

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

APPEAL NO 10 OF 2009

BETWEEN:

CARLOS POWELL AND ADRIAN ROWE

APPELLANTS

and

ATTORNEY GENERAL OF THE CAYMAN ISLANDS

(FOR AND ON BEHALF OF THE PUBLIC WORKS

DEPARTMENT AND THE ROYAL CAYMAN ISLANDS

POLICE DEPARTMENT)

RESPONDENT

BEFORE: THE RT. HON. SIR JOHN CHADWICK, P.

THE HON. MR. JUSTICE MOTTLEY, J.A.

THE HON. MR. JUSTICE VOS, J.A.

REASONS FOR JUDGMENT DELIVERED ORALLY ON SEPTEMBER 9, 2009

APPEARANCES:

On behalf of the Appellants: (no representation)

On behalf of the Respondent: Ms. V. Ellis

1 **PROCEEDINGS COMMENCED ON WEDNESDAY,**
2 **SEPTEMBER 9TH 2009 AT 10:04 A.M.**

3
4 CHADWICK, President: Call Powell and Rowe
5 and call outside to see if there is anyone for
6 Powell and Rowe.
7 THE CLERK: Application 16 of 2008 in the
8 matter of Powell and Rowe v Attorney General.
9 Shall I send the marshal to check outside?
10 CHADWICK, President: Yes please.
11 MS. ELLIS: I appear on behalf of the
12 Attorney General -- Vicki Ann Ellis from the
13 Government Legal Department on behalf of the
14 Solicitor General.
15 CHADWICK, President: Thank you.
16 Ms. Ellis you probably know we have listed this
17 matter with a direction that unless cause be
18 shown why it should not be struck out as an
19 abuse of process then it will be struck out.
20 MS. ELLIS: My Lord I'm aware of that.
21 CHADWICK, President: Is there anything
22 you want to say to us on that?
23 MS. ELLIS: My Lord I can just simply
24 confirm what it is that I had indicated to the
25 Registrar in our letter of the 3rd of

1 September.

2 CHADWICK, President: Yes we've read that.
3 MS. ELLIS: Thank you very much.
4 CHADWICK, President: The problem for the
5 Crown is that the work of the Public Works
6 Department is undoubtedly hampered --
7 MS. ELLIS: That is it exactly, My Lord.
8 CHADWICK, President: -- whether these
9 employees have to be reinstated or not.
10 MS. ELLIS: We are suffering great
11 prejudice. In fact we have -- they are
12 presently on required leave on full pay and
13 because of the nature of the work that they do
14 we were compelled to employ other persons to
15 replace them, who are also on full pay, and
16 this situation -- this circumstance has
17 continued for --
18 CHADWICK, President: Nearly 18 months.
19 MS. ELLIS: -- for almost one year.
20 CHADWICK, President: These employee are
21 on full pay.
22 MS. ELLIS: They are on full pay.
23 CHADWICK, President: That perhaps
24 explains why they don't want this matter heard.
25 MS. ELLIS: That is my concern. We have

1 brought that to the attention of the attorney
2 with no response. The way in which she has
3 proceeded with the matter has essentially
4 hampered us because we have not been able to
5 approach the courts in any other manner than by
6 letter.
7 CHADWICK, President: You are here now and
8 the Court is taking its own step.
9 MS. ELLIS: I'm very grateful for that, My
10 Lord.
11 CHADWICK, President: No reply to the
12 Court?
13 THE USHER: No, My Lord.
14 CHADWICK, President: Thank you Ms. Ellis.
15 MS. ELLIS: Thank you.
16 CHADWICK, President: Notice of appeal in
17 this matter was filed in this Court on the 29th
18 December 2008. In the circumstances which I
19 shall describe, we directed that the matter be
20 listed before us this morning for the
21 applicants to show cause why the appeal should
22 not be struck out as an abuse of process.
23 There has been no appearance on behalf of
24 the appellant, although there is a letter from
25 their attorney dated the 8th September 2009

1 indicating that she is not able to attend the
2 hearing because she is sick.

