

**IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
FEDERATION OF ST CHRISTOPHER AND NEVIS
NEVIS CIRCUIT
A.D. 2023**

CLAIM NO. NEVHCV2021/0099

BETWEEN:

[1] Petrodel Investment Advisers (Nevis) Ltd

[2] Michael J Prest

[3] Bank of Nevis International Limited

Claimants

and

[1] Regulator of the Nevis Financial Services

[2] Regulator of International Banking

[3] Nevis Island Administration

[4] Heidi-Lynn Sutton (in her personal capacity)

[5] Phil Jones (in his personal capacity)

Defendants

Before:

The Hon. Justice Patrick Thompson Jr.

High Court Judge

Appearances:

Ms. Jackie Hunkins Taylor and Mr. Kris Liburd for the 1st and 2nd Claimant

Mr. Yuri Saunders and Ms. Andwena Lockhart for the 3rd Claimant

Ms. Rhonda Nisbett-Brown, Ms. Shyra Wattlely and Ms. Janicia Hodge for the 1st,
2nd and 3rd Defendants

Dr. Henry Browne K.C. for the 4th and 5th named Defendants

2023: February 6, 7, 10,

JUDGMENT

Petrodel and Prest

[1] THOMPSON JR J: Petrodel Investment Advisers (Nevis) Ltd ("Petrodel") and Michael J Prest ("Prest") are entitled to an order for certiorari quashing the decision

of the Regulator of International Banking to issue the letter dated June 23rd, 2021 which restricted Petrodel and Prest from intervening in the day to day operations of the Bank of Nevis International Limited (“BONI”).

- [2] Petrodel and Prest are also entitled to a declaration that the Regulator of International Banking had no authority to restrict the activities of Petrodel.
- [3] Petrodel and Prest are not entitled to any of the other reliefs sought in their claim form filed on December 23rd, 2021.

BONI

- [4] BONI are entitled to orders for:
 - (i) Certiorari quashing the decisions of the Regulator of International Banking and the Regulator of the Nevis Financial Service Department, collectively referred to as (“the Regulators”) to issue a Cease and Desist Order dated June 22, 2021, and fines of EC\$10,000.00 and US\$120,000.00 against BONI on June 25th, 2021;
 - (ii) Declarations that the Regulators had no authority to issue the Cease and Desist Orders and fines referred to above;
 - (iii) Restitution to BONI of the fines of EC\$10,000.00 and US\$120,000.00 together with interest at the rate of 2½% from the 29th of March 2022 to the date of judgment; and
 - (iv) Interest on the judgment pursuant to the statutory rate.
- [5] BONI’s claim for misfeasance in public office and breach of statutory duty against the Regulators in their personal capacity is refused.

- [6] The Claimants are thus partially successful in their claim for judicial review against the Defendants for the following reasons.

Petrodel and Prest

- [7] At the outset, it is important to note that Petrodel and Prest initially filed their claims for judicial review on December 23rd, 2021. BONI was added as a party to those claims by an order of Moise J dated March 16th, 2022.

- [8] Justice Moise's decision to add BONI as a party put into stark focus the nature of the reliefs sought and against whom those reliefs could be ordered. The relevant facts are not in dispute and are as follows:

- (a) On June 22nd, 2021 the Regulator of Nevis Financial Services Department ("the Financial Services Regulator") issued a letter styled as an order to Cease and Desist. The letter set out a history of non-compliance by BONI and/or Prest and ordered that BONI cease and desist from holding out Prest as a being a director or the chief executive officer of BONI.
- (b) On June 23rd, 2021 the Regulator of International Banking ("the Banking Regulator") issued a letter dated June 23rd, 2021 addressed to Prest and restricting the activities of the shareholder of BONI (Petrodel) and its ultimate beneficial owners from intervening in the day to day operations and related activities of BONI.
- (c) On June 25th, 2021 the Banking Regulator issued a self-styled order for a global fine of US\$120,000.00 against BONI and payable by no later than August 16th, 2021.
- (d) On June 25th, 2021, the Financial Services Regulator issued a self-styled order for a fine of EC\$10,000.00 against BONI payable by July 2nd, 2021.

