THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

MONTSERRAT

CLAIM NO. MNIHCR 2022/0005
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BETWEEN:

[1] The King

Crown

and

[1] Steven Fagen
[2] Marie Carole Lidbetter

Defendants

Appearances:

Mr. Oris Sullivan for the Crown
Ms. Renee Morgan for the Office of the Attorney General
Mr. Steven Fagen and Ms. Marie Carole Lidbetter Litigants in Person/Defendants

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2024: March 19

April 24

July 5

RULING

FITZPATRICK [AG.]:

THE COURT CONSIDERED THE FOLLOWING:

[1] When should the state be called upon to pay for the legal representation of parties facing a criminal prosecution in the Montserrat High Court?

[2] Steven Fagen and Marie Carole Lidbetter (together the "Accused") are spouses who are alleged to have committed various crimes of dishonesty arising out of their involvement with a now defunct local company, Montobacco Ltd.

[3] The offences are detailed in the four count indictment filed by the Prosecution on July 28, 2022 (the "Indictment") as follows:

Count One – Obtaining Services By Deception contrary to Penal Code section 220(1)(b), as revised in 2008.

Steven Fagen between the 6th May 2012 and 31st December 2012, in the Overseas Territory of Montserrat, obtained services by deception namely the professional services of Roberto Greco.

Count Two – Obtaining Services By Deception contrary to Penal Code section 232(1)(b), as revised in 2013

Steven Fagen between the 1st January 2013 and 14th January 2015, in the Overseas Territory of Montserrat, obtained services by deception namely the professional services of Roberto Greco.

Count Three – Conspiracy to Steal contrary to common law

Steven Fagen and Carole Marie Lidbetter between the 30th October 2014 and 6th October 2017, in the Overseas Territory of Montserrat, did conspire to steal monies from Montobacco Ltd.

Count Four – Theft contrary to Penal Code section 222, as revised in 2013

Steven Fagen and Carole Marie Lidbetter between the 21st March 2017 and 15th February 2018, in the Overseas Territory of Montserrat, stole monies belonging to Montobacco Ltd., namely $11,000.00 (US dollars) from bank account 5003924.

[4] No trial date has been set in this case. The scheduling of a trial has been delayed while the Accused pursued financial assistance to fund their legal representation.

[5] Montserrat does not have any formal legal aid funding that an accused person can apply to for financial assistance. The process available here is for an accused to apply to the Office of the Attorney General for legal funding. Failing this, an accused can apply to this Court for a funding order.

[6] The Accused made application to the Office of the Attorney General who denied their request. This was followed by a reference made to the Court of Appeal on whether the failure to provide state funding represents an abuse of process and is contrary to the right to a fair trial enshrined in section 7(2)(d) of the Montserrat *Constitution*. The reference did not resolve the funding issue. As such, the Accused made application to this Court for a funding order (the "Funding Application").

[7] The documents relied upon by the Accused in support of their Funding Application was an Application For Free Legal Representation filed along with an Affidavit in Support sworn by Mr. Fagen both filed with the Court on September 16, 2022. In addition, the Accused relied upon an Application Form For Legal Aid completed by the Accused on September 21, 2022, which formed part of their application for funding made to the Office of the Attorney General.

[8] The Affidavit in Support sworn by Mr. Fagen on September 16, 2022 did not have any exhibits attached. The Application Form For Legal Aid completed by the Accused on September 21, 2022 attached copies of Mr. Fagen's U.S. passport, Ms. Lidbetter's Canadian passport along with a copy of the bank account statement for Mr. Fagen's Bank of Montserrat savings account 7176511 from the period February 1, 2022 to July 31, 2022.

[9] The Funding Application was heard on March 19, 2024 and opposed.

[10] Mr. Fagen presented himself on behalf of the Accused for testimony on March 19th. He was cross-examined by Mr. Oris Sullivan, the Director of Public Prosecution and then by Ms. Renee Morgan, Principal Counsel for the Office of the Attorney General. It should be noted that the Office of the Attorney General was inadvertently not notified of the March 19th hearing until that day. Regardless and very much to her credit, Ms. Morgan attended and participated fully in the hearing.

