BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 1293 of 2015

BETWEEN:

STEVE STRAUGHN	**CLAIMANT/RESPONDENT**

AND

JACQUELINE CORNELIUS	**1st DEFENDANT/APPLICANT**
THE REGISTRAR OF THE SUPREME COURT	**2nd DEFENDANT**
THE ATTORNEY GENERAL	**3rd DEFENDANT**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Dates of Hearing: 2016 October 3rd, 21st

Appearances:

Mr. Steve Straughn Attorney-at-Law for the Claimant/Respondent
Ms. Duana Peterson in association with Mr. Ralph Thorne Q.C Attorneys-at-Law for the First Defendant/Applicant
Ms. Donna Brathwaite Q.C Attorney-at-Law for the Second and Third Defendants

DECISION

Introduction

[1] There are many components to the timely delivery of justice. There are many stakeholders and there are disparate administrative processes and responsibilities, which if not clearly defined and managed, can lead to delays in the system.

[2] This present action displays the need for clarity in our administrative processes which must be consistently audited to meet the needs of increased filings, and to the changing demands of the justice system.

[3] It highlights a long unresolved "bone of contention" as to what documents should be requested of judicial officers by the Registration Department where there has been an appeal of an Interlocutory Order as opposed to an appeal of the written judgment of a judicial officer after the conduct of a trial. These are all questions which in the opinion of this Judge have been answered by the 'Old' Supreme Court Rules 1982, but not the CPR 2008.

[4] It focuses our attention on the lack of resources that should be directed by the Executive towards a justice system that it bears the responsibility of funding.

[5] Stated differently, a new system of mechanical recording of proceedings immediately calls for an increase in the personnel needed to 'transcribe' the recorded proceedings generally, and specifically where there has been an

appeal. (It is noted that administratively the decision for judges' secretaries to type voluminous transcripts of evidence in addition to their other work is a direct result of the lack of resources that prevents the burdened CAT office from undertaking this task, and places a significant burden on the system to produce these transcripts in a timely fashion. (See paragraph 13 and 14 of the Affidavit of Deputy Registrar Kevin Hunte filed in this matter on September 15th 2016).

[6] It reveals a lacuna in the CPR which needs to be addressed, be it by way of Practice Direction or amendment of the Rules themselves, and it is this: There exists no clarity as to whether the administrative processes established under the "Old Rules" for record keeping in the justice system, but not addressed in the "New Rules", remain in play.

The Background and Relevant Facts

[7] This matter concerns an Interlocutory Application filed in this action by counsel for the First Defendant on April 14th 2016, together with Affidavit in Support of even date.

[8] It is an application seeking the Court's Order 'striking out' this matter (the substantive action) against the First Defendant with costs on the following grounds:

> "1. Pursuant to Rule 26.3 of the Supreme Court (Civil Procedure) Rules 2008, the Claimant's claim is an abuse of the Court's process and/or discloses no

reasonable grounds for bringing this claim and/or discloses no cause of action against the First Defendant in her capacity as a Judge of the High Court of Barbados, or in her personal capacity, or at all,

2. The Claimant's claim against the First Defendant is frivolous, vexatious and wholly without merit.
3. An affidavit in support accompanies this Application."

The Substantive Action of September 2015

[9] The substantive action is an Application for judicial review under the **Administrative Justice Act Cap. 109B** filed September 9th 2015 arising out of the Claimant's allegation that the Defendants have failed and/or refused to provide to the Claimant a transcript of the 'Judge's Notes of Evidence' of the hearing heard on March 13th 2014 (a decision for which was delivered on November 11th 2014) of the interlocutory application to join the Judicial and Legal Service Commission and the Attorney General as Defendants in High Court Suit No. 712 of 2013: Steve Straughn v The Chief Personnel Officer.

[10] The Claimant appealed that decision by Civil Appeal No. 29 of 2014.

[11] The Claimant (in this action) seeks a Declaration, an Order of Mandamus and an order for damages.

[12] The Claimant alleges that some eleven (11) months after Justice Cornelius delivered the decision in the said matter, the Registrar has not provided him (the Claimant) with the said transcript of the 'Judge's Notes', such failure/ refusal constituting a violation of his rights under **section 18(8)** of the **Constitution of Barbados.**

[13] It is noted, because in the opinion of this Court this fact is significant to the determination of what documents should be made available on an appeal, that Justice Cornelius's ruling in CV No.712 of 2013 was as a result of an Interlocutory Application filed on the 29th July 2012 to have the Judicial and Legal Services Commission and the Attorney General joined as Defendants to his substantive action.

[14] The matter, significantly, was heard on submissions only; no oral evidence was taken.