(e) BONI paid the fines by August 20th, 2021.

- [9] It is immediately apparent that the cease and desist orders and fines were levied against BONI. BONI was clearly the proper party to seek to challenge the making of these orders and penalties against it.
- [10] Petrodel as a shareholder and Prest as CEO and/or director of BONI were clearly interested in these proceedings but insofar as relief was concerned, any reliefs would be directed to BONI. So that for example, an order for restitution could not be made to Petrodel or Prest since it was BONI who was liable to pay the fine and had paid the fine. Therefore, only BONI would be entitled to an order for restitution.
- [11] Similarly, the Cease and Desist orders though affecting Petrodel and Prest were clearly directed at BONI and in this Court's view it was BONI that was entitled to the quashing and declaratory reliefs that were sought.
- [12] This Court is satisfied that the letter of June 23rd, 2021 from the Banking Regulator was addressed to Prest. In the course of his evidence the Banking Regulator testified that the letter though addressed to Prest had as its addressee Petrodel. The tenor of the letter was clearly directed at Prest and indicated that Petrodel 'and its ultimate beneficial owners' were instructed to do certain things. If as the Banking Regulator says the letter was for Petrodel and not Prest, there would be no need to refer to any other ultimate beneficial owners and Petrodel was the shareholder of BONI's shares.
- [13] This Court has no difficulty in finding that the letter of June 23rd, 2021 was directed to both Prest and Petrodel and triggers Prest's claim for judicial review since the Regulator purported to take a decision in respect of both Prest and Petrodel. For reasons that this Court will come to shortly, the Regulators were not entitled to issue those orders.

- [14] This Court's findings confirm that save for the declaratory and quashing reliefs at paragraphs 1 and 2 of this judgment, Petrodel and Prest's claim for judicial review is refused. Prest and Petrodel had sought orders for general damages in the amount of US\$100 million representing damage to their reputation, damage to the enterprise value of Petrodel's shareholding in BONI and losses in the investment portfolio. Petrodel and Prest also sought order for exemplary and vindictory damages.
- [15] Putting to one side the fact that exemplary and vindictory proceedings in claims for judicial review are rare, Prest and Petrodel, aside from baldly asserting their claim, offered no evidence in support of their position. No evidence to indicate what or whose investment portfolio or details of any evidence as to the loss of reputation or enterprise value was tendered before this Court.
- [16] The affidavits of Mr. Elusogbon (on behalf of Petrodel) and Mr. Prest in support of their claim for judicial review were almost identical in the way that they were bereft of any details of these losses. In this Court's view, while Prest and Petrodel were not required to quantify their losses, they were required to prove at the very least, loss and damage of the kind that they had pleaded. The paucity of this evidence was telling and it was not surprising that counsel for Prest and Petrodel did not tax this Court with any arguments in support of their client's right to these other reliefs.
- [17] Ultimately, the decision to grant relief in judicial review proceedings is discretionary in nature and this Court is not satisfied that Prest and Petrodel are entitled to the reliefs they have sought, save for those outlined above.

BONI

- [18] BONI's claim for relief was simple. BONI contended that the Regulators had no legal authority to issue the Cease and Desist Letters and levy the fines that they did in June 2021. Simply put their case was that this Court should declare that the Regulators had no authority to do as they did, quash their decisions and order restitution of the sums paid. As a corollary of their primary argument, BONI argued

that the Regulators were liable to compensate them in damages for the tort of misfeasance in public office and/or breach of their statutory duty.

[19] Counsel for the Defendants resisted these arguments and submitted that the Regulators were authorized to do as they had done and that BONI was not entitled to an order for damages for misfeasance in public office or breach of statutory duty.

[20] Everyone is agreed that the Regulators authority is derived from the Financial Services Regulatory Commission Act (“the Act”). The long title to the Act is a well-known aid to statutory interpretation¹ and provides that the Act is “An Act to establish the financial services regulatory commission to regulate providers of financial services except for the financial services covered by the banking act and to provide for related or incidental matters”.

[21] Parliament in its wisdom decided that the provision of financial services that were not covered under the Banking Act required regulation. Even without the benefit of the Hansard² of the passage of the Act it is clear that Parliament intended that a Commission be established for this purpose. Parliament has clearly entrusted the power to regulate the provision of financial services to the Commission.