[11] There was no other witness(es) or evidence presented.

[12] At the conclusion of the March 19th hearing, this Court directed that written submissions were to be presented by the Accused and both counsel. The Accused were given a deadline of April 2nd for their submissions to be filed with both counsel having until April 16th.

[13] The Accused filed their submissions on the Funding Application on April 2nd.

[14] However, the Accused also filed an entirely new Affidavit in Support sworn by Mr. Fagen and Ms. Lidbetter on April 2nd along with a separate exhibits package titled "Certificate of Exhibits". The exhibits package included a letter from an individual claiming to be the source of the Accused's financial support dated October 13, 2022 along with a related promissory note dated November 7, 2022, receipts supporting the Accused's living expenses and current bank statements among other items.

[15] The Office of the Attorney General filed a Notice of Application also on April 2nd seeking to have the Attorney General "formally added as an interested party" on the Funding Application and to adduce "relevant evidence in relation to the application for legal aid". Additionally, the Affidavit sworn by Teresena Fergus, Director of Social Services, sworn April 2nd was filed providing information on the costs for groceries for a family of three on Montserrat along with a listing of salaries paid to various government employees.

[16] The Accused filed their "Supplementary Submission" on April 11th. This Supplementary Submission was in response to the Notice of Application and Affidavit filed by the Office of the Attorney General on April 2nd.

[17] The Office of the Attorney General filed submissions for the Funding Application on April 16th. The Office of the Attorney General also then filed the Affidavit of Vanessa Mark sworn on April 16th. Ms. Mark is the Senior Clerical Officer within the Office of the Attorney General. Her Affidavit presented groceries price lists from retailers in Montserrat.

[18] The Director of Public Prosecution filed submissions for the Funding Application on April 17th, which was one day past the Court deadline.

[19] The Accused filed their "Supplemental Submission 2" on April 18th. This Supplemental Submission 2 was in response to the late filed submissions from the Director of Public Prosecution. In essence, the Accused took the position that the Court should not accept or rely upon these late filed submissions.

[20] The Supplemental Submission 2 also offered comment on the submissions of the Office of the Attorney General, referenced content of a separate application to dismiss all charges filed by the Accused but not yet argued before this Court, made comment about the reference on legal funding submitted by the Attorney General to and ruled upon by the Court of Appeal and provided yet further submissions on the Funding Application.

[21] Lastly, the Office of the Attorney General filed copies of the reference with respect to the legal funding issue submitted by the Attorney General to the Court of Appeal dated December 7, 2022, the Certificate of Result on the reference issued by the Chief Registrar dated November 6, 2023 and the Opinion of the Court of Appeal on the reference released November 6, 2023.

[22] This Court listed the Funding Application to return for a further hearing on April 24th given the plethora of additional, unsolicited materials filed in the interim. A summary of the proceedings on that day follows below.

[23] The Accused's objection to the late filed submissions of the Director of Public Prosecution was denied.

[24] There is no doubt that deadlines set by the Court are expected to be obeyed with no expectation of indulgence otherwise. That said, the Court must always be mindful of the need to be fair to all parties especially where a filing is just beyond the deadline as here. The Accused did not demonstrate any prejudice to them if the subject submissions were permitted filing and were relied upon by the Court.

[25] Here, where the subject submissions were filed the morning after the deadline, where there was no prejudice to the Accused and where the issue was one of importance to this case and the broader administration of justice in Montserrat, the late filing of submissions from the Director of Public Prosecution was permitted.

[26] The Court also addressed the various materials filed by the Office of the Attorney General beyond submissions on the Funding Application. The Court noted that Ms. Morgan attended at the March 19th hearing on very short notice. Despite that short notice and an offer by Mr. Sullivan to conduct the hearing, Ms. Morgan fully participated in the hearing, including cross-examining Mr. Fagen. Again, this is very much to the credit of Ms. Morgan and her considerable skills.

[27] It would have been quite reasonable for Ms. Morgan to have attended the hearing on March 19th and asked for an adjournment to prepare and/or file materials. She did not. It may have been reasonable for Ms. Morgan at the conclusion of the hearing to have asked permission to file materials over the days following. She did not.

