THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Procedural Appeal No. S222 of 2018

BETWEEN

Strategic Services Agency

(Appellant/Defendant)

v.

Ravi Balgobin Maharaj

(Respondent/Claimant)

Panel:
R. Narine J.A.
G. Smith J.A
A. des Vignes J.A.

DATE DELIVERED: April 2, 2019

Appearances:

Ms. D. Peake SC leads Mr. R. Hector, Ms. S. Nixon and Ms. T. Vidale instructed by Ms. D. Katwaroo on behalf of the appellant.

Mr. Ramlogan SC leads Mr. D. Bailey and Mr. G. Ramdeen instructed by Mr. G. Jagroo on behalf of the respondent.

I have read the judgment of Narine J.A. and agree with it.

G. Smith,
Justice of Appeal.

I too, agree.

A. des Vignes,
Justice of Appeal.

JUDGMENT

Delivered by R. Narine, J.A

1. Before this court is a procedural appeal filed by the appellant against the dismissal of an application to strike out and/or dismiss the respondent's fixed

date claim form, by Rampersad J who gave an oral decision on July 2, 2018 followed by a written ruling on July 5, 2018.

2. The appeal fails for two reasons:

    (i) The exemption contained in the Legal Notice No. 151 of 2017 does not apply retrospectively.

    (ii) The irregularities complained of in relation to the fixed date claim form and the affidavit filed in support thereof, can be remedied.

3. Therefore, the Court dismisses the appellant's appeal and orders the appellant to pay the respondent's costs in the court below and the costs of this appeal.

BACKGROUND

4. The respondent filed an application for leave to institute a claim for judicial review of the appellant's refusal to provide copies of the following documents in response to a request under the Freedom of Information Act Chapter 22:02 (FOIA):

    (i) Copies of documents containing the number of interceptions conducted without judicial warrants during the period 2015 and 2016;

    (ii) Copies of financial statements submitted to the Minister of National Security for the years 2015 and 2016; and

    (iii) Copies of documents containing the number of regional and international conferences and seminars attended.

5. The respondent sought a declaration that the appellant's refusal to provide the requested information was illegal and a breach of the provisions of the FOIA and an order of mandamus directing the appellant to grant access to the information in accordance with the FOIA.

6. On June 14, 2017 the respondent was granted leave. That order contained the mandatory direction that the claim for judicial review be filed within 14 days in accordance with Part 56 Rule (4)(11) of the Civil Proceedings Rules 1998, as amended (CPR).

7. On June 21, 2017 the respondent filed a fixed date claim form for judicial review supported by an affidavit of even date.

8. The appellant filed an application on November 15, 2017, for an order that the respondent's fixed date claim form be struck out and/or dismissed and or declared a nullity. That application challenged the validity of the proceedings as it was alleged that the respondent failed to file and serve a valid fixed date claim form, together with supporting affidavit, within the time provided for by the CPR. The appellant contended that the condition upon which leave was granted was not complied with and as such, leave had lapsed. According to the appellant the claim was not in the prescribed form pursuant to Parts 8 and 56.7 of the CPR as:

    (i) it did not contain a description of the claim,
    (ii) it did not include a certificate of truth and
    (iii) it was not filed with a valid affidavit in support.

9. The appellant also asserted that the proceedings ought not to continue in light of recently enacted subsidiary legislation namely, Legal Notice No. 151 of 2017, which was published on December 13, 2017. This Legal Notice essentially exempted the appellant from the operation of the FOIA.

FINDINGS OF THE TRIAL JUDGE

10. The judge found that the purpose of the affidavit is to provide evidence in support of a claim. It is not uncommon for the affidavit filed with the original application for leave to be the same that is used at the time of issuing the claim. It was held that all of the documents were served on the appellant. The appellant knew the case it had to meet. Failure to provide an affidavit in the form suggested by the appellant did not constitute a failure to make a claim. The alleged deficiencies in the respondent's fixed date claim form and supporting affidavit could have been cured by the court pursuant to its case management powers (Part 26.8 CPR), by allowing the respondent to rely upon his previously filed affidavit or allowing a further affidavit to be filed to ensure full compliance. Failure to include a certificate of truth in the fixed date claim form did not constitute a nullity. The facts being relied upon in the fixed date claim form were certified as being true on the affidavits.