[22] The Act sets out the framework for how the Commission is to be operated and provides for among other things, its functions (Section 4), the appointment of directors (Section 8), the Commission’s powers (Section 11), staff (Section 13), meetings (Section 14), the power to impose sanctions such as cease and desist letters (Section 40).

¹ See paragraph 47 of the case of *The Labour Tribunal v St. Lucia Electricity Services Limited*. SLUHCVP2019/0002, and paragraph 12 of the case of *James Milnes Gaskell et al v Island Dredging Company Limited* CIVIL APPEAL NO.2 OF 2002.

² Another aid to interpretation. See *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.

Delegatus Non Potest Delegare

- [23] The issue of whether the Commission delegated its undoubted statutory authority to the Regulators is at the heart of this dispute. The resolution of this issue warranted a discussion of the rule of construction captured by the Latin maxim delegatus non potest delegare which simply means that one to whom power is delegated cannot further delegate that power.
- [24] Section 29 of the Act provides that the Commission is authorized to delegate such of its functions, whether wholly or partly to the Chairperson, one or more Commissioners, a director, or the Licensing Committee or any other Committee designated by the Commission.
- [25] Everyone agrees that the Regulators are not any of the persons captured by Section 29 of the Act. Section 8 of the Act provides for the appointment of directors and provides that for each operational department the Commission shall appoint a person as Director to manage the affairs of the Operational Department.
- [26] By a letter dated February 25th, 2014, the Financial Services Regulator was employed by the Nevis Island Administration as Regulator. No instrument of appointment confirming that the Financial Services Regulator was appointed as a Director of the Nevis operational department was tendered in evidence. Counsel for the 1st to 3rd Defendants accept that no such document exists but argues that the Financial Services Regulator operated in that role as Director of the Nevis operational department.
- [27] Section 5 of the Act provides for and recognizes the federal nature of St Christopher and Nevis. Parliament at Section 5(2) of the Act provided that in the carrying out of its functions the Commission shall be divided into two operational departments, one in St Kitts and one in Nevis.

- [28] In this Court's view, Parliament in its undoubted wisdom has indicated in clear and imperative terms that "the Commission shall appoint" a person to manage the affairs of the operational department. In the absence of a clear appointment the Financial Services Regulator cannot lawfully arrogate unto herself a power to act in a capacity that she has not been appointed to by the Commission. This Court does not doubt that the Financial Services Regulator was well intentioned when she sought to perform the functions of Director of the operational department but she could not lawfully do so in the absence of either the Commission's express authority or arguably any subsequent ratification by the Commission since the power having been delegated to the Commission could not be delegated to her unless she was in fact appointed to the position of Director pursuant to Section 8 of the Act.
- [29] As amicus curiae on this narrow point, Dr. Browne K.C. urged on the court that the Latin maxim *omnia praesumuntur rite esse acta* which means that all things are presumed to be done in due form applied. With the greatest of respect and deference to learned King's Counsel, this maxim cannot remedy the Defendant's dilemma. The Defendant's did not lead any evidence from the Commission at this trial and this Court cannot simply rely on the maxim without more. Moreover, it is arguable that the absence of any evidence from the Commission tells against the application of the above maxim. Additionally, the well-worn principle in Carltona Ltd v Commissioner of Works [1943] 2 All E.R. 560 that the acts of government departmental officials are synonymous with the actions of the minister in charge of that department adds nothing to the Defendant's position.
- [30] There is no room for the implied delegation argument that counsel for the 1st to 3rd Defendants tenaciously urged on this Court. The principles on delegation of power are clear and this Court can do no better than to cite from the text *Commonwealth Caribbean Administrative Law*, authored by Professor (formerly Mr. Justice) Eddy Ventose, Dean of the Faculty of Law at the University of the West Indies, Cave Hill Campus. Professor Ventose's text was cited to this Court in the course of argument by counsel for the 1st to 3rd Defendants.