[28] Given the above, this Court advised that it would not be relying on any of the materials filed by Ms. Morgan subsequent to the March 19th hearing except the submissions filed on the Funding Application and the Opinion of the Court of Appeal on the reference from the Attorney General released November 6, 2023, which sets out the test for state funded legal assistance discussed below.

[29] Lastly, the Court addressed the further materials filed by the Accused beyond their initial submissions on the Funding Application.

[30] With one exception, the Court indicated that none of the additional materials filed by the Accused would be relied upon either given there was no permission to any party for additional materials beyond the Funding Application hearing submissions and that the bulk of the materials filed by the Accused were in response to materials filed by the Office of the Attorney General that were now rejected by the Court along with their position on the late filed submissions from the Prosecution.

[31] The Court did direct that the Accused would be permitted to rely on the exhibits package they filed on April 2nd given the Court's view that those documents had some connection to the testimony given by Mr. Fagen on March 19th although he failed to produce any such documents during that hearing. However, again towards exercising fairness to all participants, the Accused were told that Mr. Fagen would be required to submit himself to further cross-examination by both counsel on the contents of those documents. Faced

with this, the Accused withdrew their request to have the exhibit package relied upon by the Court in the determination of the Funding Application.

[32] The end result of the above was that the Court was left with only the evidence presented at the March 19th hearing along with the Court requested written submissions for consideration on and determination of the Funding Application.

Evidence from the March 19th Hearing

[33] As noted above, Mr. Fagen presented himself for testimony on behalf of the Accused. While in the witness box, he adopted the contents of the Affidavit in Support sworn by him on September 16, 2022 and the Application Form For Legal Aid completed by the Accused on September 21, 2022. Mr. Fagen stated that the contents of both were accurate and represented the current financial status for the Accused. No other documents of any kind or other evidence was presented by the Accused.

[34] The Affidavit in Support sworn by Mr. Fagen on September 16, 2022 presents the Accused request for "free legal representation" in the form of King's Counsel to ensure they are "on the same footing …and afforded their constitutional right to a fair trial" in the context of the Director of Public Prosecutions having assigned this prosecution to King's Counsel from England.

[35] Mr. Fagen's Affidavit is twenty six paragraphs in total and mostly addresses what the Accused consider to be the faults on the merits of the case so far presented against them. There are three paragraphs that touch upon the Funding Application merits, which are summarized as follows:

a) Paragraph 6 – states that the Accused have been "stripped of all personal assets" by the Crown and "prevented from being a director of a company or working in management with any company" by order of this Court made May 7, 2019 thereby "preventing both from trying to make any type of income";
b) Paragraph 7 – states that the Accused had their passports, driver's license and identification "seized" since July 26, 2021 thereby preventing "all traveling or affording both the opportunity to experience a normal basic human daily existence"; and,

c) Paragraph 23 – states that the Accused "have been forced to survive on the grace and kindness of family and friends **charity**" [emphasis mine].

[36] The other document relied upon by the Accused was the Application Form For Legal Aid completed by the Accused on September 21, 2022. This is a template form with handwritten information added. The information contained in the Application relevant to the funding issue is set out below (all figures EC):

a) The Accused indicate they are "unable to work";
b) The Accused cite the reason they are applying for assistance is that they have been "stripped of all my personal assets and financial resources and have been prevented from been [sic] a director in any company or to work in management" by court order;
c) The Accused note that their household is comprised of three people, namely Mr. Fagen, Ms. Lidbetter and their daughter now almost 16 years of age;
d) The Accused state that the only source of funds for their household is from "family **charity**" [emphasis mine] in the amount of $12,500 every "5 to 6 weeks";
e) The Accused set out a budget of $12,718 in expenses every 5 to 6 weeks coinciding with the schedule of the funds they receive. Essentially, they claim to spend what they have. The budget items consist of a $2,000 "stipend contribution to an individual", $5,200 to $5,600 for food, $1,908 in household utilities, including telephone and internet, $850 for car rental, $645 for school clothes and supplies, and $570 for office supplies and "court fees";
f) The Accused note that they have no rent expense as they are "staying as a guest at a friend's house";
g) The Accused identify no significant assets; and,
h) The Accused claim to have outstanding loans estimated in the amount of $540,000. No loan(s) breakdown or other details are provided. No loan(s) payments are noted on the budget as being made.