[15] Even more significant, is the fact that Justice Cornelius delivered a written decision on the 11th November 2014 in respect of this Interlocutory Application, which said document was made available to the Claimant; and which said written decision was available to the Claimant very early in this process, as the record shows that it was exhibited by the Claimant fourteen (14) days later when he filed his appeal (Civil Appeal No. 29 of 2014).

[16] It is noted also, and considered immaterial to the issue to be addressed by this Court that on May 30th 2016 the Claimant filed an Amended Fixed Date Claim Form whereby the First Defendant was entitled 'Justice Jacqueline Cornelius' as opposed to 'Jacqueline Cornelius' in the Claim Form filed September 9th 2015. The significance of this being of course that the action is being brought against her in her official (as opposed to personal) capacity.

Discussion

[17] It is observed that there is both in the application(s) filed and in the Claimant's submissions to this Court and the documents exhibited generally, a confusion between the Judges Notes of the Proceedings, the Judges' Notes of Evidence (it being duly noted that there was no evidence given in this matter) and the transcript of the recorded proceedings (transcript of the notes of evidence and of the judgment of **Part 62.9 (1) of the CPR**), all very different documents. The Claimant repeatedly and stridently asked for the "Judge's Notes and the Judge's Notes of Evidence" and in his Written Submissions for the Notes of Evidence of the Proceedings.

[18] Under the 'old' Rules of the Supreme Court 1982, the Judge's Notes of the Proceedings were considered the official record of what transpired. But as will be seen, the Judge determined what note was to be taken, how it was to be taken (whether mechanically or manually), and in the event of an appeal what part of that Note was "relevant".

[19] **Order 32 Rule 16** provided for what record was to be kept of applications and proceedings In Chambers as follows:

> "16. A note shall be kept of all proceedings in the Judge's Chambers with the dates thereof so that all such proceedings in any cause or matter are noted in chronological order with a short statement of the matters decided at each hearing."

[20] Thus, in an Interlocutory Proceeding where no oral evidence was taken, **Order 32 Rule 16** made clear what the records (notes of proceedings) would reflect. It certainly, to my mind, anticipated an abbreviated record of the dates, parties, nature of the application and the Orders made/matters decided at the hearing, and nothing more.

[21] In interlocutory applications where complicated issues arose, it is contemplated that a Judge's Note would be more extensive; at the discretion of the Judge, it may contain a summary of submissions made and the responses thereto if there were No Written Submissions. Written Submissions have become the new norm under CPR however.

[22] **Order 35 Rule 5** spoke to the record keeping when there was a trial and required the judge in the trial of an action to take notes:

> "5. On the trial of an action the Judge shall take down, or cause to be taken down under his direction, notes of the evidence, and of all objections insisted on by either party, with the decisions on such objections."

[23] Also relevant is **Order 17** entitled Interpleader. **Rule 10 (1)** is relevant and provided:

> "10. (1) Order 35 applies, with the necessary modifications, to the trial of an interpleader issue as it applies to the trial of an action."

This speaks to my observation above, that in more complicated matters, a more extensive record/note may be made**.**

[24] **Order 59** spoke as follows to the evidence on appeal and copies of Proceedings in the court below in the following terms:

> "14 (1) When any question of fact is involved in an appeal, the evidence taken in the court below bearing on the question shall, subject to any special order of the Court, be brought before the Court as follows:
>
> a) In the case of evidence taken by affidavit, by the production of printed copies of such of the affidavits as have been printed, and office copies of such of them as have not been printed;
> b) in the case of evidence given orally, by a copy of so much of the judge's notes, certified by the Registrar, or a transcript of the evidence taken by a shorthand writer and certified by him, as is relevant or by such materials as the court may direct.
>
> (2) If, upon the hearing of an appeal, a question arises as to the ruling or direction of the judge of the court below to assessors, the Court shall have regard to the verified notes or other evidence, and to such other materials as the Court may deem expedient.
>
> 15 (1) Where any note of proceedings whether in shorthand or by longhand have been taken by a person employed in any court below or taken by the judge of the court below, copies of such parts of those notes as are required for the record of appeal shall be supplied by the registrar on payment of the fees prescribed in Part I of Appendix 2 to Order 62.
>
> (2) If no written decision is given by the judge of the court below at the time of giving judgment, the judge shall communicate his reason for the judgment in writing to the Registrar and those reasons shall be included in the record. (In other words Reasons for Decision were only requested when there was no written decision).
>
> (3) On the hearing of an appeal, the Court shall have the power, if the notes of the judge of the court below or transcript of the evidence are not produced or if there are no such notes or transcript, to hear and determine the appeal upon any other evidence or statement of what occurred before the judge which the Court may deem sufficient."

