

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM No: BVIHCV 2021/0210

BETWEEN:

**HONOURABLE JULIAN WILLOCK
SPEAKER OF THE HOUSE OF ASSEMBLY**

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 2
September 13

JUDGMENT ON COSTS

[1] **JACK, J [Ag.]**: The background to this matter I summarised in my judgment of 27th August 2021. I wrote that judgment in order that the hearing of the claimant's application for an injunction listed for 2nd September 2021 might be fully effective. Following that judgment, on 1st September 2021 at 1.33pm the claimant served a notice of discontinuance. The defendants were already finalising and filing their

skeleton arguments in opposition to the injunction application. I therefore directed that any party seeking an order for costs should serve a schedule of costs and that I would treat the hearing on 2nd September 2021 as a hearing in respect of any consequential costs orders.

[2] The first four defendants have served a costs schedule claiming \$71,388.59. The Attorney-General has served a schedule claiming \$6,084. In each case, further costs in respect of the hearing on 2nd September and work subsequent thereto will have been incurred.

[3] Before dealing with costs issues, I should mention a problem which arises from the current need to hear cases virtually. The default position is that the Court hears all matters in open court. When the Court hears matters face-to-face there is rarely any issue about whether a matter is in open court or not. Someone who wants to observe a case has merely to attend the courthouse. With a virtual hearing, an observer has to ask the Court for the Zoom details, so he or she can log in to a hearing. In the current case, a notice of the time and date hearing was due to be posted on the eccourts.org website, but that was withdrawn when the notice of discontinuance was served. When it became apparent that the costs hearing was going to go ahead, I asked that a notice of that hearing be posted on the website, but that was not done in time. It may be that the relevant Court user groups and representatives of the press should consider how this problem can be avoided in the future. In the meantime, any journalists or members of the public who wish to follow a case should leave their details with the Court so that notifications of hearings can be given to them, if problems of this type reoccur.

Mr. Davies' submissions

[4] On 2nd September, Mr. Davies appeared on behalf of the claimant. He submitted that the Court should make no order for costs. He made this submission on two bases. Firstly, the current action was not an ordinary private law action. Rather it was an administrative action, which Mr. Willock in his capacity as Speaker of the House of Assembly could properly bring without the Attorney-General's *fiat*, as

would have been required for a *relator* action. Mr. Willock was acting in the public interest. CPR 56.13(6) provides that there should be no order for costs against him unless he acted unreasonably. Secondly, there was no point making a costs order. The BVI Government was paying Mr. Willock's legal fees and would be responsible for liability for the legal costs of other parties. There was no point, he submitted, moving monies from one Government pocket to another Government pocket.

Public interest

[5] So far as the first point is concerned, CPR 56.1, so far as material provides:

“(1) This Part deals with applications —

- (a) by way of originating motion or otherwise for relief under the Constitution of any Member State or Territory;
- (b) for a declaration in which a party is the State, a court, a tribunal or any other public body;
- (c) for judicial review; and
- (d) where the court has power by virtue of any enactment or at common law to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.

(2) In this Part — such applications are referred to generally as ‘applications for an administrative order’.”

[6] Mr. Davies submitted that the current action was brought as an application for an administrative order under CPR 56.1(1)(b). The Commission of Inquiry was “a tribunal” for the purpose of that rule. In addition, by CPR 56.1(4) the Court may “[i]n addition to or instead of an administrative order... without requiring the issue of any further proceedings, grant (a) an injunction...” The Speaker, he submitted, had, in that capacity, standing to apply for an administrative order under those provisions. The Speaker was now contemplating bringing fresh judicial review proceedings. When dealing with the costs of an administrative claim, the Court had a greater discretion as to costs than in ordinary private law actions. The

current action was brought in the public interest. The default provision is no order for costs: CPR 56.13(6). In any event in all the circumstances the appropriate order was no order for costs.

- [7] There are a number of difficulties with this submission. Firstly, I have reread the claim form and affidavit in support. There is no hint in those documents that Mr. Willock was bringing a claim under CPR 56.1(1)(b). The application for an injunction appeared to be being brought on ordinary private law grounds.
- [8] Secondly, in my judgment, the Commission of Inquiry is not a “tribunal” for the purposes of CPR 56.1(1)(b). Although in the past, the term has had a wider meaning,¹ now-a-days a tribunal determines legal issues. Usually a tribunal decides cases *inter partes*, but this is not essential. A tribunal like the UK Gender Recognition Panel,² which gives legal recognition to applicants living in the other gender, determines matters *contra mundum*. By contrast, the Commission is purely investigatory. There are no parties. Without applicants or respondents, it determines no rights. An essential feature of a tribunal is that it is a judicial or quasi-judicial body. The Commission in this case does not determine rights; it is therefore not acting in a judicial or quasi-judicial capacity. CPR 56.1(1)(b) does not therefore apply to the current action.
- [9] Thirdly, if Mr. Davies’ submission is right, then it is the answer to the problem I raised as to whether the Attorney-General’s permission needed to be sought. However, the right course would have been to argue the point on the return date of the application for an injunction. There was no reason to serve a notice of discontinuance, if the action was, as Mr. Davies argues, perfectly well brought.
- [10] Fourthly, Mr. Davies has only baldly asserted that the Speaker has standing to bring an administrative action. I will assume without deciding that the test for

¹ See, for example, the Tribunals of Inquiry (Evidence) Act 1921 (11 & 12 Geo V c. 7), but of the distinction subsequently drawn between tribunals and inquiries in the Tribunals and Inquiries Act 1972 (c. 62) (both UK Acts now repealed).

² Established in the United Kingdom by Schedule 1 to the Gender Recognition Act 2004 (c. 4).

making a claim under CPR 56.1(1)(b) is the same as that for a party seeking judicial review under CPR 56.1(1)(c). There is a lot of law on what gives *locus standi* to bring a claim for judicial review. Mr. Davies has cited none of it. The learned editors of **De Smith's Judicial Review** point out:³

“Where there are strict rules as to standing there is always the risk that no one will be in a position to bring proceedings to test the lawfulness of administrative action. It is hardly desirable that a situation should exist where because all members of the public are equally affected no one is in a position to bring proceedings: such a situation would impede the rule of law.”

It may thus be properly arguable that Mr. Willock does have standing. The time for doing that, however, was on the substantive application for an injunction as part of the entitlement to seek an injunction, not as a side-wind in a costs determination without citation of any authority.

[11] Fifthly, any problems as to standing could have been addressed at the substantive application for an injunction. Mr. Willock could have asked the Attorney-General for permission to bring the claim as a *relator* action. She would then have had to decide whether to give it or not.

[12] The Attorney-General is always in a constitutionally odd position. In some matters she is a mere advisor of her client, in other situations she has to make decisions herself. As I said in **Trustees of the John Mackintosh Educational Trust v Attorney-General and Charity Commissioners** (a case where trustees of a charity in Gibraltar sought a change in the objects of the trust under the *cy-près* doctrine):⁴

“48. The Attorney-General has a large number of different rôles. The application of a public interest test is different in relation to each. Some of the duties are as follows. First, he is the Government's and the Governor's chief legal adviser. In that capacity, he acts as a normal

³ 8th Ed (2020) by Lord Woolf, Jeffrey Jowell and Andrew Le Sueur at para 2-006.

⁴ [2015] Gib LR 365 TRUSTEES of the JOHN MACKINTOSH EDUCATIONAL TRUST v. ATTORNEY-GENERAL and CHARITY COMMISSIONERS (gibraltarlaws.gov.gi)

lawyer and is subject to his client's instructions. Issues of public interest are in these cases, in principle, for the branch of the Government which is his client to determine, not for him. Secondly, he is ultimately responsible for public prosecutions,⁵ including bringing applications to commit for public contempt of court. He has a general power to prosecute or not, depending on his view of the public interest. As such, he is not subject to anyone's instructions, so the Government of the day cannot direct him how to act, but he is subject to judicial review. Thirdly, he can authorize the bringing of *ex relatione* proceedings, whereby a private individual is authorized to seek an injunction against a defendant committing a public wrong. When doing so, he acts 'in his absolute discretion... in the public interest' and is therefore arguably not subject to judicial review: **Gouriet v Attorney-General**.⁶ Fourthly, historically, he sat as acting Chief Justice in the absence of the Chief Justice.⁷ When so sitting, he would exercise a completely independent judicial function, answerable to no one save the Privy Council.⁸ As such, he was obliged to give judgment in accordance with the law, regardless of his own view of the public interest (*fiat justitia ruat caelum*).