[37] During the course of cross-examination, Mr. Fagen clarified that the $850 claimed for car rental was not an ongoing payment but one in "arrears".

[38] The funds of $12,500 received every 5 weeks produces an annual total of $130,000 EC. Receipt every 6 weeks produces an annual total of $108,333 EC annually. The average of these is $119,167, which is the figure this Court shall rely on for this Application.

[39] The Accused did not produce any documentation during the March 19th hearing with respect to the funds received. As noted above, these funds were characterized as "family charity" by the Accused in their Application and by Mr. Fagen in his Affidavit. Mr. Fagen testified that these monies were provided by family.

[40] There was no evidence of any loan agreement or standard loan terms such as a repayment schedule, deadline for repayment or interest being charged with respect to the family monies. In cross-examination, Mr. Fagen expressed that he owed these funds "morally".

[41] Clearly, charity is not a loan. Similarly, a moral debt is not a legal debt.

[42] In cross-examination, Mr. Fagen acknowledged that no taxes are paid on the funds received from their family. As such, the funds should be grossed up for taxes for the purpose of assessing the finances for the Accused. This is not a complicated or controversial calculation. The intention is to take the net amount in hand and gross it up to the amount that would be required to be earned as taxable income to achieve that net figure. This facilitates predictability in measuring financial means by using a consistent metric, namely gross income or its equivalent.

[43] The rate of taxation in Montserrat for an individual receiving funds at the level of the Accused is 30%. Grossing up the monies the Accused receive from family to reflect that taxation rate produces a gross figure of $170,000. In other words, a person in Montserrat earning $170,000 annually would pay tax of 30% resulting in a net of tax amount of $119,000. The Accused, therefore, would need to have household earnings of $170,000 annually to have the $119,000 average amount received in hand by the them from their family.

[44] Mr. Fagen noted that the family financing has been received since 2020 at the rate of $12,500 EC every five to six weeks. In cross-examination, he agreed that represents a total advanced of $637,000 EC to the date of the hearing.

[45] Mr. Fagen testified to coming to Montserrat in 2012 and investing all of his financial resources into Montobacco Ltd., which was a tobacco processing and exporting business established on Monsterrat. Mr. Fagen's evidence was that he had no income since Montobacco Ltd. was "wound up" in 2018. He noted that the company was liquidated in 2020.

[46] Mr. Fagen testified to being engaged in various civil litigation matters since 2018 although not arrested for these offences until July, 2021 and not charged until February, 2022.

[47] Mr. Fagen identified Karen Allen as the person to whom he redirects $2,000 EC from each tranche of family funds received. In addition, Mr. Fagen testified to paying Ms. Allen's monthly electrical bill, which he estimates to be as much as $700 EC. In other words, the Accused redirect $2000 to $2,700 EC from each tranche of monies received to Karen Allen. This represents approximately 20% of the $12,500 EC received each tranche.

[48] There was no meaningful explanation of why such a large amount of the funds provided by the Accused's family was/is being passed to Ms. Allen. There was no evidence that Ms. Allen is related to the Accused or the person(s) providing the funds to the Accused. In other words, she is not family. Ms. Allen was named as a defendant along with the Accused in at least three of their civil litigation matters but Mr. Fagen testified that the funds provided to her were not towards her legal expenses.

[49] It is also notable that the Accused claim to spend $5,200 to $5,600 for household food. Again, taking an average of $5,400, this represents 43% of the of the $12,500 EC received each tranche.

Analysis

[50] As noted above, the Court of Appeal accepted a reference from the Office of the Attorney General on whether the failure to provide state legal funding represents an abuse of process and is contrary to the right to a fair trial enshrined in section 7(2)(d) of the Montserrat *Constitution* (see: Attorney General Reference No. 17 of 2021 In the Matter of the Interpretation of Section 7(2)(d) of the Constitution of Montserrat Cap. 1.01 of the Laws of Montserrat).