This, in my opinion, relates to what has been characterized as the 'Judges Notes of Evidence'.

[25] The matter was qualified further by **Order 68** which spoke to the 'Official Shorthand Note' and provided as follows:

> "68. 1 (1) In every action or other proceeding which is tried or heard with witnesses, an official shorthand note may, if the Judge so directs, be taken of any evidence given orally in court and of any ruling or judgment by the Judge, and if any party so requires, the note so taken shall be transcribed at his cost and such number of transcripts as any party may demand shall be supplied to him at his cost.
>
> 68.2 (1) If the Judge intimates that in the event of an appeal his note will be sufficient, the shorthand note of evidence need not be transcribed for the purposes of appeal.
>
> (2) If the parties agree or the Judge is of opinion that the evidence or some part of the evidence of any witness would, in the event of an appeal, be of no assistance to the Court of Appeal, the shorthand note of such evidence need not be transcribed for the purposes of an appeal.
>
> 68. 6 In this Order any reference to a short-hand note of any proceedings shall be construed as including a reference to a record of the proceedings made by mechanical means and, in relation to such a record, the reference in rule 5 to the official short-hand writer shall be construed as a reference to the person responsible for transcribing the record."

[26] **The Supreme Court Practice 1993 Volume 1**(the White Book)**,** which predates the current UK Supreme Court Rules in its discussion on Appeals to the Court of Appeal under the rubric 'Documents required on setting down the Appeal' states the following:

> "(1) the judgment or order of the court below- It is essential to lodge, on setting down, a copy of the judgment or order of the court below. The word "judgment" in Order 59, means the order giving effect to the court's decision in an action; it does not mean the judge's reasoned judgment. **Accordingly, it is not necessary, on setting down an appeal, to lodge a copy of the official transcript or a note of the judge's reasoned decision; it follows that the process of setting down should not be delayed pending receipt of such an official transcript or note of judgment, otherwise the appellant will almost certainly be out of time for setting down**." (my emphasis)

[27] The Learned authors in their reference to 'notes of evidence' and 'judgment' at paragraph 59/9/6 gave the following guidance:

> "Where the evidence or judgments were not recorded in shorthand, by stenographic means or on tape, rule 9 requires copies of the judge's notes to be lodged, otherwise counsel's notes. **Now that more proceedings are being officially recorded than in the past the number of cases where notes of evidence and judgment will be required for the purposes of appeals should be significantly diminished. In cases where notes are required, it is important to distinguish between notes of evidence and a note of judgment (my emphasis)**. The judge will usually have taken notes of any oral evidence, but if he gave an ex tempore judgment he will not usually have a note of it. It also needs to be emphasised that, where the proceedings in the court below were recorded in shorthand, by stenographic means, or on tape, notes of evidence and notes of judgment will not be acceptable to the Court of Appeal, and the appellant's side must bespeak and pay for the requisite number of copies of the official transcripts of the judgment, and where relevant, the evidence."

[28] The CPR 2008 ushered in a new regime of recorded proceedings and it is noticeable that it lacks the detail (in particular the administrative provisions) to be found in the 'old' Rules of the Supreme Court.

[29] It is agreed by all that **Part 62. 9 (1) (b)** speaks to this scenario (that is, what documents are required on an appeal) and appears to be the only Part that does so.

[30] It states as follows:

> "Upon the notice of appeal being filed, the Registrar must forthwith, (b) where the appeal is from the High Court,
>
> (i) Arrange for the court below to prepare a transcript of the notes of evidence and of the judgment; and
> (ii) When the notes and judgment referred to in sub-rule (1) are prepared, give notice to all parties that copies of the transcript are available on payment of the prescribed fee."

[31] To my mind, a literal interpretation of this provision is that it speaks merely to "Notes of Evidence" presumably where oral evidence has been given and of a "judgment", the implication being a transcript of the judgment given orally, for surely if there is a Written Judgment in the normal course of things there would be no need for a transcript. No clarity is brought to bear on the circumstance where an Interlocutory Application is heard on submissions or for that matter where oral evidence is given in an Interlocutory Application.

[32] This provision **(Rule 62.9 (1) (b))** places on the Registrar the responsibility of ensuring that the 'process' of transcribing the notes of evidence and the oral decision/judgment of the Court below is done. It is also, in my opinion reasonable to infer that this references the process of transcribing the electronic or mechanical recording and not a process of transcribing the Judge's note.

