

IN THE EASTERN CARIBBEAN SUPREME COURT
COMMONWEALTH OF DOMINICA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. DOMHCV2016/0017

IN THE MATTER OF A DECISION BY THE DIRECTOR OF PUBLIC PROSECUTIONS,
THE CHIEF OF POLICE AND OFFICER JUDY ETTINOFF ANSELM TO FILE A
CRIMINAL COMPLAINT AGAINST THE APPLICANT.

AND

IN THE MATTER OF AN APPLICATION PURSUANT TO PART 56 OF THE CIVIL
PROCEDURE RULES 2000 CLAIMING THE ADMINISTRATIVE ORDER OF
CERTIORARI TO QUASH THE CHARGE OF INDECENT ASSAULT, AND
PROHIBITION TO PROHIBIT THE CHIEF MAGISTRATE OR ANY OTHER
MAGISTRATE FROM PROCEEDING WITH THE CRIMINAL COMPLAINT AGAINST
THE APPLICANT

BETWEEN:

JOSHUA FRANCIS

Claimant

and

[1] THE CHIEF MAGISTRATE

[2] COMMISSIONER OF POLICE

[3] OFFICER JUDY ETTINOFF ANSELM

[4] DIRECTOR OF PUBLIC PROSECUTIONS

Defendants

Appearances:

Mrs. Gina Dyer Munro with Mrs. Zena Moore Dyer for the claimant

Mr. Lennox Lawrence for the applicant

Mrs. Tameka Hyacinth-Burton for the first, second and third named respondents

Ms. Sherma Dalrymple with Ms. Carlita Benjamin for the fourth named respondent

2016: May 30th

: June 24

**RULING ON NOTICE OF APPLICATION FOR REQUEST FOR INFORMATION AND
SPECIFIC DISCLOSURE FILED ON THE 7TH APRIL 2016**

- [1] **STEPHENSON J.:** On 7th March 2016, Joshua Francis (the applicant) filed an application for leave to file Judicial Review against the Chief Magistrate, Commissioner of Police, Officer Judy Ettinoff Anselm and the Director of Public Prosecutions (the respondents).
- [2] The applicant is seeking leave to file administrative orders to quash a decision made by the respondents and to prohibit from proceeding with a criminal complaint filed against him pursuant to part 56 of The Civil Procedure Rules 2000. The application for leave has since been amended and re amended.¹
- [3] On 7th April 2016 the applicant filed a Notice of Application for request for information and specific disclosure requesting an order that he be supplied with information for specific disclosure as has been requested in a letter dated 22nd March 2016. The claimant contends that this request was refused by the Solicitor General by letter dated 23rd March 2016.

¹ Amended Notice of Application for leave to file Judicial Review filed on the 10th March 2016 and Further Amended Notice of Application for Leave to apply for Judicial Review filed on the 7th April 2016

- [4] The applicant contends that the request is required in accordance with the provision of CPR 2000 as it relates to matters in dispute and that the information requested is necessary as it is directly relevant to the proceedings and that it is in the interest of the administration of justice that the application should be granted. This application is supported by an affidavit sworn to by the applicant and filed on 7th April 2016.
- [5] The application is being opposed by the respondents.
- [6] This application first came before the court on 11th April 2016 and directions were given for the filing of affidavits and submissions and on 30th May 2016 and the matter was fixed for arguments. The court now rules on the application.
- [7] The issue raised in this application is whether or not an order for specific disclosure should be made at that stage in Judicial Review proceedings where leave has not yet been granted to proceed with same.
- [8] The applicant submits that he is entitled to the relief sought as a matter of law. That specified disclosure is necessary in order to afford him the opportunity to properly present his application for leave to apply for Judicial Review.
- [9] The grounds for the application have been stated as follows:
- (1) That the applicant by letter dated 22nd March 2016 through his solicitors requested information and specific disclosure from the respondents;
 - (2) That the respondents through their solicitors refused to provide the information requested;
 - (3) That the information requested is required in accordance with CPR 2000 as it relates to matters in dispute and is necessary as it is directly relevant to the proceedings.
 - (4) That it is in the interest of the administration of justice for the relief prayed for in the application is granted.