[51] The Court of Appeal decision delivered November 6, 2023 did not resolve the funding issue for the Accused but did offer the following direction on what must be established for state funding to be engaged:

> *[11] The right to legal representation found in section 7(2)(d) of the Constitution would be a thing writ in water if the question of whether an accused who genuinely cannot afford legal counsel and the interests of justice so require is not provided with legal representation funded by the state. The right enshrined in section 7(2)(d) requires that: (1) the accused shows that he/she does not have sufficient funds to pay for legal assistance (the "First Condition"); and, (2) it is in the interests of justice for the accused to be provided with legal representation at the public expense (the "Second Condition"). Section 7 of the Constitution seeks to secure the protection of the law for an accused and contains the essential requirements for a fair criminal trial. The right to legal representation in section 7(2)(d) is a core component of the fair trial obligations of the state.*
>
> *[12] Once these two conditions are satisfied, the state must pay for legal representation for a person charged with a criminal offence. The burden of proof is on the person charged with a criminal offence to show that he or she does not have the means to pay for legal assistance. It is not necessary that the First Condition is satisfied beyond a reasonable doubt; it is enough that there exist facts that indicate that the accused does not have the means to pay for his own legal representation. The Second Condition requires a consideration of all the circumstances including the complexity of the case, the nature of the charges, the gravity of the crime and the severity of the punishment that the accused faces. Also relevant to the Second Condition are the following: the personal characteristics of the accused, his or her nationality, age, background, lack of education or criminal background.*

[52] The Accused, and in fact no accused person, has the absolute right to state-funded counsel. There is an absolute right for every accused to a fair trial. There is a qualified right to state-funded counsel in certain criminal cases. The right to state funded legal representation is only engaged where the First and Second Conditions noted by the Court of Appeal are established.

[53] The burden is on the Accused to satisfy the First and Second Condition. The standard of proof is not the criminal standard of beyond a reasonable doubt. The Court of Appeal did not articulate a specific threshold beyond that "there exist facts that indicate the accused does not have the means to pay". It is helpful to have a standard noted particularly where facts are disputed. In criminal matters, the civil standard, namely the balance of probabilities, is the burden of proof where the onus is on the accused. It would seem that

is the standard intended by the Court of Appeal language quoted. That standard shall be applied to determine the Funding Application.

[54] The determination of the Funding Application requires context. The charges have been detailed above. A Sufficiency Hearing was heard before Justice Morley who ruled that there was enough evidence for the matter to proceed to trial. The trial itself is estimated to be no more than two court weeks. There are no experts listed to testify or any evidentiary issues identified. The Funding Application is fundamentally seeking payment for counsel to prepare for and conduct a four count, two-week jury trial.

[55] The evidence on the Funding Application fails to satisfy either of the First or Second Condition for the reasons below.

[56] As noted above, the Accused have the burden of satisfying the First Condition, namely that they cannot afford to retain counsel. The kind of proof needed was succinctly articulated by Mdm. Justice Wien of the Ontario Superior Court of Justice in *R. v. Woods*, 2016 ONSC 2374, at paragraphs 15 -18 as follows:

> *[15] To prove indigence, the Applicant must prove that his financial position is such that, after the date that he could reasonably have expected that he would require counsel, even after making reasonable sacrifices and efforts, he would be unable to retain competent counsel.*
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> *[16] The applicant must provide detailed financial evidence of his or her financial circumstances, which includes supporting evidence. The applicant must save money to hire counsel or contribute to his or her legal fees, and make efforts to borrow money from friends or family. The applicant should try to obtain employment or additional employment if already employed. The applicant should try to find counsel who will be willing to work at [legal aid] rates. The applicant must reasonably exhaust his or her own assets to pay for counsel before looking to the taxpayer to pay for a lawyer. The applicant must demonstrate that he or she is prudent with his or her personal living expenses and show foresight and planning of his or her financial affairs to pay for a lawyer.*

[17] The Applicant must show that he has made efforts to obtain counsel at reasonable rates. The Applicant must show planning and foresight, and in particular the Applicant must show that he has no assets which can be utilized or that every effort has been made to utilize what assets are available to raise funds.

[18] An Applicant should furnish "independent evidence" to support bald assertions of efforts to obtain assistance from family members and that family members are in fact unable to assist in the funding the legal defence.