[33] To my understanding, under the Old Rules where there was an Order made on an Interlocutory Application which was appealed (after the granting of leave), the Official Record was the Order made (duly perfected) and the Reasons for Decision requested of the judicial officer. It follows that where there was or is a Written Decision on an Interlocutory Application there was/is no need for a request for Reasons for Decision as the Written Decision spoke to that. Any interlocutory application encompassing oral evidence and submissions made

and answered would in all likelihood have generated a more extensive Judge's Note.

[34] And similarly, where the Application was on submissions, there were no "Notes of Proceedings" strictly so called or Judges Notes of Evidence.

[35] It is my view, that in the context of this matter, the document very kindly provided by the Judge, did not constitute Notes of Evidence and was, in effect, a document to which the Claimant was not entitled. I agree with counsel for the First Defendant that they constituted the Judge's own notes with respect to which there is no statutory requirement that they must be furnished to the Claimant. Certainly, in the context of the 'old Rules', these Notes are NOT relevant to the appeal.

Disposal

[36] On a consideration of the Application, Affidavits and Written Submissions, this Court exercises its authority to strike out the Claimant's Claim against the First Defendant under **Rule 26.3** of the **CPR** on the ground that the First Defendant has been improperly and /or unnecessarily joined as a party for the two main reasons as follows:

[37] Firstly, much confusion is generated by the terms used in the request for documentation (see registrar's request of Justice Cornelius of reasons for her decision and the Notes of Proceedings; her response forwarding her written

decision and her brief hand written note and her indication that the proceedings were recorded and that the proceedings were recorded and a transcript available from the CAT Recorders; the Claimant's request dated 12th May 2015 to the Deputy Registrar of the Judge's "Notes").

[38] Under the 'old Rules' several documents could have been made available or requested as follows:

i. The transcript of the official shorthand note (if there was one ordered by the Judge);
ii. A recording of the judgment;
iii. Failing the above, the judge's own note of the proceedings, if the judge intimated that his/her notes were relevant; it is noted that at his/her discretion it was up to the judge to make available his/her note of relevant parts of the evidence.
iv. The judge's reasons for decision.

See **Odgers' Principles of Pleading and Practice 21st ed** under the rubric 'Documents for use on appeal' at **page 334**.

[39] See also **Supreme Court Practice 1988** (Whitebook) at 59/9/3 which makes the distinction between Notes of Evidence and Note of Judgment and the practices attendant on determining which of the two is relevant in a particular appeal. (It is noted this matter was addressed in the United Kingdom by a Practice Statement dated October 22, 1986.)

[40] But in the circumstances of this matter, none of these documents are relevant.

[41] By his own admission, the Claimant received the Judge's (personal) Notes prior to the filing of this action (specifically in July 2015), but indicated to this Court that this was not what he wanted; but the record shows and counsel admits that it was what he requested. Thus, in point of fact, the Judge neither refused nor neglected to provide the documents requested of her. Significantly, it was clear from the oral submissions of the Claimant to this Court that there was no dispute of the factual content of paragraph 20 of the Affidavit of Deputy Registrar Kevin Hunte that prior to the filing of this action the Claimant was informed that "the Notes of Proceedings taken by … Justice Cornelius had been completed and (were) ready for collection"; and at paragraph 21 that the Claimant never collected the said Notes.

[42] The Claimant, in response to the Court's request as to clarification as to why he sued the Judge submitted that it was because the Judge wrote to him and admitted responsibility for providing the documents requested. He argued at paragraph 23 of his Written Submissions that the First Defendant having indicated to the Registrar and to the Claimant that she had taken the responsibility of preparing the transcript of the Notes of evidence in accordance with **Part 62.9(1)** of the **CPR** Rules, the responsibility of

making the said transcript of the Notes of Evidence available to the Claimant rested with the First Defendant.

[43] I do not accept this argument.

[44] A review of the exhibited documents does not support this. The documents exhibited show that by letter dated July 3rd, 2015 the Judge responded to the Registrar's request affixing a copy of her handwritten note and copied said response to the Claimant.

[45] This correspondence cannot reasonably be seen as an assumption of responsibility as alleged by the Claimant. Also, this argument ignores the fact that the said letter enclosed the handwritten notes of the judge as requested by the Claimant, which said notes were later typed and made available to him before he filed this action for judicial review.

[46] The above reasoning is based on a consideration of the chronology of events and the facts/circumstances of this occurrence. Such facts fail to show a failure and/or refusal by Justice Cornelius to provide the Claimant with a Transcript of the Judges Notes (the document requested by him). Rather, the Claimant's affidavit shows that every effort was made by Justice Cornelius to provide the Claimant with the documents that he requested.