11. Further, the subsidiary legislation referred to by the appellant was issued after the decision was made and as such could not be determinative of the respondent's rights as of that date. The appellant's application was dismissed and the appellant ordered to pay costs of the application to be quantified by the court in default of agreement certified fit for senior and junior counsel in light of the complexity of the issue in relation to the retrospective operation of the Legal Notice.

SUBMISSIONS BY THE APPELLANT

12. Counsel for the appellant argued that the reliefs sought by the respondent in the judicial review proceedings are purely academic in light of Legal Notice No. 151 of 2017 published on December 13, 2017, which exempted the appellant from the operation of the Act. The case of **Carib Info Access Limited v. First Citizens Bank Limited and Honourable Minister of Finance** CV2005-00080 was cited. In that case Jamadar J (as he then was) ruled that the Legal Notice passed after the commencement of proceedings, exempting First Citizens Bank Limited from the operation of the Act, made the issues in the claim academic.

13. Counsel also cited the case of **R v. Secretary of State for the Home Department ex p Salem** [1999] AC 450. In that case it was stated that the court should not hear academic disputes unless there is good reason in the public interest for doing so for example, when "a discrete point of statutory construction" arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that it will most likely be necessary to resolve the issue in the near future.

14. It was submitted that in the instant matter the issue of statutory construction that arises for consideration involves consideration of specific facts namely, the oath of allegiance and secrecy sworn by employees of the appellant which is specific to the agency. Further, there are no other similar cases and there is no possibility of similar cases arising in the future. Accordingly, in keeping with the overriding objectives of the CPR, the court's resources should not be utilised to entertain such an academic dispute since there is no substantive benefit to be achieved.

15. Counsel also contended that an absolute right to information is not vested in an applicant upon making a request, but it is rather a qualified right. According to Section 3 of the FOIA, while members of the public are given a general right of access to information, that right is limited by exceptions and exemptions which are subject to the exercise of discretion. The existence of the discretion militates against the creation of a vested right.

16. It was further submitted that the wording of the exemption order contained in the Legal Notice is clear and unambiguous. The words "is exempt from the application of the Freedom of Information Act" provides a definitive statement. Thus, any purported rights an individual may have claimed pursuant to the FOIA in relation to the appellant, were extinguished. Likewise, any duties imposed upon the appellant by the FOIA, would have been extinguished upon the publication of the Legal Notice.

17. Counsel also submitted that it would be a contravention of the law to remit the matter to the appellant to disclose the requested information since the appellant is no longer subject to the provisions of the FOIA. Counsel also argued that in judicial review proceedings, the issue of the granting of reliefs is discretionary and is determined at the time of the hearing of the judicial review application and not the date of the impugned decision. Counsel relied on the cases of **Walkerwell v. WASA** HCA No. 342 of 2000; **Balram Singh v. The Public Service Commission** [2014] UKPC 26 and **Dennis Graham v. Commissioner of Police** Civil Appeal No. 67 of 2005 in support of this submission.

18. Counsel argued that if at the time of the hearing the appellant was no longer subject to the provisions of the FOIA because of the change in the law, and could no longer be compelled to provide the requested information, then there is no useful purpose in allowing the claim for judicial review to proceed.

19. Counsel for the appellant took issue with the judge's failure to give consideration to the authorities cited which dealt with the identical issue namely, **Southwest Centre for Biological Diversity (Dr. Robin Silver) v. US Department of Agriculture (United States Forest Service; Department of Interior)** 314 F.3d 1060 (9th Cir. 2002) and **Centre for Biological Diversity (Defenders of Wildlife; Sierra Club) v. US Department of Agriculture (Wildlife Services, Animal and Plant Health Inspection Service)** 626 F. 3d 1113 (9th Cir. 2010). In those cases the court rejected the assertion that it was impermissible to apply a statute retrospectively on the basis that an applicant had a right to the information at the time it filed suit. Counsel for the appellant submitted that the approach of the US Court of Appeal is highly persuasive and should have guided the judge in the instant matter.