[57] There are several reasons why the Funding Application fails on the First Condition.

[58] There is no doubt that a household with a non-taxable income of $119,000 EC or its pre-tax income equivalent of $170,000 EC would be characterized as a higher income home in Montserrat. This is easily demonstrated by reference to the local salaries earned by employees.

[59] The Government is easily the largest employer in Montserrat. A 2021 salary review for the Government of Montserrat Public Service commissioned by the Office of the Deputy Governor relying on figures from the Human Resources Management Unit documented that less than ten percent of all government employees had a gross annual income of $90,000 EC or greater. The most current figures available from the Human Resources Management Unit identify that the average annual income on island generally (ie. government and private income sources) in 2018 was $35,442.84 or $2,953.57 monthly.

[60] The Accused appear to argue that this family support is not salary so it should not be considered in any determination of their means. The question of means is a broad view looking at the finances available to the Accused to finance counsel, including loans and charity from third parties, friends and family.

[61] The expenses noted by the Accused also belie their claim of impecuniosity. The Accused have presented no meaningful explanation for why they pass 20% of their household finances to Ms. Allen. This represents roughly $24,000 EC in non-taxable dollars or $34,000 of the gross income equivalent paid by the Accused to Ms. Allen annually. Clearly, these funds are otherwise available towards paying for legal representation and should be

so assigned in the absence of any evidence supporting the transfers to Ms. Allen. In other words, these monies should be prioritized to funding legal representation for the Accused.

[62] It is also reasonable to characterize the budget relied upon by the Accused as inflated. The most obvious reference in support of this conclusion is the 43% of the $12,500 EC tranche that the Accused claim to spend on groceries. The Accused say they are spending about $1,000 EC weekly on groceries for three people. That is difficult to accept even with consideration to the general costs for food on Montserrat given nearly all supplies are imported.

[63] Mr. Fagen acknowledged that the Accused do not have a $850 per month car lease payment. His evidence was that they spend about $450 monthly on taxis.

[64] The nearly $600 claimed to be expensed for office supplies and court filing fees also is difficult to digest for a household that does not work or have any other engagement that would require a supplied office.

[65] The point of the surface level forensics above is that there are funds available within this budget that could be used for legal fees. The food expense claimed is simply unbelievable. Reducing this amount by even 30% would free up about $1,500.00 per tranche. Similarly, there is already $400 available being the difference between the $850 car lease payment claimed but not paid and the reality of the $450 being spent on transportation. The nearly $600 per tranche spent on office supplies and court fees is also unsupportable. It would seem 50% of that figure would be generous freeing $300 EC towards legal expense.

[66] A quick review of the budget reasonably creates a pool of available funds of approximately $4,500 per tranche being provided to the Accused (ie. the averaged amount of $2,350 paid to Ms. Allen, $1,500 redirected from the exorbitant grocery expenses claimed, $400 in reduced actual transportation costs and a further $300 from reasonable office supply expense). This is a sum that should have been pooled ongoing from the point the Accused were arrested in July, 2021 or at least from when the Accused were charged in February, 2022. Had they done so there would now be a sizeable reserve available to pay counsel.

[67] There is also strong evidence before this Court that the Accused have access to significant family financial resources. They have received support in excess of six hundred thousand dollars EC to date.

[68] The point is that there is an obvious, available source of funds for counsel, namely family. There was no independent evidence that this same family source is not available to fund a retainer and/or ongoing legal fees for a four count, two-week trial. Frankly, it does not matter if these funds are available as loans or charity or a mix. Means must include an inquiry into whether the requested funding is available in whatever form from arm's length third parties, family and/or friends.

[69] This Court would also reject the Funding Application with consideration to the Second Condition.

[70] The Second Condition requires a determination of whether it is in the interests of justice for the Accused to be provided with legal representation at the public expense. Here, the Court of Appeal directs a review of all relevant circumstances, including the complexity of the case, the nature of the charges, the gravity of the crime and the severity of the punishment that the Accused face, the personal characteristics of the Accused, his or her nationality, age, background, lack of education or criminal background.