[10] The applicant swore to an affidavit in support of his application setting out the facts upon which his application is premised.

[11] The information being sought by the applicant was stated in exhibit 'JF2'²:

- (1) "Whether AL³ signed any statement on 29th September 2016, which has not been disclosed as an exhibit in the affidavit of the deponent Kimaura Theodore Thomas⁴?
- (2) Whether Kimaura Theodore – Thomas gave to AL any statement at or after her return to Police Headquarters on 29th February 2016?
- (3) Whether between 29th February 2016 and March 4th 2016 AL gave any written statement that she wanted to proceed against Joshua Francis?
- (4) Who was the Attorney referred to by AL when she said she did not consult with her lawyer before giving the statement?
- (5) Did the Attorney attend to the Police Headquarters on 4th March 2016 before the confrontation with Joshua Francis and the Virtual Complainant?
- (6) Did the Attorney have private conference with AL before the confrontation with Joshua Francis?"

[12] The respondents filed an affidavit sworn to by the learned DPP in opposition to the application for specific disclosure⁵ essentially stating that the application for specific disclosure and further information is premature as if leave is granted the duty of candour will dispense with the need for discovery.

[13] The applicant contends that the application is relevant for the court to determine his application for leave. The respondents contend that the disclosure should not be ordered as it is not necessary for the determination as to whether or not leave should be granted.

² Exhibited to the affidavit of Joshua Francis sworn in support of the application for disclosure and filed on the 7th April 2016. – Letter from the solicitors for the applicant to the Solicitor General dated March 22nd 2016.

³ "AL" are the initials of the mother of the minor child involved in the magistrate court proceedings.

⁴ . The correct name is Kimaura Thomas Theodore and she swore to one of the affidavits sworn in support of the respondents' opposition to the application for leave filed on the 17th March 2016.

⁵ Affidavit sworn to and filed on the 18th April 2016

Legal Principles

Orders for Disclosure & Specific Disclosure as provided for by CPR 2000

- [14] The applicant contends that Parts 34 and 28 of CPR 2000 govern the application currently before the court. Part 34 governs the making of orders compelling discovery which order would not be made unless it is necessary in order to dispose fairly of the claim or to save costs.⁶
- [15] Part 28.5 and 28.6 of CPR 2000 deals with Specific Disclosure and criteria for ordering Specific Disclosure respectively.

Duty of Candour

- [16] In Judicial Review matters it has been held that there is the duty of candour by both parties. The duty requires the parties to assist the court by providing full explanations of all relevant facts and issues, as well as any documents and information in the defendant's possession, both helpful and unhelpful to its case, which are relevant to the issue which the court must decide⁷. This duty is a wide one and extends to providing those documents which could give rise to additional grounds of challenge⁸.
- [17] The respondents do not deny that there is a required duty of candour on their part however; they contend that the duty of candour is not open but it is linked to the

⁶ Part 34.2(2) of CPR 2000 “... *an order may not be made under this rule unless it is necessary in order to dispose fairly of the claim or to save costs.*”

⁷ *Re: Secretary of State for Foreign and Commonwealth Affairs v Quark Fishing Limited [2002] EWCA Civ 1409*. Per Laws LJ

⁸ *Re: R v Barnsley Metropolitan BC ex p Hook [1976] 1 WLR 1052*.

relevance to the issues that the court must decide as was held in the **Quark Fishing Case**⁹.

[18] Learned counsel for the applicant submitted that the duty of candour applies at every stage of the proceedings, this was accepted by learned counsel for and on behalf of the defendants.

[19] The case of **Tweede –v- Parades Commission for Northern Ireland**¹⁰ was accepted by both parties to be the authority on disclosure in Judicial Review matters. It was held in that case that “The test will always be whether in the given case, the disclosure appears to be necessary in order to resolve the matter fairly and justly.”¹¹

[20] Lord Brown in the said **Tweede** case said

“ ... In my judgment disclosure orders are likely to remain exceptional in Judicial Review proceedings, even in proportionality cases, and the courts should continue to guard against what appears to be merely “fishing expeditions” for adventitious further grounds of challenge. It is not helpful, and is often both expensive and time consuming to flood the court with needless paper... ”¹²

[21] It is noted that in all the cases cited by counsel for both sides the orders were granted after the leave stage and when the court was concerned with the substantive applications. The issue therefore in the application in the case at bar is, whether the disclosure sought by the applicants is necessary to resolve the applicant’s application for leave to file Judicial Review?

[22] In the courts view it is therefore necessary to enquire why does the applicant need to apply for leave to file Judicial Review? In the case of **R-v- Inland revenue Commissioners, ex p National Federation of Self Employed and Small**

⁹ Op cit

¹⁰ [2006] UKHL 53

¹¹ Ibid Per Lord Bingham at Paragraph 3 of the judgment

¹² Ibid Paragraph 56 of the judgment

Business Ltd¹³ it was held inter alia that the purpose of applying for leave to file Judicial Review was

“to prevent the time of the court being wasted by busybodies with misguided or trivial complaints of administrative error, and to remove the uncertainty in which public officers and authorities might be left as to whether they could safely proceed with administrative action while proceedings for Judicial Review of it were actually pending even though misconceived.”¹⁴

[23] The test which has been applied by our courts at this stage of seeking leave of the court to apply for Judicial Review was stated in the Privy Council case of **Sharma –v- Brown-Antoine**¹⁵

“The court will ordinarily refuse leave to claim Judicial Review unless satisfied that there is an arguable ground for Judicial Review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy... . But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application... . It is not enough that a case is potentially arguable: an applicant cannot plead potential arguability to 'justify the grant of leave to issue proceedings upon a speculative basis which it is hoped the interlocutory processes of the court may strengthen”¹⁶

[24] In these proceedings the respondents contend that the matters in issue in the application for leave are:

- (1) whether the decision to prosecute is amenable to Judicial Review where the decision is procured by third parties;
- (2) whether there is an arguable case with a realistic prospect of success that the decision to charge the applicant was directed or procured by third parties;
- (3) Whether the applicant has an alternative remedy.

¹³ 1982] AC 617

¹⁴ Ibid at page 643

¹⁵ [2007] 1 WLR 780

¹⁶ Paragraph 14(4) of the judgment of Lord Bingham of Cornhill and Lord Walker of Gestingthorp

- [25] Learned Counsel for the respondent submitted that the application for specific disclosure ought to be viewed against the back drop of the application for leave. It was further pointed out by counsel that the applicant in his most recent application for leave indicated that the issues raised in the application are pure questions of law.
- [26] Learned counsel Mrs. Hyacinth Burton further referred the court to the caveat in the **Tweed** decision that the court should guard against what might appear as *“fishing expeditions”*¹⁷.
- [27] It was submitted on behalf of the applicant that the applicant’s case as pleaded is that the charges which have been brought against him has been procured and directed by third parties. That based on the affidavits filed thus far by both sides in the matter that the following facts are not in dispute:
- (1) that AL gave a written statement that she did not want to proceed against the applicant;
 - (2) that the two named parties were present on the day of the confrontation between the applicant and the virtual complainant;
 - (3) that one of the two named persons had a conversation with AL; and
 - (4) that another of the named persons was outside of the Criminal Investigation’s Department on the day of the confrontation.
- [28] Learned counsel for the respondents further submitted that at this stage, what has to be determined by the court is whether having regard to all the facts before it, in particular, the matters not in dispute whether the applicant has an arguable case with a realistic prospect of success and whether there is a discretionary bar of an alternative remedy. That the question at this stage is one of law.

¹⁷ Op Cit - Per Lord Brown of Eaton-Under-Heywood at Paragraph 56

- [29] That in the circumstances of the case at this stage in the proceedings, the further information requested by the applicant is not required to resolve the matters at issue.

Court's considerations

- [30] On a claim for Judicial Review the court has the same interlocutory powers as when dealing with any other claim under CPR2000. However, there are specific considerations as it relates to disclosure. Disclosure is important and sometimes decisive in achieving the right outcome in civil litigation.
- [31] Although the disclosure provisions of CPR 2000 apply with full effect to claims for Judicial Review, the nature of Judicial Review claims means that general disclosure orders will not be made as a matter of course¹⁸.
- [32] The issue which is at the heart of the application before the court in the case at bar is whether or not there should be an order for specific disclosure.
- [33] The applicant contends that the order that they require is necessary and relevant for the court to determine his application for leave and that the information sought will assist the claimant in establishing the legal requirements at the permissions stage.
- [34] The applicant also contends that the information sought will assist the court in determining whether his application for leave ought to be granted.

¹⁸ *IBID* AND See *Practice Direction—Judicial Review* PD 54A para 12.1; and *Tweed v Parades Commission for Northern Ireland* [2006] UKHL 53, [2007] 1 AC 650, [2007] NI 66. Disclosure is ordered in relatively few Judicial Review cases, and is generally restricted to specific documents or categories of document. As to the obligations of candour attaching to both claimant and defendant to a Judicial Review application see *PARAS 664,673*. As to the statutory right of access to information held by public authorities

[35] The respondents on the other hand oppose the application. They contend that the application must be viewed against the background that the applicant's application is for leave and the issue that arises is whether the decision to prosecute him is amenable to Judicial Review, in that the decision to charge was allegedly directed or procured by third parties and whether or not there is an arguable case with a realistic prospect of success that the decision to charge the applicant was directed or procured by third parties.

The Law regarding duty of Candour

[36] Judicial Review is generally concerned with a Review of the legality of a decision. Generally, the issues that arise are issues of law. In Judicial Review matters, facts are often not in dispute, they however do provide the background to the decision under challenge.

[37] There are times when there are disputed facts in the context of the alleged violations of the applicant's rights.

[38] In proceedings such as the case at bar there arises a duty of candour on the part of the respondent.

[39] What is the scope of the duty of candour? The duty of candour has been described as "...the obligation to make candid disclosure of the decision making process, laying before the court the relevant facts and the reasoning behind the decision challenged"¹⁹. In the case of **R-v-(Quark) –v- Secretary of Foreign and Commonwealth Affairs (No.1)**²⁰ Laws LJ described the scope of the duty as "the duty to assist the court with full and accurate explanations of all the facts relevant to the issue that the court must decide."²¹

[40] The duty of candour calls on the defendant to identify the facts relevant to the particular decision making process which is being challenged; the defendant is

¹⁹ Tweed –v- Parades Commission for Northern Ireland (Northern Ireland) [2006] UKHL53 per Lord Carswell and Lord Brown at Paragraphs 31 and 54 respectively.

²⁰ [2002] EWCA 1409

²¹ Ibid at Paragraph 50

also under a duty to disclose the reasoning underlying the decision which is being challenged.

- [41] There are consequences for failure by the defendant to comply with their duty of candour. The court can where necessary draw adverse inferences, in that the court can in the circumstances infer that there is no adequate or valid reason existing for the decision.²² The applicant can also apply for and obtain an order for specific disclosure of particular documents.²³
- [42] In the case of **R(AKH) –v- Secretary of State for the Home Department**²⁴ the court found that there was a duty of candour where the defendant was required to explain the relevant facts and also to disclose documents even though the issue did not need to be decided. This was also held in **Graham –v- Police Services Commission**²⁵.
- [43] In Judicial Review decisions the defendant may need to identify the facts and/or the considerations that was taken into account in the decision making process. Those facts are not usually in dispute. However, there are circumstances where there may be a dispute as to the facts between the parties and where the court may have to determine what the relevant facts are. The court is required to make decisions and specific orders in the context of the particular case which it is dealing with; such orders are likely made in specific factual situations and specific legal issues.
- [44] The important question to be decided on this application is whether the disclosure application brought by the applicant is necessary in order to resolve the matter that is the application for leave fairly and justly. At the application stage of leave to file Judicial Review duty of candour is not open but it is linked to the duty of relevance to the issues that the court must decide. At the permissions stage, permission

²² Ibid at Paragraph 50

²³ ibid

²⁴ [2012] EWHC 117

²⁵ [2011] UKPC 46 at paragraph 18

could be granted by the court on “a quick perusal of the material then available”²⁶. There are instances however where the court will hear arguments and grant leave when it is satisfied that there is clear merit in the application.