20. Counsel submitted that in determining whether the provisions contained in the Legal Notice were retrospective, the court must look at whether it is fair in the circumstances to apply it at the time when the court made its decision. It was also submitted that the test was whether if the statute is applied retrospectively, it would impair existing rights and obligations: **Yew Bon Tew & Another v. Kenderaan Bas Mara** [1983] 1 AC 553. Further, no unfairness existed because there is no entitlement of a citizen for the law to remain static and there was no existing right in the respondent to obtain the information sought and no existing obligation on the appellant to provide same.

21. Counsel highlighted that declarations will only be granted if they have some current or future value and it is inappropriate to assume that if the other reliefs claimed are not granted, that an applicant might still be able to obtain a declaration. It is unjust and inconvenient for a court to make an order that

is in contravention of the law as it stands at the time that a decision is made: Section 8 Judicial Review Act Chapter 7:08.

22. Counsel also submitted that in the circumstances, the judge was plainly wrong in refusing to strike out or dismiss the matter and allowing it to proceed.

23. Counsel contended that the judge also erred in law in finding that the respondent had made his claim as provided, as this finding is unsustainable and unsupported by the CPR. Leave obtained by the respondent to apply for judicial review was conditional on the claim for judicial review being filed within 14 days. Non-compliance of the condition meant that leave would lapse. The respondent having filed a document labelled as a fixed date claim form did not meet the requirements of the CPR as to what it should comprise. The purported claim only contained the reliefs sought. There were no facts, brief or otherwise to substantiate the claim. It did not assist in identifying and defining the issues which the claim sought to address. It did not contain a certificate of truth. It did not satisfy the minimum requirements of a claim for judicial review. The respondent therefore failed to comply with the condition that the claim for judicial review be filed within 14 days. Such failure to file and serve within the allotted time resulted in the leave lapsing: **Janet Tobias-Douglas v. The Tobago House of Assembly and the Chief Personnel Officer** CV2007-04742.

24. Counsel on behalf of the appellant also complained that the affidavit filed was defective as it was not in the first person nor was it numbered consecutively. It appeared to be legal submissions. It was submitted that without an affidavit being filed in support of the fixed date claim form then there was no proper claim for an administrative order.

25. Further submissions were made that the court is not empowered to take any corrective measures to correct the deficiencies in the above mentioned documents unless there is compliance with the order that the claim for judicial review be filed within 14 days in keeping with the conditional leave granted. As a result of the deficiencies in the purported claim and the affidavit it amounted to a nullity. Non-compliance with the order and the CPR resulted in a lapse of time. Thus, the judge did not have the power to treat with and regularise the deficiencies.

26. Counsel also took issue that despite acknowledging the identified deficiencies, the judge nevertheless awarded costs to the respondent fit for senior and junior counsel.

SUBMISSIONS BY THE RESPONDENT

27. Counsel for the respondent on the other hand submitted that the starting point for ascertaining whether an enactment has retrospective effect is to look at the enactment itself to ascertain whether it expressly provides as such. Counsel relied on the learning found in **Bennion on Statutory Interpretation** Fifth Ed. at pages 315 and 316. Counsel submitted that there is nothing on the face of Legal Notice No. 151 of 2017 to suggest that it ought to have retrospective effect.

28. It was further submitted that the second step in the test is to determine whether or not the enactment would impair the rights that a party possessed. Reliance was placed on the cases of **Blyth v. Blyth** [1966] 22 WLR 634 and **Yew Bon Tew v. Kenderaan Bas Mara** (supra). Counsel contended that the respondent acquired a vested right under the FOIA to access the requested

information and the subsequent exemption order contained in the Legal Notice cannot affect that right.

29. Counsel contended that the onus and burden of proving an exemption is on the public authority seeking to invoke it. The case of **R (Evans) & Anor. v. The Attorney General** [2015] UKSC 21, was cited.