3 I shall now give our reasons for the order
4 which we shall make:

5 The appellants were employees of the
6 Cayman Islands Public Works Department. They
7 were dismissed from that employment in 2008.
8 The director of the Public Works Department
9 decided not to reinstate them. He conveyed
10 that decision by a letter dated 15th of
11 July 2008.

12 There was a subsequent meeting between the
13 appellants and the director on the 4th of
14 September 2008, and on the 21st of
15 September 2007, the Department had provided
16 material to the police in support of obtaining
17 search warrants.

18 On the 30th of October 2008, the
19 appellants filed an application for leave to
20 apply for a judicial review of the decision of
21 15th July 2008 of the decision not to provide
22 the appellants with a transcript of the hearing
23 of the meeting on the 4th of September 2008 and
24 of the decision not to provide copies of the
25 affidavits in support of obtaining a search

1 warrant.
 2 Since the middle of 2008, the appellants
 3 have been, in effect, suspended on full pay.
 4 The Attorney General was named as a respondent
 5 to the proposed judicial review proceedings.
 6 The application for leave to apply for judicial
 7 review was made *ex parte*, as the rules provide.
 8 It came before Mr. Justice Foster on the
 9 3rd of December 2008. The Attorney General's
 10 office had become aware of the application and
 11 they applied for leave to be heard on it. It
 12 is clear that they wished to put before the
 13 Judge some point which as they thought would
 14 make it inevitable that a judicial review
 15 process would fail.
 16 At a hearing on the 3rd of December 2008,
 17 the Judge granted permission to the Attorney
 18 General to be heard on the *ex parte*
 19 application. It became, therefore, an
 20 application made *ex parte* but to be heard on
 21 notice. The Judge adjourned the application
 22 for hearing on notice on the 12th of
 23 December, 2008.
 24 It is that order giving permission to the
 25 Attorney General to be heard on the *ex parte*

1 been told the attorney wished to withdraw the
 2 application to make representations at the
 3 hearing on the application for leave. In the
 4 premises, she said, we are happy for you to
 5 list the application for leave to be heard *ex*
 6 *parte*.
 7 Since the 15th of December, 2008 there has
 8 been no response to this appeal. The attorney
 9 is content that the application for leave
 10 should proceed without his representations.
 11 That letter of the 15th of December, 2008
 12 was followed by a letter to Mrs. Facey-Clarke
 13 of the 12th of January 2009 from the Deputy
 14 Solicitor General. She asked for an indication
 15 within 14 days whether the application for
 16 leave was to be listed for an *ex parte* hearing.
 17 There seems to have been no reply from that
 18 request.
 19 In an email dated the 9th of February,
 20 2009, the Registrar of the Court of Appeal
 21 wrote to Mrs. Facey-Clarke asking whether she
 22 wished to withdraw the appeal now that the
 23 Attorney General had agreed for the matter to
 24 be heard *ex parte*. The response to that on the
 25 10th of February was in these terms:

1 application and adjourning it for that purpose
 2 which the appellants now seek to appeal by the
 3 notice dated 29th December 2008.
 4 It seems that when the matter came before
 5 the Judge on the 12th of December, 2008 for
 6 hearing on notice, the attorney for the
 7 appellants indicated that she wished to appeal
 8 the order of the 3rd of December and she
 9 persuaded the Judge to give her leave for that
 10 purpose.
 11 The Attorney General, conscious of the
 12 potential for delay that would arise on such an
 13 appeal, indicated that rather than take the
 14 matter to appeal, he would withdraw his
 15 application to be heard and be content with the
 16 application for leave to proceed *ex parte*
 17 without submissions by the Attorney General.
 18 Of course, whatever submissions the Attorney
 19 General might wish to make if leave were
 20 granted could be made on the substantive
 21 hearing of the judicial review proceeding.
 22 On the 15th of December, 2008, the Deputy
 23 Solicitor General Ms. Ellis wrote to
 24 Mrs. Margeta Facey-Clarke, the attorney for the
 25 appellants, who indicated that as the Judge had