[47] Thus, in the opinion of this Court, there was no basis in fact to support the inclusion of Justice Cornelius as a party to this action.

[48] Secondly, the more significant reason for this Court's striking out of the First Defendant is grounded in the long established principle of law/ public policy, that judges are not personally liable to civil actions in respect of their judicial functions and/actions.

[49] **Halsburys' Laws of England Vol 20 2014 ed. at paragraph 607** states that persons exercising judicial functions in a court are exempt from all civil liability at common law for anything done or said within their jurisdiction even if there is bias, malice or corruption. It is a rule of the highest antiquity which has been accepted as a respected principle of Public Policy.

[50] Relevant hereto is the discussion of this subject by **Lord Hailsham** (Privy Council) in **Ramesh Lawrence Maharaj v The Attorney General of Trinidad and Tobago (1978) 30 WIR 310 at pages 13-14**, where he states as follows:

> "A judge…is not in the ordinary sense a civil servant. But he had further immunity of his own. Judges, particularly High Court judges were not, and are not, liable to civil actions in respect of their judicial acts, although, of course, in cases of corruption and criminal misconduct, they have never been immune from criminal process or impeachment. This is trite law… This civil immunity protected the judge whether he committed a mere error of law, or, in the case of a High Court judge, and perhaps not only then, if he exceeded his jurisdiction, or if he committed a breach of natural justice, or subject to what I have said about criminal liability if he acted maliciously or corruptly."

[51] **Lord Denning** stated in **Sirros v Moore [1975] 1 QB 118** as follows:

> "Ever since the year 1613, if not before, it has been accepted in our law that no action is maintainable against a judge for anything said or done by him in the

> exercise of a jurisdiction which belongs to him. The words which he speaks are protected by absolute privilege. The orders which he gives and the sentences which he imposes, he cannot be made the subject of civil proceedings against him. No matter that the judge was under some gross error or ignorance, or was actuated by envy, hatred and malice and all uncharitableness, he is not liable to an action. The remedy of the party aggrieved is to appeal to a Court of Appeal or to apply for habeas corpus, or writ of error or certiorari, or take some such step to reverse his ruling. Of course if the judge has accepted bribes or been in the least degree corrupt, or has perverted the course of justice, he can be punished in the criminal courts. That apart, however, a judge is not liable to an action for damages. The reason is not because the judge has any privilege to make mistakes or to do wrong. It is so that he should be able to do his duty with complete independence and free from fear."

[52] This immunity from suit arises even in circumstances where the judge has acted outside of his jurisdiction, so long as he/she has acted judiciously. At Page 15 of the judgment Lord Denning stated further:

> "A judge of a superior court is not liable for anything done by him while he is "acting as a judge" or "acting judicially" or "In the execution of his office" or "quatenus a judge". What do all these mean? They are much wider than the expression "when he is acting within his jurisdiction" I think each of the expressions means that a judge of a superior court is protected when he is acting in the bona fide exercise of his office and under the belief that he has jurisdiction, though he may be mistaken in that belief and may not in truth have any jurisdiction. No matter that his mistake is not one of fact but of law…nevertheless he is protected if he in good faith believes that he has jurisdiction to do what he does."

[53] As recently as 2013 the courts in England re-affirmed this principle when it applied **Sirros v Moore** in the case of **Engel v Joint Committee for Parking & Traffic Regulation Outside London [2013] All ER (D) 08**, in determining whether judicial immunity applied. The Court was of the view that the principle of immunity for exercise of judicial functions is a policy decision

and one which must be upheld even in extreme circumstances to permit the advancement of justice.

[54] This too is the law in the Commonwealth Caribbean and Barbados.

[55] In summary, there is no basis in law or fact why the First Defendant should have been made a party to this action.

The Issue of Costs

[56] **Part 65, Rule 65.11 (1)** of the **CPR** provides:

> "On determining any interlocutory application except at case management conference, pre-trial review or the trial, the court must
>
> a) decide which party, if any, should pay the costs of that application;
> b) assess the amount of such costs; and
> c) direct when such costs are to be paid."

[57] This application not being made pursuant to a case management conference, pre-trial review or trial, this Court awards the costs of this Application to the First Defendant.

[58] In assessing such costs this Court is guided by the factors set out in **Rule 64.6 (5)**.

[59] This was in the opinion of the Court a "vexatious" action and consideration of that fact has played a part in the Court's assessment of the Costs.

[60] This Court accordingly awards costs in the sum of $3000 to the First Defendant.

[61] On the application of counsel for the Claimant, there is a stay of execution of this judgment for four (4) weeks.

MARGARET A. REIFER
Judge of the High Court