30. Counsel for the respondent submitted that the Legal Notice does not have retrospective effect and is therefore irrelevant to the instant proceedings. This submission was supported by the approach taken by the courts in the cases of **Chandresh Sharma v. The Integrity Commission** Civil Appeal No. 51 of 2005 and **The Sanatan Dharma Maha Sabha of T & T v. The Honourable Minister of Finance** Civil Appeal No. 123 of 2004. The argument advanced on the basis of those authorities was that the public authorities were exempted from the operations of the FOIA after the applicants submitted their applications requesting information. The courts held that this did not affect the applicants' vested rights under the FOIA. The exemptions which came after the applications were made under the FOIA, did not have retroactive effect.

31. It was also submitted that the cases referred to by the appellant namely, **Southwest Centre for Biological Diversity (Dr. Robin Silver) v. US Department of Agriculture (United States Forest Service; Department of Interior)** (supra) and **Centre for Biological Diversity (Defenders of Wildlife; Sierra Club) v. US Department of Agriculture (Wildlife Services, Animal and Plant Health Inspection Service)** (supra), are decisions from the United States which essentially maintained that the court should apply the law in effect at the time it rendered the decision. This approach is different to that adopted in our jurisdiction and therefore those cases have no direct relevance and should not be followed.

32. Submissions were made by counsel on behalf of the respondent that whatever relief appears just and convenient at the end of the case is a matter of judicial discretion. Counsel submitted that it was within the jurisdiction of the court to declare the respondent's entitlement to the requested information and order its production on the ground that the right to access the requested information accrued and predated the exemption order contained in the Legal Notice.

33. Counsel argued that the case of **Carib Info Access Limited** (supra) relied upon by the appellant was distinguishable from the instant matter. In that case there was no challenge to the exemption order or the denial of access to requested information. Instead, the case involved the failure on the part of the public authority to comply with its duty to assist in reformulating a fresh freedom of information application unlike the instant matter in which the invocation of the exemption by the appellant is being frontally challenged.

34. It was further submitted that the respondent did comply with the order dated June 14, 2017. Any defects in the fixed date claim form and affidavit were minor and did not cause any prejudice to the appellant. The cases of **Chester Hamilton v. The Commissioner of Police** [2013] JMCA Civ 35; **Wayne Dillon V. Trinity Housing Co. Ltd** CV2010-05075 and **Wyllie v. West et al** Civil Appeal No. 8 of 2008 were cited. Counsel for the respondent submitted that the defects have been cured by the court pursuant to its case management powers under the CPR.

35. Counsel contended that it would be contrary to the overriding objective for the claim to be struck out due to pure technicalities in the manner in which the fixed date claim form and affidavit were drafted. The basic function of pleadings is that each party knows the case against them. It was clear from

the documents served on the appellant that the appellant knew the case it had to meet. There was no prejudice to the appellant.

36. Counsel also argued that when leave was granted for the respondent to rely on the affidavit which was used to obtain leave to apply for judicial review, in support of the fixed date claim, junior counsel appearing on behalf of the appellant indicated that it had no objection to this being done. Thus, any objections to irregularities and deficiencies pertaining to the documents ought to have been raised at that point.

37. Submissions were also made that there was no reason for the respondent not to be awarded costs, the appellant's application having failed.

THE ISSUES

38. The issues which arise for determination of this court may be summarized as follows:

    (i) Whether the judge was plainly wrong to refuse to dismiss/strike out the respondent's claim for judicial review on the basis of the Legal Notice.

    (ii) Whether the claim should have been dismissed/struck out on the basis of the alleged irregularities.

    (iii) Whether costs ought to have been awarded against the appellant.

Issue No. (i) - Whether the judge was plainly wrong to refuse to dismiss/strike out the respondent's claim for judicial review on the basis of the Legal Notice.

