

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHCV 2019/0262

IN THE MATTER OF THE VIRGIN ISLANDS CONSTITUTION ORDER 2007 (UK SI 2007 No. 1678)

And

IN THE MATTER OF AN APPLICATION BY MITCH CHRISTOPHER, A PERSON ALLEGING A BREACH OF ARTICLE 16(2)(d) OF THE SAID CONSTITUTION, FOR DECLARATORY AND COMPENSATORY RELIEF PURSUANT TO SECTION 31 OF THE SAID CONSTITUTION.

BETWEEN:

MITCH CHRISTOPHER

Claimant/Respondent

and

THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Defendant/Applicant

Appearances: Mr. Jamal Smith for the Claimant/Respondent
Mr. Christopher Forde, Crown Counsel, for the Defendant/Applicant

2020: January 22
February 4

RULING

- [1] **WARD, QC J:** This is an application by the Defendant to strike out the Claimant's Fixed Date Claim Form filed on 7th October 2019 for abuse of process or, alternatively, to strike out parts of the Claimant's affidavit in support on the basis that they are irrelevant.

BACKGROUND

- [2] On 28th May, 2014 the Claimant was arrested on suspicion of murder. On 29th May, 2014 he was formally charged with murder. He subsequently made a successful application for a legal aid assigned attorney to undertake his defence. This legal aid scheme derives from a Memorandum of

Understanding between the Government of the British Virgin Islands and the British Virgin Islands Bar Association. It specifies, *inter alia*, the brief fee and refresher payable to counsel for criminal trials on indictment. The Claimant's trial commenced on 12th March, 2015 but concluded with a hung jury on 27th March, 2015. The learned Judge ordered a retrial. The Claimant's attorney rendered an invoice in accordance with the existing legal aid scheme and received payment. At the re-trial, which commenced on 8th March, 2016, the Claimant was represented by the same attorney who again held a legal aid brief. That trial was aborted on 21st March, 2016 and another re-trial ordered. Once again the Claimant's attorney rendered her invoice and was paid in accordance with the existing legal aid scheme. The second retrial commenced on 12th April, 2016. Yet again the Claimant was legally aided and represented by the same attorney. That retrial concluded on 4th May, 2016 with the acquittal of the Claimant. On 10th May, 2016 his attorney rendered an invoice in the sum of \$9,800.00 to the legal aid board but was paid only \$4,800.00. By letter dated 28th July, 2016, the Claimant's attorney advised him that he had to make payment of the outstanding \$5,000.00. The Claimant avers that he paid off this sum over a three year period.

- [3] It is the Claimant's contention, first, that by reason of section 16(2)(d) of the Virgin Islands Constitution Order, 2007, the Defendant owed a duty to establish a public legal aid scheme as prescribed by law. The Claimant's argument is that the current Legal Aid Scheme breaches that provision because it is not one prescribed by law but established by a Memorandum of Understanding between the Government of the Virgin Islands and the BVI Bar Association. Secondly, the Claimant says that the payment schedule established under the current legal aid scheme was fixed almost 20 years ago and has not been reviewed or revised to take account of inflation, consumer price indices and other monetary changes which have the potential of discouraging legal practitioners from participating in the voluntary legal aid scheme, thus narrowing the pool of attorneys available to act on his behalf. As a consequence thereof, the Claimant submits that the current payment schedule is unfair, null and void. His attorney, as a senior legal practitioner, was entitled to charge \$500.00 per hour. At 16 full trial days she ought to have been paid \$64,000.00 instead of the paltry sum of \$4,800.00 which she in fact received. The Claimant says he lacked sufficient means to pay for legal aid or to repay his attorney and had a legitimate expectation that legal aid would be paid in full. By virtue of the foregoing matters the Claimant says that section 16(2)(d) of the Constitution has been breached and he has thereby suffered loss and damage.

[4] Accordingly the Claimant seeks:

- (i) A declaration that his rights pursuant to section 16(2)(d) of the Virgin Islands Constitution Order 2007 have been contravened in relation to him because he was charged with the offence of murder but was not able to retain a legal practitioner at the public expense provided through an established public legal aid scheme as prescribed by law;
- (ii) Damages for breach of section 16(2)(d);
- (iii) Statutory interest, such further and other relief as the Claimant may request or the court allow and costs.

[5] By Notice of Application dated 12th November, 2019, the Defendant applied to strike out the Claimant's Fixed Date Claim filed on 7th October 2019 pursuant to **CPR Parts 56.11(1) and 26.3(1)(c)**. The Defendant asserts that alternative remedies are available to the Claimant, such as judicial review, and thus it is an abuse of process for him to seek to access the Court via Originating Motion.

[6] In the alternative, the Defendant seeks to have paragraphs 29 – 31 of the Claimant's affidavit in support of the Originating Motion struck out pursuant to **CPR 30.3(3)** as being irrelevant to the claim sought in his Originating Motion.

The Defendant's submissions

[7] The Defendant submitted that the Claimant's case is essentially that his rights under section 16(2)(d) of the Constitution were breached due to the fact that his attorney was not paid sufficiently or in full under the existing legal aid scheme which has led to him having to pay his attorney \$5,000. Having regard to the nature of his claim, alternative remedies such as judicial review are available and there is no feature of this claim that amounts to exceptional circumstances that would justify the Claimant seeking constitutional relief. That being so, it is an abuse of process to seek constitutional relief.

[8] Alternatively, the Defendant submitted that paragraphs 29 – 31 of the Claimant's affidavit in support of the Originating Motion contain matters which are irrelevant to the claim. These paragraphs purport to calculate the fee that the Claimant's attorney should have been paid based on the Consumer Price Index Inflation Calculator of the Bureau of Labor Statistics of the United States Department of Labour; complain that the failure to take account of the impact of inflation

over 20 years is inconsistent with the Claimant's right to legal aid as it would mean that legal practitioners would have to work at a significant discount for work done and would discourage legal practitioners from taking his case; and assert that his trial attorney should have been paid \$64,000.00 for which the court should award full compensation to his trial attorney.

The Claimant's submissions

- [9] On behalf of the Claimant, learned counsel, Mr. Jamal Smith, submitted that the Claimant's case is a "paramount example of what would constitute a rare event that would require and necessitate audience before the Constitutional court of any jurisdiction." This quality is said to derive from the fact that the Claimant is the first to challenge the failure of the Government to implement a constitutionally guaranteed legal aid scheme as prescribed by law. The claim is therefore a substantive claim brought for the purpose of addressing a fundamental breach of rights by the State as a result of its failure to act in accordance with the provision of the Constitution which has resulted in systematic hardship to its citizens and the Claimant in particular.
- [10] Secondly, submitted learned counsel, no parallel remedy exists for the vindication of the Claimant's rights in the circumstances of this case. It was submitted that the Defendant wholly misconceives the true nature of the claim hence its invocation of the strike out jurisprudence. According to the Claimant: "An important dimension and the fulcrum of the Claimant's case being that there is at present no legal aid scheme as *'prescribed by law'* (Claimant's emphasis) in the Virgin Islands (*meaning as provided for by duly enacted legislation passed by a majority of the House of Assembly*)." It is the failure to establish such a scheme that constitutes the breach of the guaranteed right under section 16(2)(d) of the Constitution.
- [11] As it relates to the application to strike out paragraphs 29 – 31 of the Claimant's affidavit, learned counsel submitted that the paragraphs are relevant to the Claimant's case because they provide useful authority from the United Kingdom which supports his case and underscores the need for a legal aid scheme which is prescribed by law, duly enacted and subject to periodic review. The use of the Consumer Price Index Inflation Calculator is said to be relevant for the purpose of highlighting the many pitfalls of a legal aid scheme not based on duly enacted legislation and which is not subject to periodic review by the legislature to avoid absolution.

Issue

- [12] The issue that arises for resolution in this case is whether the Claimant's resort to a constitutional motion is an abuse of process because alternative remedies are available.

Law and analysis

Alternative Remedy

- [13] Chapter 2 of the Virgin Islands Constitution sets out the fundamental rights and freedoms of the individual protected under the Constitution.

- [14] Section 31 provides:

(1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

a. to hear and determine any application made by any person under subsection (1);
and

b. to determine any question arising in the case of any person that is referred to it under subsection (7)

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled.

(3) The High Court may decline to exercise its powers under subsection (2) if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.”

- [15] Assistance as to the meaning of this provision may be derived from the case of **Aubyn St. Price v Attorney General**¹, where the Court of Appeal of the Eastern Caribbean Supreme Court, in construing the analogous St. Lucia Constitutional provision, summed up the position thus:

“The court's power to hear a constitutional motion are contained in section 16 of the Constitution of St. Lucia and it is clear from the proviso to the section that the power is discretionary and the court may decline to hear the motion if adequate means of redress

¹ SLUHCVP2012/0027

are or have been available to the applicant...Each case must be decided on its own facts."

- [16] A settled body of law has emerged to the effect that an application for constitutional relief should not be used as a general substitute for the normal procedures for invoking judicial control of administrative action and where there is a parallel remedy: **Kemrajh Harrikissoon v Attorney General**². In the context of analogous Trinidad & Tobago Constitutional provisions the Privy Council stated:

"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."

- [17] A sufficient illustration of this principle is provided in **Jaroo v Attorney General (Trinidad and Tobago)**³. The appellant purchased a car in good faith. When he applied to the Licensing Authority for the re-classification of the vehicle, it was detained by the police who suspected that it was a stolen vehicle. On their instructions he took the motor car to the police so that they could examine it and conduct inquiries into its theft. After a suitable interval, having heard nothing from them, he asked the police to return the vehicle. Repeated requests met with no reply. The appellant therefore instituted proceedings by way of originating motion under section 14(1) of the Constitution of Trinidad and Tobago. The Privy Council held that it was an abuse of process to do so instead of instituting the common law remedy for the return of the vehicle. Lord Hope stated at paragraph 39:

"Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the

² (1979) 31 WIR 348

³ [2000] UKPC 5

procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.”

- [18] Subsequently, the Privy Council in **Attorney General of Trinidad and Tobago v Ramanoop**⁴, somewhat qualified this principle in the following way:

“...where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse of the court’s process.”

- [19] It follows from the foregoing principles that in order for the Claimant to successfully resist this application it must be established that the true nature of his case is one that engages a constitutional right and, either that he has no parallel remedies available to him, or, if a parallel remedy exists, that there is some special feature of the circumstances of the case that makes it appropriate to proceed by way of originating motion because the means of redress otherwise available would be inadequate. To this task I now turn.

- [20] The Claimant’s case is twofold. The first limb asserts that the failure of the Government to establish a public legal aid scheme as prescribed by law is in itself and without more a breach of section 16(2)(d) of the Constitution. The second limb contends that the fee structure of the existing legal aid scheme is inadequate and has not kept pace with inflation. It is said that this inadequacy is itself a breach of an implicit requirement in section 16(2)(d) that an established public legal aid scheme prescribed by law would meet this minimum standard. That section falls under the rubric “Provisions to secure protection of the law” and provides:

“16. (2) Every person who is charged with a criminal offence shall –

- (a) ...
- (b) ...
- (c) ...
- (d) be permitted to defend himself or herself before the court in person or at his or her own expense, by a legal practitioner of his or her own choice or where he

⁴ [2005] UKPC 15

is unable to afford to retain a legal practitioner and the interests of justice so require, by a legal practitioner at the public expense provided through an established public legal aid scheme as prescribed by law.”

- [21] The first limb of the Claimant's case amounts to an assertion that because the existing legal aid scheme is not one “prescribed by law” he has been denuded of the protection of the law afforded by this section. On the face of it, and in isolation, it would seem that this limb of the claim raises a legitimate constitutional claim without parallel remedy. However, viewed in the context of the grounds advanced in support of the claim it seems clear that the real complaint, and the issue with which the Claimant is really aggrieved, is the decision of the Legal Aid Board not to pay his attorney the full sum claimed which was the catalyst for his attorney's demand that he should pay the difference. In his affidavit the Claimant contends that his attorney should rightly be paid \$64,000 when she herself only claimed \$9, 800 from the legal aid authority. The Claimant made the bold assertion that the current legal aid scheme has resulted in systematic hardship to its citizens and the Claimant in particular. There is simply no evidence to support this. It would seem that the Claimant has mounted the constitutional platform to lobby for a legal aid scheme with an enhanced payment schedule.
- [22] As to the second limb of the claim relating to the inadequacy of the existing legal aid scheme, the basis of complaint only arose after the third trial when the Claimant's attorney billed him for the sum of \$5,000. The Claimant does not plead that this contribution was required of him by the Legal Aid Board or the scheme. Indeed it is plain that this demand was made by his lawyer on this isolated occasion. I am satisfied therefore that this claim does not entail the contravention of any human right or fundamental freedom guaranteed by Chapter 2, section 16(2)(d). Skeletonized, the Claimant's case amounts to no more than an attempt to recover money demanded by his attorney and which he chose to pay. I am therefore satisfied that the claim does not sound in constitutional relief and that if the Claimant wishes to recover this sum, alternative remedies are available in that he may seek to challenge the decision of the Legal Aid Board on the basis that he is a person adversely affected by it; or he may seek the return of his money directly from his lawyer.
- [23] The Claimant's contention that this is the first claim “to challenge the failure of the Government to implement a constitutionally guaranteed legal aid scheme as prescribed by law” fails to imbue the claim with the quality of a special feature which even arguably, indicates that the means of legal

redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse of the court's process.

[24] Further, even if it could be said that there was a failure to establish a legal aid scheme that was "prescribed by law", the Claimant must demonstrate that in consequence thereof he has been denied the protection of the law as he claims. In order to test the Claimant's assertion that the failure to establish a public legal aid scheme *prescribed by law* has prevented him from being able to afford to retain a legal practitioner at the public expense, it is necessary to have an understanding of the what is meant by "the protection of the law" in order to assess whether there is a scintilla of a case (see **Baldwin Spencer**).

[25] The scope of the right to protection of the law was defined by the Caribbean Court of Justice in **Maya Leaders Alliance v The Attorney General of Belize**⁵ in the following way:

"The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life liberty or property. It encompasses the right of every citizen to access the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However, the concept goes beyond such questions of access and includes the right of the citizen to be afforded, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."

[26] Section 16(2)(d) has as one of its objectives the securing of access to the courts by impecunious persons or those of modest means in order to properly defend themselves against criminal charges.

[27] A party alleging contraventions of the Constitution must plead and particularize the alleged violation of the constitution: **Baldwin Spencer v Attorney General of Antigua and Barbuda**⁶. It is therefore for the Claimant to establish that he was denied protection of the law because the current legal aid scheme which he thrice accessed in successful defence of the charge of murder was not one prescribed by law.

⁵ [2015] CCJ 15

⁶ Civ. APP. No 20A of 1997

[28] Based on the Claimant's pleadings the factual circumstances are uncontroversial and may be fairly stated thus. At all three trials the Claimant accessed a legal aid scheme sanctioned by the Government in partnership with the BVI Law Association. The Claimant makes no complaint regarding his ability to retain an attorney through this legal aid scheme nor about the quality of service did he receive from his appointed lawyer throughout any of his three trials. By his own evidence, on every occasion the system worked for him in that he was represented at his murder trial by very able counsel who ultimately secured his acquittal. On none of these occasions was he asked by the legal aid authority to contribute towards payment of fees. In these circumstances, I can discern no sense in which the Claimant can establish that he was denied the protection of the law merely because the scheme was not one "prescribed by law." On the contrary, the Claimant's pleadings establish beyond doubt that the existing legal aid scheme negotiated and operated by the government enabled him to secure the full protection of the law throughout his three trials. This is the type of protection, through access to justice, that section 16(2)(d) is designed to afford and did afford to the Claimant on every occasion of his encounter with the criminal justice system.

[29] Where, as here, a statement of case or part thereof discloses no reasonable grounds for bringing or defending a claim the court is not powerless to prevent its process from abuse. **CPR 26.3(1)(b)** empowers the court to strike out a claim in such circumstances. I am mindful that the power to strike out is one that must be used sparingly and especially so where the litigant asserts breach of a constitutional right. The rationale for this cautious approach was explained by Mitchell, J.A. in ***Tawney Assets Limited v East Pine Management***⁷:

"The exercise of this jurisdiction deprives a party of his right to a trial and of his ability to strengthen his case through the process of disclosure, and other procedures such as requests for further information. The court must therefore be persuaded either that a party is unable to prove the allegations made against the other party; or that the statement of case is incurably bad; or that it discloses no reasonable ground for bringing or defending the case; or that it has no real prospect of succeeding at trial."

[30] It is uppermost in my mind also that I may not do so if there is even a scintilla of a cause of action. I pay heed to the injunction in **Baldwin Spencer v Attorney General of Antigua and Barbuda** that:

"Regardless of the length or difficulty of the argument, which has already been concluded the operative issue for determination must be whether there is a scintilla of a cause of action. If the pleadings disclose any viable issue for trial then we should order the trial to proceed but if there is no cause of action we should be equally resolute in dismissing the [claim]".

⁷ Civil Appeal No. 7 of 2012 (Unreported)

- [31] In considering whether to strike out a claim, the Court must be concerned only to test the particulars averred by the Claimant to see whether they are sufficient to establish a cause of action: **Lonhro Case**⁸.
- [32] Having considered the Claimant's case as pleaded, the truth of which have been assumed, and for the reasons discussed at paragraphs 21 – 28 above, I hold that the Claimant's case as pleaded discloses no reasonable cause of action. It is wholly lacking in merit and unsustainable. On this basis also the claim for constitutional relief must fail.
- [33] Accordingly, the Claimant's claim for declarations and reliefs under the Constitution of the Virgin Islands is hereby struck out. The Claimant shall pay to the Defendant the costs of this application to be assessed in default of agreement.

Trevor M. Ward, QC
High Court Judge

By the Court


Registrar

⁸ [1991] 4 ALL ER 965