[45] The burden is on the applicant to show that disclosure of the documents sought is necessary to determine the matter in question fairly and justly. The applicant should therefore establish that:

- (1) The grounds for Judicial Review are such that the court is required to conduct a careful evaluation of the facts;
- (2) The evidence adduced by the respondent is not sufficient to conduct that evaluation; and
- (3) That the documents sought are likely to aid the court in its determination of the case at this stage.

[46] In the case of **Sky Blue Sports & Leisure Ltd and others –v-Coventry City Council**²⁷ Silber J commented on the fact that none of the lawyers appearing before him in that case were able to submit any authorities where an order for specific disclosure was made prior to the grant of permission in Judicial Review applications. In rendering the court’s decision in that case the learned Judge stressed the fact that the matter was at the permission stage.

[47] That case, is to be distinguished from the case at bar in that there it was a renewal of an application for permission which permissions were refused before. Likewise the **Tweed** Case and the other cases discussing application for specific disclosure can also be distinguished from the case at bar because they were all in fact made after leave was granted and the measure used in those cases was different as the disclosure related to the substantive case.

[48] It is settled law that the courts adopt a restrictive approach to applications for

²⁶ R-v-Inland Revenue Commissioners ex parte National Federation of Self Employed and Small Business Ltd [1982] AC 617 at page 644A

²⁷ [2013] EWHC Admin

disclosure in Judicial Review matters. This has been justified on the grounds that:

- (1) It is undesirable to allow fishing expeditions;
- (2) That the public authority is subject to a duty to make candid disclosure to the court of its decision making process. When preparing a response to the substantive matter, the defendants are required to provide a full and fair explanation of the reasons and facts underlying their decision and they are required to provide full information to enable the court to determine whether it has acted lawfully or unlawfully. In the **Quark**²⁸ case it was described as “a very high duty ... to assist the court with full and accurate explanations of all the facts relevant to the issue the court must decide”.

Conclusion

- [49] The court has reviewed the submissions by the parties and the facts upon which the claimant is seeking to rely on their application for leave to apply for Judicial Review. There is no doubt in the court’s mind that the claimant is seeking to have the decisions of the defendants examined. Once leave is granted and the claim issued the defendants are then saddled with the duty to assist the court by providing full explanations of all the relevant facts and issues. This duty also includes a duty to provide the claimant with all documents and information which is in their possession. This duty extends to all documents whether helpful or unhelpful to their case. It is noted that when this disclosure is made the claimant can introduce additional grounds of challenge.²⁹
- [50] Reviewing the evidence provided thus far by the respondents in the application for leave to file Judicial Review and weighing them against the grounds upon which they seek to set aside the respondents decision to prosecute, this court has no doubt that there is sufficient material enough before the court at this preliminary

²⁸ Op cit

²⁹ Re: R-v-Barnsley Metropolita BC Ex p Hook [1976] 1 WLR 1052

stage of application for leave, it is this court's view that the claimant has put sufficient facts before the court to enable the court whether or not to grant leave for Judicial Review.

[51] The applicant has at this stage failed to show that it is necessary to order further disclosure. I have also examined the request for the specific disclosure and I have come to the considered view that in the circumstances of this case the information sought is not necessary for the applicant's application for permission.

[52] For these reasons the application is refused.

[53] Having reviewed the application for leave and the evidence adduced by both parties this court has come to the conclusion that there is no need for further arguments regarding the application or leave and in order to give effect the Overriding Objective of CPR 2000 to expeditiously dispose of this matter the court will at this stage grant the Applicant leave to apply for Judicial Review and to give directions for the further hearing of this matter.

[54] No order as to Costs.

M E Birnie Stephenson
High Court Judge