- [31] At page 169 of that text, Professor Ventose discussed the case of Suisse Security Bank and Trust Ltd v Francis which concerned the revocation of the Applicant's banking license by the Governor of the Central Bank and whether the Governor had delegated the power of revocation to an officer of the Central Bank. In Professor Ventose's view the Court in Suisse Security was clear that the delegatus principle was strictly applied even where it causes administrative inconvenience. It was accepted that the delegatus principle was a rule of construction which meant that there was a prima facie presumption that the power conferred by statute was intended to be exercised by the person on whom the authority was conferred. This presumption was rebuttable by any contrary indications found in the language, scope of objects of the statute.
- [32] Moreover, in assessing the nature of the power, a court should be careful to consider the nature of the function that was being exercised. Counsel for the 1st to 3rd Defendants argued that the issuing of cease and desist orders and fines were administrative in nature and character. This Court has little hesitation in finding that those functions were in Dr. Browne K.C.'s words 'decisional' and not administrative in nature and character. In this Court's view, the word 'decisional' only confirms that they were not administrative and there can be no gainsaying that the imposition of a fine was penal and not administrative in nature.
- [33] The learned authors of Supperstone, Goudie and Walker on Judicial Review at paragraph 7.42 succinctly outline the nature of how the delegatus principle is affected by the nature and character of the functions under review. In their view "executive and administrative functions may be delegated but not decision-taking or the core of the power vested in the principal." The power to issue cease and desist orders and decision taking powers is fundamental to the powers vested in the Commission. In the absence of any express delegation to the Financial Services Regulator there is no scope for this Court to find that the Commission impliedly delegated its powers to the Financial Services Regulator when the Commission did

not appoint the Financial Services Regulator as the Director of the Nevis operational department under Section 8.

- [34] The danger in the reasoning of counsel for the 1st to 3rd Defendant is best encapsulated by the dissent of Lord Bridge in the case of Provident Mutual Life Assurance Association and Derby City Council [1981] 1 W.L.R. 173. It is accepted that Lord Bridge was the sole dissenting voice but his dissent is not proffered for the purpose of disputing the facts but rather because it puts into focus the pitfalls of implied delegation. At page 183 of his judgment, Lord Bridge was of the view that:

"If the necessary appointment of a responsible officer under Section 151 involves the necessary delegation of an undefined range of statutory functions of the authority there must be room for endless debate and uncertainty as to what the range of functions comprises. I cannot believe this was what Parliament intended."

- [35] The position of the Banking Regulator is considerably weaker than that of the Financial Services Regulator. There is no scope for arguing that he is the Director of the operational department and as such the argument for implied delegation is even weaker where he is concerned. However well-intentioned he may have been, the Banking Regulator was not authorized to levy fines or issue letters which restricted the activities of Petrodel, the shareholder of BONI. I can do no better than cite Dr. Browne K.C's elegantly phrased submission that the Regulators' '*carrying out of their functions was conflated with the taking of decisions*.' Decisions were for the Commission, operational functions were for the Regulators.

- [36] In passing this Court notes that Section 29 of the Act empowers the Commission to delegate its functions whether wholly or partly to among other persons, '*any other Committee designated by the Commission*'. There is no lawful bar to the Commission designating a Regulatory Committee which would obviate the need for legislative intervention to address these matters.

Misfeasance in Public Office

- [37] Ancillary to their claim to be entitled to quashing, declaratory and restitutionary remedies, BONI also alleged that the 4th and 5th Defendants in their personal capacities as opposed to their professional capacities as the 1st and 2nd Defendants respectively were liable to compensate BONI in damages for misfeasance in public office and breach of statutory duty.
- [38] In their fixed date claim form filed on March 29, 2022, BONI pleaded that as a direct consequence of the actions taken by the Financial Services Regulator BONI suffered major disruptions to its daily operations including but not limited to:
- (i) The appointment of an interim chairman of its board of directors, who would be entitled to receive a 'substantial chairman's fee';
 - (ii) An interim chief executive officer was appointed at a salary of US\$8,000.00 per month;
 - (iii) The interim board of directors declined to honour established agreements between BONI and various third parties including retainer agreements with attorneys at law;
 - (iv) The interim board of directors declined to honour certain agreements with BONI's subsidiary in relation to proposed locations in St Lucia and Dubai and that such actions disrupted the livelihoods of key staff members of that subsidiary;
 - (v) The interim board of directors took steps to appoint new counsel with a view to discontinuing legal proceedings against a former senior officer of BONI; and
 - (vi) Changes were made to authorized payments, signatories and limits of BONI.

- [39] BONI therefore sought an order that it be awarded damages for interruption of business, loss of reputation and expenses incurred as arising from the breach of statutory duty and misfeasance in office as a result of the Cease and Desist order of June 22, 2021.
- [40] In support of its fixed date claim form BONI relied on the affidavit of a Mr. Stephen Agbeyegbe. At paragraph 56 of Mr. Agbeyegbe's affidavit he recited the matters set out at (i), (ii), (iii) and (vi). Mr. Agbeyegbe also averred that the interim chairman took over the management of certain investment accounts that were being managed by Prest and that changes were made to BONI's email platform to restrict Prest's access thereto.
- [41] Finally, at paragraph 56(g) of his affidavit Mr. Agbeyegbe averred that the cease and desist order and its contents were shared with third party service providers, auditors, corresponding banks and investment brokers causing a series of catastrophic events including but not limited to the loss of correspondent banking relationship, a hold on BONI's broker accounts and major disruptions to the operations of the Board of BONI. In his view, those actions destabilized BONI, terrified its depositors and tarnished the reputation of the Claimants.
- [42] Mr. Agbeyegbe's assertions as set out above were unsupported by any evidence, whether documentary or oral to support his position that the cease and desist order had caused BONI to sustain the damage described above. The lack of evidence meant that this Court could not be satisfied, on a balance of probabilities that BONI had in fact sustained the damage alleged by Mr. Agbeyegbe. This Court has opted to address Mr. Agbeyegbe's affidavit in this extensive way since this is the only evidence that grounds BONI's claim that it sustained damage flowing from the actions of the 4th and 5th named Defendants in their personal capacity.
- [43] Proof of the quantum of its **damages** (my emphasis) was for another day but before BONI could get to that stage they were required to prove that they had sustained

damage. Mr. Agbeyegebe's evidence is startling in its paucity. No figures in support of this damage, nor damages, was pleaded or adduced in evidence before this Court. There was therefore nothing for Dr. Browne KC to raise with Mr. Agbeyegebe when he was in the witness box unless he wished to run the risk of Mr. Agbeyegebe providing information in cross examination that could have been elicited in chief.

[44] It is accepted that Dr. Browne KC did not challenge Mr. Agbeyegebe's evidence. A closer look at his evidence indicates that there was no need for challenge as the evidence adduced in his affidavit did not meet the threshold for proving damage to BONI. For example the fact that an interim chairman of the board of directors was appointed at a substantial fee that exceeded the usual Chairman's fee could only be proved by at the very least demonstrating what those differing fees were. How else could a court be satisfied that this difference in fees between chairmen was proven?

[45] The fact that the interim chairman took over investment accounts that had been previously managed by Mr. Prest does not prove damage. BONI was entitled to lead evidence from the interim chairman testifying to the challenges involved in stepping into Mr. Prest's shoes and details of the financial consequences for BONI. The quantum of those challenges was a matter for assessment, the fact of that damage was a matter of evidence for the trial.

[46] The appointment of an interim chief executive officer at a salary of US\$8,000.00 per month does not prove any loss to BONI unless there was evidence that the previous CEO was an unremunerated position or some evidence as to the remuneration of the previous CEO. There were no details or copies of the agreements that were not honored nor any information from the third party service providers, auditors, corresponding banks and investment brokers. The fact that not one of these entities were named or any evidence adduced as to their identity tells against BONI's ability to prove these matters to the requisite civil standard.

[47] In order to prove the loss of a correspondent banking relationship it would have been helpful to know with whom this relationship existed. It would have been reckless, if not professionally negligent of Dr. Browne KC to ask Mr. Agbeyegbe for details of these matters when no details had been given in evidence in chief. The position would be different if details had been provided and Dr. Browne KC opted to ask no questions of Mr. Agbeyegbe.

[48] Finally, the fact that changes were made to BONI's email platform, authorized payment, signatories and limits does not without more prove damage to BONI. Therefore, for all of the foregoing reasons, this Court has declined to find that the 4th and 5th named Defendants are liable for the tort of misfeasance in public office.

[49] It is trite law³ that in order to succeed in their claim for misfeasance in public office BONI would had to have established all of the following elements, save for (iii) below which was phrased in the alternative:

- (i) The defendant must be a public officer;
- (ii) The acts complained of must have been done by the defendant in the exercise of his power as a public officer;
- (iii) The defendant's state of mind must have been either that of targeted malice, in that he intended by his conduct to injure a person or persons and he exercised his public powers for an ulterior or improper motive) or that of reckless indifference, in that he acted knowing that he has no power to do the act complained of and that the act would probably injure the plaintiff;
- (iv) The plaintiff must have a sufficient interest to found a legal standing to sue; and

³ See SKBHCV 2020/0094 - Lennox Gumbs v Denzil Harris, Chief Prison Officer for Her Majesty's Prison at paragraph 16 which cites the leading authority of *Three Rivers District Council v Bank of England* No. 3 [2003] 2 A.C. 1

- (v) The acts complained of must have caused damage to the plaintiff (which is a question of fact).

[50] BONI's inability to prove damage is fatal to its claim for misfeasance in public office. Justice Bernard at paragraph 67 of her judgment in the Caribbean Court of Justice decision of Marin and another v Attorney General of Belize (2011) 78 WIR 51 makes it abundantly clear that proof of material damage in the tort of misfeasance is integral in order to ground liability. The case of Watkins v Secretary of State for the Home Department [2006] 2 A.C. 395 underscores the primacy of this element.

[51] This Court's findings on BONI's inability to prove damage means that this Court does not have to decide whether the 4th and 5th Defendants were acting with reckless indifference (there was no argument that they were acting with targeted malice). All the same, this Court would caution public officials against doubling down on the decision they had taken, as opposed to carefully considering whether the decision making process had been flawed in any way, when they are called upon to account for and explain decisions they had previously taken.

Breach of Statutory Duty

[52] BONI contends that the 4th and 5th Defendants were acting without good faith and are in breach of their statutory duties. It is accepted that breach of statutory duty is its own distinct cause of action in tort. See NEVHCV2016/0046 - Tamarind Cove Marina Development v Director of Physical Planning. All the same the reasoning of Moise J in Tamarind Cove confirms that:

"The question is whether, on a proper construction of the statute, parliament intended to confer such a right on a limited class of persons. The court may determine that issue by assessing whether there are remedies available within the statute, in circumstances where the public authority is said to be in breach. If there are such remedies then it is unlikely that the statute was designed to give rise to a cause of action in private law."

[53] It is therefore dubious, the extent to which BONI has established that matters complained of fall within the ambit of the tort of breach of statutory duty. All the same

and out of an abundance of caution, this Court has considered BONI's arguments on this issue.

[54] In support of its claim for breach of statutory duty BONI relies on its arguments that the 4th and 5th Defendant were acting with reckless indifference for their client's rights such that they were in breach of their duty to act with good faith. In short, they argue that the 4th and 5th Defendants were acting with bad faith when they purported to issue cease and desist letters and levy fines that they knew or ought to have known they were not lawfully authorized to do.

[55] BONI complains that this breach is particularly egregious in the case of the 4th named Defendant who has been an attorney at law for over 15 years. In BONI's view, the 4th and 5th named Defendants were acting with flagrant disregard for the statute and as such were acting in bad faith and thus liable for breach of statutory duty.

[56] Dr. Browne K.C. for the 4th and 5th named Defendants submitted that his clients were acting with good faith and pointed to the fact that on the face of their impugned letters they cited sections of the Act to ground their position. In his view, they were clothed with the presumption of acting in good faith and the evidence adduced did not demonstrate that they were acting in bad faith.

[57] This Court had the benefit of observing the demeanour of the 4th and 5th Defendants when they gave evidence in the witness box and were rigorously cross examined by Mr. Saunders for BONI. This Court is satisfied that the 4th and 5th Defendants were not acting in bad faith. In this Court's view, their actions though worthy of censure do not demonstrate the bad faith and flagrant disregard for the interests of BONI and others.

[58] Mr. Saunders drew to this Court's attention the reasoning of Sir Louis Blom-Cooper QC in R v Newham London Borough Council ex parte Watkins (1994)26 H.L.R. 434 and cited with approval by the Court of Appeal in Three Rivers No. 3 that:

“There is always a spectrum of possibilities in which to place the particular noncompliance along a continuum from the trivial default which can properly be overlooked to the flagrant defiance of a statutory obligation which cannot be condoned or even countenanced. The latter end of the continuum is tantamount to bad faith”.

[59] This Court is satisfied that while the actions of the 4th and 5th Defendants cannot be considered as trivial defaults, their actions do not meet the threshold for flagrant defiance of a statutory obligation. This Court is satisfied that the 4th and 5th Defendants honestly believed that they were entitled to do as they did. This honest belief is inimical to any finding of bad faith.⁴

[60] Sir Louis Bloom Cooper QC’s analysis is apt and properly captures the varying levels of conduct that may fall along that continuum before one arrives at a finding of bad faith. In this Court’s view, it would be unfair to characterize the actions of the 4th and 5th Defendants as trivial default or innocent mistakes as urged upon this Court by Dr. Browne K.C. All the same, flagrant defiance is a bridge too far and as such this Court is not satisfied that BONI has proved their case for bad faith on the part of the 4th and 5th Defendants.

Interest

[61] The rationale for pre-judgment interest is articulated by Justice of Appeal Michel in the case of Attorney General of St Christopher and Nevis v SKN Choice Times. At paragraph 22 of his judgment Justice Michel said:

“It cannot be disputed that a party wrongfully deprived by another of money to which the first party is entitled ought to be compensated for his loss, not just by an award to him of the sum of money to which he was entitled but so too by an award of the time value of the money from the date of its appropriation to the date on which it is ordered to be paid to him. This latter award is what is referred to as an award of pre-judgment interest”

[62] In this Court’s view BONI is entitled to interest at the rate of 2½% per annum on the fines of EC\$10,000.00 and US\$120,000.00 from March 29th, 2022 to date and then

⁴ See *Three Rivers District Council and others v Bank of England* [2000] All ER (D) (690) at pg 6, and *Chagos Islanders v The Attorney General and Another* [2003] EWHC 2222 (QB) at [274]

post judgment interest on these sums at the statutory rate from the date of this judgment until payment. The rationale is clear. Once BONI filed its claim on March 29th, 2022 the issue of the repayment of the fines was a live issue. It would have been prudent of the NIA, as the party that may have been liable to repay these sums to pay these monies into court so as to avoid being required to pay interest on these monies. Such a position would not have unduly prejudiced the NIA since if they were successful the monies would have been transferred from the Court into the NIA's accounts. If they were unsuccessful the monies were readily available to be repaid to BONI. Those charged with the management of public funds would do well to bear this in mind in the future.

- [63] Although not having an impact on the outcome of this matter, this Court thinks it important at this juncture to remind the parties of the recent Court of Appeal decision in The Nevis Island Administration v Ocean Reef Resorts Limited⁵ on the juridical status of the NIA. Therein, the Court of Appeal stated that given the applicability of the Crown Proceedings Act CAP 5.06 to Nevis, the NIA has no legal standing to sue or be sued in civil proceedings. The Court of Appeal confirmed that the proper party in this regard is the Attorney General of St. Christopher and Nevis. This Court is not aware of whether this decision is appealed to the Privy Council, and subject to that caveat, parties are reminded to keep this decision at the forefront of their minds when instituting litigation against the NIA.

Costs

- [64] Both sides have enjoyed partial success. It may well be that their competing costs may well cancel out each other since the 1st to 3rd named Defendants are liable to pay the costs of the Claimants while BONI would be liable to pay the costs of counsel for the 4th and 5th named Defendants. In the absence of an agreement on costs this Court is minded to order that costs be assessed if not agreed within 18 days of

⁵ NEVHCVAP 2018/0006.

today's date. Any assessment of costs hearing is fixed for March 6th, 2023 and will take place virtually.

**Patrick Thompson Jr
Resident High Court Judge**

BY THE COURT

REGISTRAR