[71] Mr. Fagen is presently 55 years of age. Ms. Lidbetter is 58. There is no evidence of either having any physical or mental health issues.

[72] Mr. Fagen is a citizen of the United States with landed immigrant status in Canada. Ms. Lidbetter is a Canadian citizen. They together have lived in both the United States and Canada prior to relocating to Montserrat in 2012.

[73] The Court has no evidence about the educational background for either of the Accused. However, Mr. Fagen testified to having earned "millions" as an entrepreneur operating a liquidation business. He also stated that Ms. Lidbetter was an entrepreneur with her own business. They together formed and operated Montobacco Ltd. This speaks to a considerable acumen and level of sophistication.

[74] In terms of personality, this Court has little difficulty in describing both the Accused as confident and strident in their several attendances.

[75] The Accused are also anything but litigation neophytes. In addition to this case, the Accused have represented themselves in no fewer than nine cases (see: MNIHCV 2018/0014, MNIHCV 2018/0026, MNIHCV 2019/0006, MNIHCV 2020/0004, MNIHCV 2020/0011, MNIHCVAP 2020/0011, MNIHCV 2020/0019 and MNIHCV 2020/0022 plus the formal complaint brought against the Director of Public Prosecutions and the Office of the Attorney General) wherein they have undertaken the following:

a) The Accused have represented themselves in trials before the High Court;
b) The Accused have represented themselves before the Court of Appeal;
c) The Accused represented themselves at the Privy Council;
d) The Accused have prepared detailed documents quoting case law, including a 52 page complaint brought against the Director of Public Prosecutions and the Office of the Attorney General, Applications seeking to dismiss this criminal case and an Application to Recuse Justice Morley while he was the presiding judge for this case; and,
e) The Accused have filed their documents and otherwise followed the required procedure, prepared arguments and made submissions in these various litigation matters.

[76] The Accused acknowledge that they have access to some assistance in the conduct of these various litigation matters. The Accused did not reveal the source of this assistance beyond noting that Ms. Allen conducted a cross-examination for them in one civil matter. The Accused did not indicate any details respecting Ms. Allen's legal education, training and/or experience.

[77] Mr. Fagen acknowledged the considerable experience he and Ms. Lidbetter have in the various court actions referenced above. However, Mr. Fagen says there is a difference between civil and criminal litigation without offering any details of what that means.

[78] There is no doubt that there are differences between civil and criminal proceedings. Two obvious examples are the burden of proof and the format for trial. The civil standard is proof on a balance of probabilities versus the criminal threshold of proof to the point of being sure also referred to as beyond a reasonable doubt. Criminal trials in the Montserrat High Court are before a jury whereas civil matters are typically by judge alone.

[79] While acknowledging differences, the appropriate focus is the complexity of the case when determining whether it is in the interests of justice for the Accused to be provided with state funded legal representation not whether the matter is civil or criminal.

[80] This Court does not consider the charges faced by the Accused as complex.

[81] There are two counts charging only Mr. Fagen where he is alleged to have obtained the services of Robert Greco by deception. The two charges cover one, ongoing offence occurring over a time frame where the applicable legislation changed such that two counts had to be named. This offence is not complex. Essentially, Mr. Fagen is alleged to have promised but failed to deliver certain benefits to Mr. Greco in exchange for his services on behalf of Montobacco Ltd. This will be a largely fact driven exercise concerning whether Mr. Fagen was deceitful and otherwise dishonest in his dealings with Mr. Greco causing Mr. Greco to provide services for which he was not compensated as agreed.

[82] The Accused are also alleged to have conspired to steal. Distilled, the Accused are alleged to have removed approximately $146,000 CDN from Montobacco Ltd. and a related company, 888 International Ltd., directing these funds to the account of relatives in Canada. This is an admittedly more advanced legal matrix than the first two counts but not what this Court would consider complex. Again, this will be a fact driven exercise to determine whether the Accused made an agreement between the two of them to remove these funds (i.e. the conspiracy) and whether doing so was lawful, namely whether done in the normal course of business in their capacity as corporate directors or otherwise.