39. Legal Notice No. 151 of 2017 published on December 13, 2017 and made under section 5(1)(c) of the Act subject to the negative resolution of Parliament provides as follows:

> *"The Strategic Services Agency established under the Strategic Services Agency Act is exempt from the application of the Freedom of Information Act."*

40. Counsel for the appellant submitted that any purported rights the respondent may have had pursuant to the FOIA to have access to the information requested, were extinguished as a result of the publication of the Legal Notice. Similarly, any duties imposed upon the appellant under the FOIA, would have been extinguished upon the publication of the Legal Notice.

41. Counsel also submitted that in determining whether the exemption provision contained in the Legal Notice is retrospective, the court must look at whether it is fair in the circumstances to apply it at the time when the court makes its decision. Submissions were made that the approach of the US Court of Appeal in the cases of **Southwest Centre for Biological Diversity (Dr. Robin Silver) v. US Department of Agriculture (United States Forest Service; Department of Interior)** (supra) and **Centre for Biological Diversity (Defenders of Wildlife; Sierra Club) v. US Department of Agriculture (Wildlife Services, Animal and Plant Health Inspection Service)** (supra) were highly persuasive in this regard.

42. Counsel also submitted that the test was whether if the statute is applied retrospectively, it would impair existing rights and obligations: **Yew Bon Tew & Another v. Kenderaan Bas Mara** [1983] 1 AC 553. It was argued by counsel that no unfairness existed in the instant matter because there is no entitlement of a citizen for the law to remain static and there was no existing

right of the respondent to obtain the information sought and no existing obligation on the appellant to provide same.

43. Counsel for the respondent on the other hand submitted that in light of the words used in the Legal Notice and the general presumption against retrospectivity as set out in the authorities, the exemption cannot apply retrospectively.

44. In determining the issue of whether the judge was plainly wrong to refuse to dismiss/strike out the respondent's claim for judicial review on the basis of the Legal Notice, it is necessary to examine the issue whether the Legal Notice applies retrospectively.

45. There is a presumption against the retrospective operation of statutes. **Bennion's Statutory Interpretation**, 5th Ed. 2008, at pages 315 and 316 states the position as follows:

> *"Unless a contrary intention appears, an enactment is presumed not to be intended to have a retrospective operation… The true principle is that lex prospicit non respicit (law looks forward not back)."*

46. Viscount Simonds in **John Hudson & Co Ltd v. Kirkness** [1955] AC 696, 713 stated the reasons for the presumption against the retrospective application of legislation as follows:

> *"When an Act of Parliament becomes law and its meaning is plain and unambiguous a citizen is entitled to order his affairs accordingly and to act upon the footing that the law is what it unambiguously is. He must be assumed to know that the law may be altered but, if so, he may be assumed to*

know also that it is contrary to the general principles of legislation in this country to alter the law retrospectively…"

47. The application made by the respondent for the requested information was made on March 15, 2017, before the Legal Notice came into force on December 13, 2017. As was stated by Bennion, there is a presumption against the retrospectivity of Acts. This presumption is only displaced where its retrospective operation is stated in clear terms or where it arises by necessary and distinct application from its terms.

48. Legal Notice No. 151 of 2017 does not contain any express terms to demonstrate that it is intended to operate retrospectively. Retrospective operation also does not arise by necessary and distinct application from the terms used in the Legal Notice. Since the presumption against retrospectivity has not been displaced, the Legal Notice which came into force on December 13, 2017, will therefore only apply to applications arising from that date onward and not before.

49. The objective of the FOIA is stated in Section 3 which provides as follows:

"3. (1) The object of this Act is to extend the right of members of the public to access to information in the possession of public authorities by—

(a) making available to the public information about the operations of public authorities and, in particular, ensuring that the authorisations, policies, rules and practices affecting members of the public in their dealings with public authorities are readily available to persons affected by those authorisations, policies, rules and practices; and

(b) creating a general right of access to information in documentary form in the possession of public authorities limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities.

(2) The provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and any discretion conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information."