49. In carrying out his duties in charity cases, the Attorney-General has a different function again. Exercising the *parens patriae* prerogative, he is seeking to ensure that the charitable trusts established by the settlor or testator are carried out in accordance with the wishes expressed in the deed or will establishing the trust. The fact that a trust is charitable is of itself sufficient to show that the trust is in the public interest, so the Attorney-General does not need to, and would be wrong to, consider whether the enforcement of the terms of the charitable trust is in the public interest. The Attorney-General has no power to consent to a breach of the terms of a charitable trust on public interest grounds. Unless the conditions for the making of a *cy-près* scheme existed, he could not properly, for example, consent to moneys of the John Mackintosh Education Trust being spent for primarily non-educational purposes."

[13] It cannot be assumed that the Attorney-General would have refused her *fiat*, had it been requested. She would have had to balance (a) the view she takes as to

⁵ In this Territory, the Attorney-General's rôle in criminal prosecutions is affected by the existence of the Director of Public Prosecutions, a post which was only subsequently created in Gibraltar: Director of Public Prosecutions Act 2018 (Gibraltar Act No 2018-17).

⁶ [1978] AC 435 at p 442, *per* Mr. Samuel Silkin QC, the Attorney-General, although the point was left open by the House of Lords, *ibid* at p 475, *per* Lord Wilberforce.

⁷ See John Restano, *Justice so Requiring* (2012) at p 88.

⁸ There was no Court of Appeal, so appeals went directly to the Privy Council. The 1969 Constitution of Gibraltar established the Court of Appeal for the first time: Gibraltar Constitution Order 1969 (unnumbered prerogative order SI 1969, II p 3602), Schedule, section 57.

whether the three English lawyers were “practising [BVI] law” (including the question as to whether it was at least arguable that they were) and (b) her view as to the public interest in preventing them so doing (assuming she took the view they were or might be practising BVI law). If she refused her *fiat*, potentially her decision might be subject to judicial review. The “absolute discretion” (and with it the immunity from judicial review) claimed by Mr. Silkin QC for his decisions as Attorney-General to grant the power to bring proceedings *ex relatione* was left open by the House of Lords in **Gouriet** and may need re-examination in any event in the light of **Miller 2**, the prorogation of Parliament case.⁹

[14] Whether the current proceedings should have been stayed to permit Mr Willock to bring proceedings for judicial review in the event that the Attorney-General refused her *fiat* is a matter which no longer arises in consequence of the discontinuance of the case. The possibility, however, existed. Whether this produces a difficulty in relation to the Speaker’s proposed fresh judicial review application by virtue of the rule in **Henderson v Henderson**¹⁰ will be a matter for the Court hearing his application to bring such proceedings.

[15] Considering all these points, in my judgment Mr. Willock did have at least an argument when he issued these proceedings that it was in the public interest that it be determined whether the three lawyers in issue were practising BVI law illegally. However, in the exercise of my discretion, the Court should not recognise Mr. Willock’s public-spiritedness in bringing these proceedings so to make no order as to costs. Firstly, I do not accept that the current action is anything other than an ordinary private law claim, so that the issue does arise as to whether it required the Attorney-General’s *fiat*. Secondly and as a wholly separate ground for the exercise of my discretion, assuming I should have regard to the public interest which Mr. Willock was defending, the simple fact is that by serving the notice of discontinuance he was abandoning his pursuit of the public interest. If he had fought and lost, then he could make the argument that he was acting in the public

⁹ R (on the application of Miller) v The Prime Minister [2019] UKSC 41, [2020] AC 373.

¹⁰ (1843) 3 Hare 100.

interest. Instead by folding the moment a potential difficulty was raised, he was likewise abandoning his pursuit of the public interest. Thirdly, in my judgment he acted unreasonably in abandoning the action at the first indication that there might be procedural difficulties. It caused very substantial costs to be incurred by the defendants to no public benefit whatsoever.

Robbing Peter to pay Paul

- [16] The second head of argument put forward by Mr. Davies was that, since the Government of this Territory was paying Mr. Willock's legal costs and would pay any costs order made against him, it made little sense to be moving money from one Government pocket to another.
- [17] Mrs. Vanterpool disputed that there was any such agreement between Mr. Willock and the BVI Government. She said that any agreement up to \$100,000 would require the authorisation of the accounting officer for the House of Assembly, who was the clerk to the House of Assembly. Any agreement over \$100,000 required the authorisation of the Financial Secretary. The Attorney-General's investigations, she said, showed that no such authorisations had been given.
- [18] In consequence I gave a direction that Mr. Willock file an affidavit by close of business on 7th September explaining the funding arrangements for the action. In compliance with that direction, Mr. Willock swore and filed an affidavit. It is very short, a mere five paragraphs. The whole substance of the affidavit is this:

"3. I make this affidavit to state whether the funding of the action is private or governmental in relation to this matter.