[83] The final count faced by the Accused is an allegation of theft involving three transfers totaling approximately $11,000 USD out of Montobacco Ltd. just before court appointed liquidators took over operation of the company. This count is not lies between the first tow counts and the third in terms of the legal matrix. Theft is a straightforward legal concept. The focus here will be on the actions of the Accused with consideration to the timing og the monies moved. Again, this will be a fact driven exercise to determine whether the funds were removed and whether doing so was lawful, namely whether done in the normal course of business in their capacity as corporate directors or otherwise.

[84] As noted previously, there are no expert witnesses expected and there are no evidentiary or other legal challenges identified for the trial of these charges.

[85] The potential penalties for these charges upon conviction are serious, including imprisonment for as much as fifteen years.

[86] The Accused are intelligent, experienced and sophisticated business persons. They have and continue to represent themselves in every facet of numerous court actions before the High Court, the Court of Appeal and the Privy Council. The charges the Accused face here are not legally complex. All of these factors weigh against granting the Funding Application.

[87] This is not to say that the Accused could not benefit from having legal representation. It is very possible that they would. In other words, this Court acknowledges that the Accused may not be able to conduct their defence as effectively as experienced counsel could, especially the King's Counsel the Accused ask the state to fund. This Court also acknowledges that having counsel at a criminal trial could offer greater certainty that the overall process and verdict following a trial will be just. Again, that is very possible. However, that is not the test.

[88] The test is whether representation is required for these Accused in the overall circumstances of this case to secure their constitutional right to a fair trial or, in other words, that state funded counsel is necessary in the interests of justice.

[89] The only factor in favour of the Second Condition is the potential for a significant custodial sentence should the Accused be convicted following a trial.

[90] Weighing all of the factors, the Accused have failed to establish that it is in the interests of justice that they be provided with legal representation at the public expense in this case. The factors against are considerably in excess to the one factor that favours the position of the Accused on the Second Condition.

[91] In coming to the above conclusion, this Court also notes that there is a recognized duty on the trial judge to provide informational and procedural guidance to ensure a fair trial for an unrepresented accused. What that guidance will be, of course, is dependent upon the circumstances and issues of each case along with the abilities of the accused. As such,

criminal trials with an unrepresented person should be before a judge with sufficient criminal trial experience to identify and provide the necessary evidentiary and other assistance needed as it arises.

[92] To be clear, the judge is not the advocate for the accused. The court must remain impartial but there is an enhanced and well-defined duty upon the court to provide the assistance necessary in the particular circumstances of a case to ensure that the accused person can present his/her defence fully and to otherwise ensure a fair trial. It is a balance that can be challenging but one that is achieved in our courts regularly.

Conclusion

[93] The Accused, Steven Fagen and Marie Carole Lidbetter brought an application for state funded legal representation for their criminal proceeding and trial (the "Funding Application").

[94] Section 7(d) of the Montserrat *Constitution* enshrines the right of the Accused to a fair trial. This does not mean that the Accused have an absolute, constitutional guarantee of state funded counsel. There is a qualified right to state-funded counsel in certain criminal cases.

[95] The state must provide funding where the Accused establish that he/she does not have sufficient funds to pay for legal assistance (the "First Condition"); and, that it is in the interests of justice that they be provided with legal representation at the public expense (the "Second Condition").

[96] The First and Second condition are conjunctive meaning that both must be established by the Accused on a balance of probabilities or the Funding Application must be dismissed.

[97] The determination of an application for state funded legal representation must be made objectively based only on the evidence presented or lacking.

[98] The Accused have failed to establish, on a balance of probabilities, that they cannot pay for legal assistance. The Funding Application must be dismissed on that basis.

[99] In addition and for completeness, the Accused have failed to establish, on a balance of probabilities, that the interests of justice direct that they be provided with legal representation by the state. The Funding Application must be dismissed on that basis also.

[100] Given the dismissal of the Application, this Court will not address the imbedded issue raised by the Accused respecting whether the state must fund King's Counsel for them to ensure equality of arms.

[101] In conclusion, this Court dismisses the Funding Application of the Accused.

IT IS HEREBY ORDERED THAT:

1. The Application of Steven Fagen and Marie Carole Lidbetter for state funded legal representation for their criminal proceeding and trial is dismissed.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

By the Court

REGISTRAR