50. The object of the FOIA as set out in section 3 gives the public a right to access information in the possession of public authorities. In **Caribbean Info Access Limited** (supra) Jamadar JA at paragraph 8 noted:

> "There is no dispute that "the policy, purpose and object of the FOIA are to create a general right of access to information in the possession of public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by public authorities. There can also be no dispute that the court in both interpreting and applying the provisions of the FOIA is mandated to do so purposively, so as to further the policy, purpose and object stated above. The FOIA provides for a statutory right to information held by public authorities, and its effect is to broaden and deepen the democratic values of accountability,

transparency and the sharing of and access to information about the operations of public authorities."

51. Further, **Section 27(1)** of the **Interpretation Act Chapter 3:01** provides that rights and privileges acquired under a written law which is revoked are not affected unless the contrary intention appears. The section specifically states as follows:

> *27. (1) Where a written law repeals or revokes a written law, the repeal or revocation does not, except as in this section otherwise provided, and unless the contrary intention appears—*
>
> *(a) revive any written law or thing not in force or existing at the time at which the repeal or revocation takes effect;*
> *(b) affect the previous operation of the written law so repealed or revoked, or anything duly done or suffered thereunder;*
> *(c)* ***affect any right, privilege, obligation or liability acquired, accrued or incurred under the written law so repealed or revoked****;*
> *(d) affect any offence committed against the written law so repealed or revoked, or any penalty or forfeiture or punishment incurred in respect thereof; or*
> *(e)* ***affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as mentioned above,***
>
> ***and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the written law had not been repealed or revoked****."* (emphasis added)

52. Thus, the right acquired by the respondent under the FOIA to access the requested information cannot be affected by the Legal Notice because the Legal Notice came into being after the respondent's application was made and therefore it cannot apply retrospectively.

53. Accordingly, I uphold the judge's refusal to dismiss/strike out the respondent's claim for judicial review on the basis of the Legal Notice.

Issue No. (ii) - Whether the claim should have been dismissed/struck out on the basis of the alleged irregularities.

54. Before I summarize the submissions of the parties in relation to this issue it is convenient to set out several provisions of the CPR to which reference has been and will be made in this judgment:

> "**Certificate as to truth**
>
> 8.8 (1) The claimant must certify on the claim form or his statement of case that he believes that the contents are true and that he is entitled to the remedy claimed.
>
> **How to make an application for an administrative order**
>
> 56.7 (1) An application for an administrative order must be made by a fixed date claim identifying whether the application is—
>
> (a) for judicial review;
>
> (b) under section 14(1) of the Constitution;
>
> (c) for a declaration; or
>
> (d) for some other administrative order (naming it).

. . . . . .

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

. . . . . .

(10) The application may be without notice but must be supported by evidence.

Form of affidavit

31.2 Every affidavit must—

(a) be headed with the title of the proceedings;

(b) be in the first person and state the name, address and occupation of the deponent and, if more than one, of each of them;

(c) state if any deponent is employed by a party to the proceedings;

(d) be divided into paragraphs numbered consecutively;

(e) be signed by the deponent or deponents;

(f) be endorsed with the name of the attorney-at-law, if any, for the party on whose behalf it is filed; and

(g) be marked on the top right hand corner of the affidavit and of the backsheet with—

(i) the party on whose behalf it is filed;

(ii) the initials and surname of the deponent;

(iii) (where the deponent swears more than one affidavit in any proceedings), the number of the affidavit in relation to the deponent;

(iv) the identifying reference of each exhibit referred to in the affidavit;

(v) the date when sworn; and

(vi) the date when filed.

General power of the court to rectify matters where there has been an error of procedure

26.8 (1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

55. Counsel for the appellant complained that the fixed date claim form filed by the respondent did not meet the requirements of the CPR as to what it should

comprise. It only contained the reliefs sought. There were no facts, to substantiate the claim. It did not assist in identifying the issues which the claim sought to address. Counsel also complained that it did not contain a certificate of truth. It did not satisfy the minimum requirements of a claim for judicial review. The respondent therefore failed to comply with the condition that the claim for judicial review be filed within 14 days. Such failure to file and serve within the allotted time resulted in the leave lapsing: **Janet Tobias-Douglas v. The Tobago House of Assembly and the Chief Personnel Officer** CV2007-04742.