4. I hereby confirm that I instructed the lawyers at Silk Legal (BVI) Inc to pursue this administrative law action on the understanding that the Government of the Virgin Islands is covering the costs/fees of the matter.

5. I have not paid for the lawyers of Silk Legal (BVI) Inc, it is not my responsibility."

[19] I find various difficulties with these averments. Firstly, is Mr. Willock saying the “understanding” is legally binding or not? Secondly, with whom did he reach the understanding? Presumably to have any efficaciousness, it needed to be an understanding with the BVI Government. An understanding simply with Silk Legal would have been pointless. Mrs. Vanterpool was asserting at the hearing on 2nd September that there had been no such agreement, because it would have had to have been approved by (depending on its size) the clerk of the House of Assembly or the Financial Secretary. Mr. Willock says nothing about whether such approval was given. (As speaker, he is presumably in a good position to know.) If no such approval was given, how could the understanding be legally enforceable? Thirdly, who was Silk Legal’s client? Which human being agreed that the Government of this Territory would pay Silk Legal’s legal fees? Lastly, Mr. Willock says nothing about the alleged liability on the part of the BVI Government to indemnify Mr. Willock against any costs order in favour of the defendants to the current action.

[20] The evidence I have at present as to the funding arrangements is unclear. It would not be fair to Mr. Willock to determine this aspect of his defence to the costs application by the defendants without giving him an opportunity to explain the position. I am therefore minded to direct that this matter be clarified.

[21] I will hear counsel on the handing down of this judgment, but I am minded to order that by 4pm on Tuesday 14th September 2021 Mr. Willock and a person with knowledge of the facts from Silk Legal (BVI) Inc each make, swear and file an affidavit on the e-Portal as follows:

(a) Mr. Willock shall give evidence as follows, namely:

- (i) whether the understanding mentioned in paragraph 4 of his affidavit of 7th September 2021 was reached orally or in writing;
- (ii) if in writing, he shall (subject to any claim as to professional legal privilege) exhibit the relevant documents to his affidavit;
- (iii) if he makes any claim to legal professional privilege, he shall state the date of the relevant document or documents and which

human beings signed the documents and on whose behalf the relevant document or documents were sent and received;

(iv) if the said understanding was oral, when, where and between which human beings the understanding was reached, whether the communication was face to face or by telephone or by some other (and if so, what) electronic means, and (subject to any issue as to legal professional privilege) what the gist of the conversation was; and,

(v) whether the Government of the Territory of the Virgin Islands or an emanation thereof (and if so what emanation thereof) agreed

(1) to pay the legal costs of Silk Legal (BVI) Inc, and/or

(2) any liability incurred by him to the defendants or any or some of them (and if so, which) in the current litigation; and

(b) the person from Silk Legal (BVI) Inc shall give evidence as follows, namely:

(i) who the client of Silk Legal (BVI) Inc is in the current action;

(ii) whether the Government of the Territory of the Virgin Islands (or an emanation thereof) agreed to pay the legal fees of Silk Legal (BVI) Inc and if not, which natural or legal person (if anyone) has agreed to pay the legal fees of Silk Legal (BVI) Inc;

(iii) whether the agreement to pay the legal fees of Silk Legal (BVI) Inc (if there was one) was oral or in writing;

(iv) if in writing, the deponent shall (subject to any issue of legal professional privilege) exhibit the relevant documents to his or her affidavit;

(v) if the deponent makes any claim to legal professional privilege, he or she shall state the date of the relevant document or

documents and which human beings signed the documents and on whose behalf the relevant document or documents were sent;
(vi) if oral, when, where and between which human beings the agreement was reached, whether the communication was face to face or by telephone or by some other (and if so, what) electronic means, and (subject to any issue of legal professional privilege) what the gist of the conversation was; and,
(vii) whether the Government of the Territory of the Virgin Islands or an emanation thereof (and if so what emanation thereof) agreed to pay

- (1) the legal costs of Silk Legal (BVI) Inc, and/or
- (2) any liability incurred by Mr. Willock to the defendants or any or some of them (and if so, which) in the current litigation.

[22] Once this further information is filed, I shall consider whether I can reach a determination of costs or whether I should invite further submissions.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar