

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM No: BVIHCV 2021/0210

BETWEEN:

HONOURABLE JULIAN WILLOCK

Claimant

and

**(1) THE RIGHT HONOURABLE SIR GARY HICKINBOTTOM
AS COMMISSIONER OF THE COMMISSION OF INQUIRY**

(2) BILAL RAWAT

(3) ANDREW KING

(4) RHEA HARRIKISSOON

(5) ATTORNEY GENERAL

Defendants

Appearances:

Mr. Daniel Fligelstone Davies of Silk Legal (BVI) Inc for the Claimant

Mr. Andrew Sutcliffe QC, with him Mr. Oliver Clifton and Ms. Yegâne Güley of Walkers (BVI) for the First to Fourth Defendants

Mrs. Fiona Forbes-Vanterpool of the Attorney-General's Chambers for the Fifth Defendant

2021 September 28, 30

FURTHER JUDGMENT ON COSTS

[1] **JACK, J [Ag.]:** I have previously given two judgments in this matter, the first on 27th August 2021, which raised certain procedural difficulties which might face Mr. Willock in pursuing his claim, and the second on 13th September 2021 dealing with some aspects of the costs of the case following Mr. Willock's decision to discontinue the action.

- [2] On costs, Mr. Davies, who appeared for Mr. Willock, raised at the earlier hearing two issues which meant, he submitted, that costs should not be ordered against Mr. Willock. The first was that the action was an administrative action and that it was in the public interest that it be brought. In my judgment of 13th September, I rejected that argument. I held that the current claim is not an administrative action, but that even if it was, Mr. Willock had acted unreasonably and would be liable for costs pursuant to CPR 56.13(6). The second was that since the BVI Government was paying Mr. Willock's legal costs and would pay any costs order made against him, the Court should not make an order moving money from one Government pocket to another.

The retainer of Silk Legal

- [3] The factual background to this second issue seemed unclear. I gave directions that it be clarified, so that I could determine this remaining issue. Pursuant to that order, both Mr. Rowe, the senior partner of Silk Legal (BVI) Inc, and Mr. Willock made affidavits. Mr. Rowe's affidavit said:

"3. The Client of Silk Legal (BVI) Inc is the Speaker of the House of Assembly, in his official capacity, as per a contract signed by myself on behalf of Silk Legal (BVI) Inc and the Premier/Minister of Finance Honourable Andrew Fahie on behalf of the Government of the Virgin Islands, on the 28th of May 2021. Legal privilege is asserted over this document."

- [4] Mr. Willock's affidavit said:

"4. A contract was signed on May 28th, 2021 between Silk Legal (BVI) Inc... and the Premier/Minister of Finance, Honourable Andrew Fahie..., wherein I along with the other members of the House of Assembly (except the Attorney General) were to be represented by lawyers from Silk Legal (BVI) Inc, in matters relating to the Commission of Inquiry... Legal privilege is asserted over this agreement.

5. I as Speaker continue to act in my official capacity and I have had conversations with some members from both sides of the aisle. I have written to the Minister of Finance requesting supplementary funds to be placed in the House of Assembly vote, authorized for legal fees.

6. In addition, I have asked the Clerk, the accounting officer for the House of Assembly to make the formal request to the Ministry of Finance, in keeping with [the] practice and procedure of the Financial Management Act. It is crystal clear that the Government of the Virgin Islands will be undertaking any costs associated with my official duties as the Speaker. As these are matter concern [sic] the House of Assembly privilege is asserted over these documents, in keeping with Chapter 137 Legislative Council (Immunities and Powers) Act along with the practice of the House of Commons and Parliamentary Procedure set out in Erskine May.

7. In the Contract, I am authorized to instruct the lawyers of Silk Legal. In the Retainer I am also authorised to approve of fees. In said Contract the Government of the Virgin Islands is responsible for the payment of fees of Silk Legal and it has in fact been billed for same.”

[5] He went on to say that payment of Silk Legal’s fees had from time to time been authorised by the Clerk of the House of Assembly. He does not say what the total amount of fees paid has been.

[6] There seems to be no basis on which legal professional privilege could properly be claimed in respect of the contract of retainer. The point is, however, academic. On 31st May 2021 the contract was deposited with the Registrar of the High Court and is publicly available. A copy has been provided to me. Any privilege in the document has been lost.

[7] The contract begins:

“1. Silk Legal (BVI) Inc thanks you, Mr. Julian Willock, Speaker of the House of Assembly, on behalf of the Government of the Virgin Islands, for your instructions...
2. The Client is Mr. Julian Willock, Speaker of the House of Assembly, Virgin Islands acting on behalf of the Government of the Virgin Islands.”

[8] This is very different to the picture presented by Mr. Rowe and Mr. Willock. If Mr. Willock is acting on behalf of the BVI Government, then the client is the BVI Government. Mr. Willock is an agent acting on behalf of an undisclosed principal.

The contract was never signed by Mr. Willock. The only signatories were Mr. Rowe and Mr. Fahie. This reflects what in my judgment is the true position, namely that the Government of the Virgin Islands was the client.