1 "The Honourable Justice Foster has
 2 already explained to Crown Counsel
 3 Ms. Vicki Ellis after he gave
 4 judgment that she could not just
 5 decide at that time to withdraw her
 6 application that the matter be heard
 7 *inter partes*. The Honourable Judge
 8 had already made his ruling and I had
 9 already given my verbal notice of
 10 appeal.
 11 My clients would like to proceed with
 12 the appeal.
 13 Please let me know your earliest
 14 available dates for this appeal. It
 15 should take about 1/2 day."
 16 On a further request for clarification
 17 made by the Registrar, Mrs. Facey-Clarke wrote
 18 back by email dated 10th February 2009:
 19 "We had a full hearing before the
 20 Judge which lasted over a period of 2
 21 days. At the end of the Crown[']s
 22 application the Judge made a formal
 23 ruling. The matter now needs to be
 24 appealed to reverse that ruling."
 25 On that basis the Judge was asked, much to

1 his surprise, to provide reasons for the ruling
2 which he had made. In circumstances that, as
3 he pointed out, there was no possible purpose
4 in an appeal for that ruling, he wrote by email
5 dated the 13th of February to the Registrar in
6 these terms:

7 "I simply do not understand this.

8 The Crown have now said they abandon
9 or concede their application and no
10 longer seek to be heard so there is
11 no need for any appeal to reverse the
12 formal ruling; it is pointless and a
13 waste of the Court of Appeal's time.

14 Can you please reiterate that to
15 Mrs. Facey-Clarke in emphatic terms,
16 with a copy to Mrs. Vicki Ellis. If
17 Mrs. Facey-Clarke persists, then
18 please let me have the file and I
19 will write some brief reasons. In
20 that case, how do we get the Crown's
21 recent letter and your correspondence
22 with Mrs. Facey-Clarke before the
23 Court of Appeal because they should
24 see it?"

25 Indeed they should.

1 On the 9th of April, 2009 Ms. Ellis,
2 Deputy Solicitor General, wrote to the Court of
3 Appeal to ask for an indication as to where the
4 captioned appeal stood and she noted that it
5 hadn't been set down at the last sitting of the
6 Court of Appeal -- that would have been the
7 sitting in March and April 2009 -- and she
8 pointed out that although the Attorney General
9 was aware that the notice of appeal had been
10 filed, they had never been served with a copy
11 of that notice and went on to say that the
12 Public Works Department had been advised to
13 stay any action pending the outcome of this
14 matter, but the prolonged delay continues to
15 affect the Department's ability to effectively
16 and efficiently carry out its work.

17 As Ms. Ellis explained to us this morning,
18 these two appellants are on leave with full pay
19 and two others have had to be hired to replace
20 them on full pay in the meantime. But the
21 department is simply not able to get on with
22 its proper business because it does not know
23 whether it may eventually be ordered to
24 reinstate these employees.

25 That underlies the need in a case of this

1 nature for judicial review proceedings to be
2 heard promptly. It also underlies the motive
3 which these appellants have in stringing out
4 these proceedings while they continue to enjoy
5 a period of suspension on full pay.

6 On the 22nd of April, the Registrar wrote
7 back to the Deputy Solicitor General with a
8 copy to Mrs. Margeta Facey-Clarke indicating
9 that Mrs. Facey-Clarke had undertaken to file a
10 notice of withdrawal and that the Court was
11 regarding the appeal as having been abandoned.

12 On the 5th of June, 2009, the Judge
13 delivered full reasons for the decision which
14 he had made on the 3rd of December.

15 I may say at once that those reasons fully
16 vindicate that decision; an appeal against that
17 decision would be hopeless as well as
18 pointless. The Judge quite properly took the
19 view that he was entitled on an *ex parte*
20 application to seek assistance from the
21 proposed respondent if he thought he needed it.
22 The purpose of the rule that these applications
23 be made *ex parte* is to avoid the need for
24 unnecessary costs and the possibility of
25 duplication of argument; first on the leave

1 application and second on the substantive
2 application. But there are circumstances and
3 the Judge took a view that this was one in
4 which he would be assisted in deciding whether
5 or not to grant leave by a fuller understanding
6 of what the issues would be if the matter was
7 fought out. That was a course that was plainly
8 open to him and his reasons could not be
9 faulted.

10 On the 11th of August, 2009, the Registrar
11 wrote again to Mrs. Facey-Clarke indicating
12 that reasons had been released on the 5th of
13 June and granting her to file her grounds of
14 appeal and to provide a time estimate for the
15 appeal and dates not available in the session
16 of the Court which would begin on the 23rd of
17 August.

18 On the 12th of August, those dates were
19 supplied by Mrs. Facey-Clarke and they included
20 today's date. Still, no Notice of Appeal had
21 been served on the proposed respondent to the
22 appeal, the Attorney General.

23 On the 28th of August, the Attorney
24 General wrote to the Registrar, with a copy to
25 Mrs. Facey-Clarke, to point out that despite

1 the directions of the 11th of August 2009, no
2 further progress seems to have been made in the
3 matter. She said:

4 "Despite our repeated exhortations we
5 have yet to be served with a Notice
6 of Appeal and Counsel for the
7 apparent Appellant appears to have
8 ignored your direction in respect of
9 the submissions."

10 She went on to say that the "dilatatory
11 conduct of this matter has continued to cause
12 the Government much prejudice" and asked that
13 it be dealt with and that it be referred to the
14 members of this Court for a direction.

15 Still no Notice of Appeal has been served,
16 as appears from a further email of the 2nd of
17 September from the Deputy Solicitor General to
18 the Registrar.

19 The correspondence then culminated with a
20 formal letter of the 3rd of September 2009 from
21 the Attorney General's Chambers to the
22 Registrar asking for the Court's directions.
23 It was on the receipt of that letter of the 3rd
24 of September 2009 that we directed that the
25 matter be listed for today.

1 In response to that letter, we have a
2 letter dated the 8th of September 2009 from
3 Mrs. Facey-Clarke indicating, as I said, that
4 she would not be able to attend the hearing
5 today. She then set out what was said to be
6 the brief facts of the case, including the
7 allegation that the Judge had told the Attorney
8 General that they couldn't simply withdraw
9 their application because he had already made a
10 formal ruling and that it would be up to the
11 plaintiffs and the defendants to decide how to
12 proceed. It is plain that that is not the
13 position of the Judge and never has been. His
14 position is that this appeal is a perfectly
15 pointless appeal in the circumstances that he
16 and the parties are content to proceed with the
17 hearing of the application for leave to bring
18 judicial review proceedings without hearing the
19 Attorney General on that matter.

20 The letter of the 8th of September asks
21 that this appeal be put over for hearing during
22 the November session. To do that would mean
23 that this application for leave to bring
24 judicial proceedings has been held up for
25 almost one year on an appeal which is both

1 pointless and hopeless and that the point of
2 suspension, which began in the summer of last
3 year, would have continued for some 15 months.
4 That position is simply unacceptable.

5 The process of the Court is being abused.
6 It is being abused in two ways; first the Court
7 is being asked to hear an appeal for which
8 there is no practical need at all, and secondly
9 the appellants, through their attorney, are
10 failing to comply with the procedural
11 requirements that they serve notice of the
12 appeal on the Attorney General and provide
13 their skeleton arguments and submissions so
14 that an appeal, if it were to be heard, could
15 be heard in the ordinary way.

16 There being no excuse for either of those
17 elements and in particular no excuse in the
18 letter of the 8th of September, the appeal will
19 be struck out.

20 MS. ELLIS: My Lords, thank you very much.
21 If I may just clarify one point at the
22 beginning much your ruling? The appellants
23 have not in fact been terminated, My Lord.
24 They have not been terminated, they were never
25 dismissed. Essentially the point where we were

1 at before this went off into a ditch as it were
2 was that the concerns of the appointing officer
3 was being put to them and they were asked to
4 simply give the explanation as to why they took
5 certain decisions. They have not been
6 dismissed. They were placed on required leave,
7 I believe, as of the 15th of July 2007, and
8 they have remained there for that entire
9 period.

10 CHADWICK, President: I will correct that
11 when I come to look at the transcript.

12 MS. ELLIS: Thank you very much, My Lord.

13 CHADWICK, President: They have not been
14 dismissed, but they have been suspended?

15 MS. ELLIS: Well, it's "required leave".
16 We don't like to call it "suspension". We
17 don't like to call it suspension because no
18 decision -- it's not a disciplinary action.
19 Essentially they have been put on leave while
20 the investigations progress.

21 CHADWICK, President: Very well, I will
22 make that clear.

23 MS. ELLIS: Thank you very much, My Lord.

24 CHADWICK, President: They are on
25 required leave, rather than suspension and they

1 haven't been dismissed.
 2 VOS, J.A.: From the 15th of July 2007.
 3 MS. ELLIS: Yes, My Lord.
 4 VOS, J.A.: Over two years?
 5 MS. ELLIS: Yes, My Lord.
 6 CHADWICK, President: 2007?
 7 MS. ELLIS: Yes, My Lord, they have been
 8 on required leave. Just let me clarify.
 9 CHADWICK, President: I see so it's a
 10 coincidence that the letter refusing to
 11 reinstate is 15th of July 2008?
 12 MS. ELLIS: Pardon me, My Lord?
 13 CHADWICK, President: I'm looking at the
 14 Judge's reasons.
 15 MS. ELLIS: Yes, My Lord.
 16 CHADWICK, President: Have you got those?
 17 MS. ELLIS: Yes, My Lord, I do have those
 18 in front of me.
 19 CHADWICK, President: In paragraph 2 of
 20 the Judge's reasons he refers to a letter
 21 refusing to reinstate dated 15th July 2008. Is
 22 that the correct date or the wrong date?
 23 MS. ELLIS: My Lord, I am not aware of
 24 that letter to be quite frank. I'm not aware
 25 of a letter dated the 15th of July 2008 and

1 pending the criminal investigation. In 2008
 2 the criminal investigation indicated that there
 3 were no criminal charges that could be laid,
 4 but in 2008 the appointing officer took a
 5 decision that they were going to proceed with
 6 the disciplinary charges. So this is how the
 7 matter has.
 8 CHADWICK, President: So there was a
 9 letter in 2008?
 10 MS. ELLIS: In 2008, yes.
 11 CHADWICK, President: It's just a
 12 coincidence that they both happen to be the
 13 15th of July?
 14 MS. ELLIS: Yes, My Lord.
 15 CHADWICK, President: Thank you very much.
 16 If I have a copy of the transcript I will pick
 17 up those points.
 18 MS. ELLIS: I'm grateful, My Lord. My
 19 Lord, I know that we have not been served, but
 20 I have to make an application in respect of the
 21 way this matter has progressed, whether or not
 22 Your Lordships are minded to make an order for
 23 costs in respect of this matter?
 24 CHADWICK, President: Ms. Ellis, I
 25 understand why you make the application, but

1 there was no question of a reinstatement.
 2 CHADWICK, President: That's the decision
 3 which is subject to judicial review. If the
 4 decision was in fact 15th of July 2007, the
 5 judicial review proceedings would be utterly
 6 hopeless. It would be well out of time.
 7 MS. ELLIS: My Lord, this is precisely the
 8 point and in fact that was one of the very
 9 knock out points which we intended to put
 10 before His Lordship Justice Foster when the
 11 matter was heard.
 12 MOTTLEY, J.A.: Obviously the other point
 13 was that the Attorney General was not a proper
 14 party to those proceedings.
 15 MS. ELLIS: Yes, My Lord, this was the
 16 very point we brought to the attention of the
 17 attorney even before the matter was -- even
 18 before she contemplated actually filing the
 19 application for leave for judicial review.
 20 My Lord, I'm sorry, he has been on
 21 required leave since the 15th of September
 22 2007. What happened by the letter in 2008
 23 essentially was commencing the judicial review
 24 proceedings because he was put on required
 25 leave -- they were put on required leave

1 this actually is a hearing directed by the
 2 Court and if we now make an order for costs I
 3 think it would simply give rise for more
 4 trouble.
 5 MS. ELLIS: I think you are quite right
 6 about it, My Lord.
 7 CHADWICK, President: We are striking out
 8 the appeal.
 9 MS. ELLIS: Thank you, My Lord. No order
 10 for costs.
 11 CHADWICK, President: Although we are
 12 striking out the appeal, the transcript of what
 13 I have said will make it quite clear that this
 14 Court finds no fault in the Judge's approach to
 15 the problem.
 16 MS. ELLIS: Yes, I think that's abundantly
 17 clear. Thank you very much, My Lord.
 18 CHADWICK, President: I will add this; the
 19 effect of striking out the appeal does not, of
 20 course, affect the pending application for
 21 leave to bring judicial review proceedings, but
 22 the delay that has taken place since the 12th
 23 of December, 2008 delay for which on the
 24 history that I have recited is wholly
 25 attributable to the conduct of the appellants

1 and their attorney, it is essential that the
 2 application be heard as speedily as possible.
 3 Do you want us to give a direction as to
 4 time?
 5 MS. ELLIS: Yes, My Lord, I was about to
 6 rise to ask for that in the circumstances.
 7 Although we maintain our position that she be
 8 at liberty to proceed on an ex parte basis, we
 9 would appreciate if some directions could be
 10 given in respect to the time frame.
 11 CHADWICK, President: Well, sadly, the
 12 effect of your concession, which it would
 13 appear was made in order to avoid delay, there
 14 seems to have been very little purpose in the
 15 concession, but nothing we say prevents you
 16 from asking the Judge again if you want to. It
 17 may be better not to stir that pot.
 18 MS. ELLIS: No.
 19 CHADWICK, President: Would you like us to
 20 say that the application is to be listed within
 21 14 days? Let me ask the Registrar. Is that
 22 going to give rise to difficulty in the Grand
 23 Court?
 24 MS. ELLIS: I think so.
 25 THE CLERK: We would have to ask the

1 listing officer to be present to --
 2 MOTTLEY, J.A.: Not heard but listed.
 3 THE REGISTRAR: Listed.
 4 MS. ELLIS: In other words, the actual
 5 listing not the actual hearing date.
 6 THE CLERK: Okay.
 7 CHADWICK, President: It is the hearing
 8 that I am concerned about. What I would
 9 propose is that we direct that -- insofar as
 10 the list can accommodate it -- this application
 11 should be heard within the next 14 days. If
 12 the list cannot accommodate it, the listing
 13 officer will have to list it as soon as
 14 possible.
 15 MS. ELLIS: For the first available date,
 16 yes.
 17 CHADWICK, President: Yes. And that in
 18 listing the matter for hearing, the convenience
 19 of the appellants' counsel is not a factor to
 20 be taken into account.
 21 Thank you. Is there anything else?
 22 MS. ELLIS: No, My Lord, I believe that's
 23 it. Thank you very much.
 24
 25 (PROCEEDINGS CONCLUDED AT 10:40 A.M.)