rule 56.6(6)).

[61] In the instant case, JRF had acted, for at least six years, on the basis that the exemption orders were valid. Williams J was correct in finding that JRF would have suffered severe prejudice and hardship if any relief, whatsoever, had been granted. The number of debtors and the expanse of time involved, would have alerted her, as

soon as she had decided that the 2002 order was the relevant order, that any grant of relief could trigger a vast number of claims against JRF and also the Minister of Finance. This was a classic case of the mischief that rule 56.6(6) was designed to prevent.

[62] In the circumstances, Williams J was entitled to refuse the relief without considering the merits of the substantive claim. To have embarked on that journey would have been an exercise in futility. These courts do not act in vain.

[63] For those reasons, I would dismiss the appeal and affirm the judgment of Williams J. In the circumstances, I need not consider the additional or alternative grounds contained in the counter-notice of appeal filed by JRF that concerned the merits of the substantive application. I am obliged, however, to consider the question of costs.

**Costs**

[64] The guidance as to the appropriate order for costs in respect of applications for judicial review is to be found in rule 56.15(5) of the CPR. It states:

> "(5) The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application."

[65] Counsel for the JRF have argued that costs should be awarded against Mr Levy because he has acted unreasonably in making the application and during the course of the application. They contend that this application came on the heels of another claim

by which Mr Levy attempted to prevent the sale of his property on the basis that he was not indebted to JRF. Learned counsel also argued that Mr Levy also abused the process of the court by applying, under the auspices of this claim, for an injunction to prevent the sale of the property, when his previous attempts at securing an injunction had failed.

[66] Two things need to be noted. The first is that costs were awarded against Mr Levy in the previous claim. The second, is that he was granted leave to file his claim for judicial review. Had an order for costs been made against Mr Levy, at the stage of the application for leave, I doubt that it would have been disturbed. The court, however, allowed him to proceed. I cannot, therefore, accept that there should be any departure from the general rule provided by rule 56.15(5). Each party should bear its own costs.

**PANTON P**

**ORDER**

1) The appeal is dismissed.
2) The judgment of Williams J is affirmed.
3) Counter-notice of appeal allowed on the grounds stated by Williams J.
4) Each party to bear own costs.