56. Counsel also complained that the affidavit that was filed was defective as it was not prepared in the first person nor was it numbered consecutively. In addition she submitted that it appeared to be legal submissions. It was submitted that without an affidavit being filed in support of the fixed date claim form then there was no proper claim for an administrative order.

57. In response to this, Counsel for the respondent argued that the respondent did comply with the order dated June 14, 2017. Any defects in the fixed date claim form and affidavit were minor and did not cause any prejudice to the appellant. The defects have been cured by the court pursuant to its case management powers under the CPR. Further, it would be contrary to the overriding objective for the claim to be struck out due to pure technicalities in the manner in which the fixed date claim form and affidavit were drafted. The basic function of pleadings is that each party knows the case against them. It was clear from the documents served on the appellant that it knew the case it had to meet.

58. The Court in exercising its discretion to strike out a claim must give effect to the overriding objective of the CPR, as stated in Rule 1.1.. That is, to enable

the Court to deal with matters justly. In **UTT v Ken Julien and Ors** CV2013-00212, the principles involved in striking out applications were examined:

> *"A striking out application is a draconian remedy only to be employed in clear and obvious cases where it is possible to demonstrate at an early stage before further management of the claim for trial that the allegations are incapable of being proved or the Claimant is advancing a hopeless case, either accepting the facts as pleaded as proven or as a matter of law. See Caribbean Court Civil Practice 2011, Mc Donald Corporation v Steel [1995] 3 AER 615. Zuckerman on Civil Procedure, A. Zuckerman p 279."*

59. The spirit of the CPR is not to exclude litigants merely because of procedural issues without the opportunity of examining the strengths and weaknesses of their case. Accordingly, Rule 26.8 of the CPR sets out the general powers of the Court to rectify matters where there has been an error of procedure. An error of procedure does not invalidate any step taken in the proceedings, unless the Court so orders: Rule 26.8(2). Where there has been an error of procedure, the Court may make an order to put matters right: Rule 26.8(3). Further, the CPR provides that the Court may make such an order on or without the application by a party: Rule 26.8(4).

60. I am of the view that the procedural errors in the fixed date claim form and affidavit in the instant matter were of a nature which could be rectified by the court. I am also of the view that it would not have been just for the court to strike out the respondent's claim for judicial review. In these circumstances, it would have been too much of a technical approach, for the court to strike out the claim on the basis of the procedural errors complained of. It was open to the judge to exercise his discretion under CPR 26.8 to remedy the irregularities

in the claim form and the affidavit. In doing so, the judge has not been shown to be plainly wrong. Accordingly, I decline to interfere with the exercise of his discretion.

Issue No. (iii) - Whether costs ought to have been awarded against the appellant.

61. Counsel for the appellant took issue that despite acknowledging the deficiencies that were identified, the judge nevertheless awarded costs to the respondent fit for senior and junior counsel.

62. Counsel for the respondent responded that there was no reason for the respondent not to be awarded costs, the appellant's application having failed.

63. Part 66.6(1) of the CPR provides that:

> *"If the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party."*

64. Subparagraph (2) thereafter gives the court the discretion to order a successful party to pay all or part of the costs of an unsuccessful party. Part 66.6(3) empowers the court to order the payment of only a specified proportion of another person's costs or the payment of costs from or up to a certain date only or the payment of costs relating only to a specified part of the proceedings.

65. In a striking out application, the judge has a discretion to exercise in granting or refusing such an application and is also entitled to make an order for the costs of

the application against the unsuccessful party. I have not been persuaded that the judge was plainly wrong in the exercise of his discretion. Accordingly, I decline to disturb his award of costs.

DISPOSITION

66. It follows that this appeal is dismissed. The orders of the judge are affirmed. Costs below to be assessed by the judge in default of agreement certified fit for senior and one junior counsel. The appellant shall pay the respondent's costs of the appeal determined in the amount of two thirds of the costs in the court below certified fit for senior and one junior counsel.

Dated the 2nd day of April, 2019.

R. Narine,
Justice of Appeal.