[9] The contract continues:

“3. ...Silk Legal (BVI) Inc will take instructions from all Members of the House of Assembly as arranged and directed by the Client save and except the Honourable Attorney General...

4. Silk Legal (BVI) Inc will keep the Client properly informed of the conduct of any instructions from the said Members of the House of Assembly and it will do so in a timely manner and in writing...

7. ...Silk Legal (BVI) Inc was solicited for and it intends to provide the following services:

i) Provide the Client with independent written opinions on correspondence sent to the COI on/concerning all Members of the House of Assembly save and except the Honourable Attorney General;

ii) Advise all Members of the House of Assembly save and except the Honourable Attorney General on any correspondence or requests originating from the COI's office in their official capacity as a House of Assembly Member;

iii) Advise on any other legal matters that the Members or the House of Assembly save and except the Honourable Attorney General may request through the Client directly relating to the COI in their official capacity); and

iv) If any aspect of the COI work reaches a court of law as it related to the aforesaid members in their official capacity, Silk Legal (BVI) Inc will assist Attorney General with legal representation in forms that the Honourable Attorney General approves and considers necessary.”

[10] There are issues about the way this contract has been drafted. In particular, at least on one reading of it, the Speaker is acting as the agent of the executive. In a Westminster system of government, the legislature has two main functions: the passing of legislation and the holding of the executive to account. In order to carry out this second function, it is essential that the Speaker is neutral. If the Speaker is party-partisan, members of the opposition are likely to be hindered in carrying out their key constitutional rôle of investigating and, if necessary, criticising the

actions of the Government. Mrs. Forbes-Vanterpool, who appeared for the Attorney-General, explained, however, that the reference to Mr. Willock acting “on behalf of the Government of the Virgin Islands” was not intended to be a reference to the executive, but rather to the Government as a whole, in other words the Territory consisting of all three branches of the State. The contract had been seen and approved by the Attorney-General when it was made.

[11] On that basis, there would be no unlawfulness of the type put by **Chitty on Contracts** into the category of “objects injurious to good government... in the field of domestic... affairs.”¹ See **Egerton v Brownlow**² and **Amalgamated Society of Railway Servants v Osborne**.³ The Court is obliged to take points on public policy of its own motion, but here neither Mrs. Forbes-Vanterpool nor Mr. Sutcliffe QC wished to make any submissions on this, so I shall not determine the point.

[12] Another problem is that an important part of the retainer is that Silk Legal was to advise all members of the House of Assembly (apart from the Attorney-General). Indeed Mr. Willock confirms that he has “had conversations with some members from both sides of the aisle.” That potentially gives rise to a conflict of interest in Silk Legal agreeing to act on this basis. Members of the opposition are very likely to have views and interests differing from those of member supporting the Government. Again, Mrs. Forbes-Vanterpool and Mr. Sutcliffe QC did not wish to pursue this argument.

Does the retainer cover the current litigation?

[13] What the defendants’ counsel did submit was that the retainer does not cover the current litigation. The first three sub-clauses of clause 7 concern the giving of advice. Clause 7(iv) only covers litigation “[i]f any aspect of the COI work reaches a court of law as it related to the aforesaid members in their official capacity...” The current action has no connection with members of the House of Assembly at all; it is an action to prevent the three COI lawyers from continuing to act.

¹ 33rd Ed (2019) at para 16-008.

² (1853) 4 HL Cas 1 at p 161 *per* Lord Lyndhurst.

³ [1910] AC 87 at p 90.

[14] Moreover, Silk Legal's work was to be by assisting the Attorney-General with legal representation, but only "in forms that the Honourable Attorney General approves and considers necessary." In the current case, the Attorney-General does not approve Silk Legal's actions. Clause 7(iv) of the retainer of 28th May does not in my judgment cover Silk Legal's work in the current action.

[15] Mr. Davies sought to meet this objection by saying that the contract of retainer had been varied by the Speaker authorising the bringing of the current action. There is no evidence of this, beyond the fact that Silk Legal have in fact brought the current claim. In particular, there is no evidence that Mr. Fahie, or anyone else able to vary the contract, approved any variation on behalf of the Government. The variation is not in writing and has never been (and would never have been) approved by the Attorney-General. In my judgment the retainer of 28th May 2021 does not cover the bringing of the current action.

[16] Further, there is no express term whereby the Government of the Virgin Islands agreed to indemnify Mr. Willock against adverse costs orders. Now it is true that an agent generally has a right to indemnification from his principal. However, the agent must be acting within the scope of his authority to have standing to claim an indemnity. Here, there is nothing in the retainer which gives Mr. Willock a power to bring the current proceedings. Accordingly, any right to an indemnity falls away.

Mr. Willock's liability for costs

[17] Even if there were an indemnity, on the facts of this case that would not in my judgment affect the claimant's liability for costs. The costs of the first to fourth defendants are being met out of funds provided to the COI. There is no reason why the COI should be out of pocket for having to defend Mr. Willock's claim. As to the costs of the Attorney-General, she seeks those costs. I see nothing unreasonable in her so doing. She no doubt has a limited budget. There is no reason why her budget should be whittled down defending claims conducted unreasonably.

[18] Mr. Davies argued that it was relevant to costs that Mr. Willock was acting in his capacity as Speaker of the House of Assembly. It was part of the circumstances of the case: see CPR 64.6(5) and (6). In some cases that may be so, however, in the current case I have held that Mr. Willock acted unreasonably in issuing the proceedings and then discontinuing them at the first indication that there might be procedural problems with the case. Weighing all the factors in CPR 64.6, in my judgment there is nothing to cause me to diverge from the general rule in CPR 64.6(1) that costs follow the event.

[19] Accordingly, I shall order that Mr. Willock pay the defendants' costs.

The assessment of costs

[20] Mr. Davies submitted that any costs awarded should be prescribed costs rather than assessed costs, with a notional value of \$50,000. The relevant rules are these:

“65.3 Costs of proceedings under these Rules are to be quantified as follows –

- (a) where rule 65.4 applies... [It is common ground that this rule does not apply]; and
- (b) in all other cases if, having regard to rule 64.6, the court orders a party to pay all or any part of the costs of another party – in one of the following ways –
 - (i) costs determined in accordance with rule 65.5 ('prescribed costs');
 - (ii) costs in accordance with a budget approved by the court under rule 65.8 ('budgeted costs'); or
 - (iii) (if neither prescribed nor budgeted costs are applicable), by assessment in accordance with rules 65.11 and 65.12.

65.5(1) The general rule is that where rule 65.4 does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule.

(2) The 'value' of the claim, whether or not the claim is one for a specified or unspecified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant –

(a) by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim; or
(b) if the claim is not for a monetary sum it is to be treated as a claim for \$50,000 unless the court makes an order under Rule 65.6(1)(a).”

No order has been made under CPR 65.6(1)(a).

[21] Mr. Sutcliffe QC submitted that CPR 65.5(2) had no application. That submission is in my judgment borne out by authority. Although it was not cited to me, Ventose J in **Orin Roberts v Financial and Regulatory Commission** held:⁴

“[I]t is necessary to focus on the chapeau of CPR 65.5(2) which states that ‘[t]he “value” of the claim, whether or not the claim is one for a specified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant.’ The important point is that CPR 65.5(2) does not apply in all cases where the value of the claim is to be determined but applies only where the claim is: (1) for a specified sum; or (2) for an unspecified sum; and in both cases where it is (3) coupled with a claim for other remedies. The words ‘coupled with a claim for other remedies’ is the deciding limitation on the scope of CPR 65.5(2). If the claim, whether for a specified or unspecified sum, is not coupled with a claim for other remedies, CPR 65.5(2) does not apply.”

[22] In the current case, there is no claim for a specified or unspecified sum, so CPR 65.5(2) does not apply. It follows that there is no value of the claim on which the prescribed costs regime can bite. Accordingly, in my judgment CPR 65.3(b)(iii) applies. The defendants are entitled to assessed costs.

[23] The Attorney-General had as long ago as 2nd September 2021 served her schedule of costs claimed in the sum of \$6,084.00. The only point taken by Mr. Davies on the assessment was that the Attorney-General was billing in units of 15 minutes. That, he submitted, was too long and did not properly reflect the actual time devoted to a particular item. A similar submission was rejected by Leon J in

⁴ [2019] ECSCJ No 338, Claim No SKBHCV 2016/0019 (determined 14th October 2019).

Olive Group Capital Ltd v Gavin Mark Mayhew.⁵ Accordingly, I shall assess the costs of the Attorney-General at \$6,084.00.

- [24] The costs schedule of the other defendants was only served on the morning of the hearing claiming \$115,348.50, which was a substantial increase over the earlier schedule served on their behalves. Mr. Davies reasonably asked for time to deal with the schedule. I therefore directed that he should serve points of dispute by close of business on 5th October with a reply by 8th October. All parties were content that I should assess costs on paper without a further hearing.

Recusal

- [25] I should mention one further matter. In an article published on 15th September 2021, Virgin Islands News Online (“VINO”) said it:

“has also understood there are some questions as to whether UK national Mr. Jack should have taken up the case since he is believed to be friends with Col Commissioner Gary R. Hickinbottom and Governor John J. Rankin. The case was originally assigned to Justice Gerhard Wallbank; however, it was reportedly ‘wrestled’ away from him by Justice Jack.”

⁵ [2016] ECSCJ No 88, BVIHC (COM) 2015/0115 (determined 29th April 2016) at paras [120] to [125].

[26] Mr. Davies made no application that I should recuse myself. Since no such application has been made, I do not need to deal with it. I should, however, put on record that I barely know either Sir Gary Hickinbottom or his Excellency the Governor. They are not friends of mine. As to the allegation of “wrestling” the case from Wallbank J, the position is that the case was indeed originally assigned to that judge. His judicial assistant is, however, Mr. Willock’s sister. The judge therefore felt it was inappropriate for him to deal with the case.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar