

ST VINCENT AND THE GRENADINES

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)



CLAIM NO SVGHCV2014/0068

In the Matter of a nolle prosequi entered on the 24th day of
January 2014 pursuant to s 67 of the Criminal Procedure Code

AND

In the Matter of s. 8 of The Constitution of Saint Vincent and the
Grenadines

BETWEEN:

RUDOLPHO ALEXANDER

Respondent/Claimant

AND

[1] THE !DIRECTOR OIF PUBLICPROSECUTIONS

[2] ADOLPHUS DHPLESCHE

[3] FITZBOURNE CHAMBERS, (CORPORAL 168)

[4] THE ATTORNEY GENERAL

Applicants/Defendants

Appearances :

Mr Richard Williams for the Claimant/Respondent

Mr Joseph Delves and Ms Heidi Badenock for the Defendants

2014: October 07; 2015: March 24.

DECISION

INTRODUCTION AND FACTURAL BACKGROUND

- [1] LANNIS, J[Ag]: On 5th April 2013, Rudolpho Alexander {Alexander) and Kadeem Laidlow, (Laidlow) were jointly charged with the offence of being in possession of thirty rounds of prohibited .357 magnum ammunition without the lawful authorization of the Minister, contrary to Section 14 (4) (a) of the Firearms Act, Chapter 386 of the Revised Laws of Saint Vincent and the Grenadines, 2009 (the Act).
- [2] The offence was tried summarily before the Learned Chief Magistrate Sonia Young at the Serious Offences Court on the 12th June 2013; and continued on 17th January 2014. Mr Grant Connell appeared on behalf of Laidlow and Mr Arthur Williams appeared on behalf of Alexander.
- [3] The Prosecution called five witnesses and then closed its case. At the close of the case for the Prosecution, Counsel for Alexander and Laidlow made submissions of no case to answer.
- [4] The Learned Magistrate upheld the no case submission on behalf of Laidlow, as conceded by the Senior Police Prosecutor, Mr Adolphus Delplesche, who is the Second named Defendant herein. However, in relation to Alexander, the Police Prosecutor was driven to request time to respond to the no case submission made on his (Alexander's) behalf. In that connection, the Chief Magistrate ordered the Police Prosecutor to file and serve his response to the no case submission by the 23rd January 2014, and the matter was adjourned to 24th January 2014. The Police Prosecutor did not file or serve any response. Instead, he took a different course of action.
- [5] On 24th January 2014, when the matter came back before the Learned Chief Magistrate for the Prosecution's response, and for the decision of the Magistrate in relation to Alexander, the Police Prosecutor disclosed to Alexander's Counsel and to the Court, his intention to enter a Nolle Prosequi in relation to the case against Alexander, and then recharge him. This intended move triggered an objection raised by Learned Counsel Mr Williams on the ground that a Nolle Prosequi cannot be done in the manner which the Senior Prosecutor was seeking to do so. The matter was stood down to allow the Learned Magistrate time to consider the question as to whether a Nolle Prosequi may only be entered by the Director of Public Prosecutions (OPP), or under his signature.

- [6] _ In her reasons for decision, the Chief Magistrate stated that during the course of the day's sitting, the OPP personally attended court and entered a Nolle Prosequi verbally, in the matter against Alexander. The Chief Magistrate therefore discharged Alexander. Thereupon, (according to the Chief Magistrate in her reasons) a new information on oath was presented to the Magistrate in Alexander's name. The Chief Magistrate in her reasons for decision, noted that the charge, except for one word, was essentially the same as the one for which Alexander had just been discharged. The new charge was read to Alexander and he pleaded not guilty, and the matter was adjourned for hearing on 20th May 2014 before another Magistrate.
- [7] The new charge accused Alexander of the offence of being in possession of thirty rounds of restricted .357 magnum ammunition without the lawful authorization of the Minister, contrary to Section 14 (4) (b) of the Firearms Act, Chapter 386 of the Revised Laws of Saint Vincent and the Grenadines, 2009 (the Act).
- [8] The difference between the initial charge and the new charge is that, whereas the initial charge was brought under Section **14 (1) (4) {a)}** of the Firearms Act No 386 of 2009; and accused Alexander of being in possession of "Thirty (30) rounds of **prohibited** .357 Magnum Ammunition without the authorisation of the Minister", the new charge was brought under Section **14 (b) (4)** of the Firearms Act No 386 of 2009, and it accused Alexander of being in possession of "thirty (30) rounds of **restricted** .357 Magnum Ammunition without the authorisation of the Minister" (My emphasis).
- [9] The new charge having been read to Alexander, and he, having pleaded not guilty, and a hearing date having been set, the Director of Public Prosecutions had effectively discontinued the proceedings previously brought against Alexander under the wrong section of the Act, (being section 14 (1) (4) (a), which apparently does not exist), and had brought a new charge under section 14 (4) (b) of the Act, based on the same set of facts.

Application for *leave* to apply for Judicial Review

- [10] Alexander was aggrieved by the decision taken to Nolle Prosequi and then recharge him; so, on 4th April 2014, he, through his legal representatives, filed a Without Notice application to file proceedings for judicial review, for the following reliefs:

- "1. A declaration that the Defendants did not apply fair procedures and conduct of the prosecution against the Applicant";
- "2. A declaration that the Defendants' conduct of the proceedings was an abuse of process";
- "3. A declaration that the entering of the Nolle Prosequi and the subsequent recharging of the Applicant was unfair";
- "4. A declaration that the Defendants were acting Ultra Vires and contrary to Law";
- "5. That the Decision of the Defendants to enter a Nolle Prosequi and to recharge the Applicant were arrived at as a result of an improper motive";
- "6. A declaration that the Defendants' actions were arbitrary and perverse";
- "7. An Order prohibiting the further prosecution of the Applicant in relation to the charges dated the 4th April 2014".

[11] Thirty-one "grounds of application" were put forward. They can be summarised as follows:

1. The actions of the Defendants amounted to an abuse of process;
2. The procedure was unfair because, having carried out the prosecution and defined the issues, and realising that the Applicant was bound to succeed on the no case submission, the Prosecution entered a Nolle Prosequi with the sole intention of depriving the Applicant of the advantage obtained during the trial;
3. The actions of the Defendants were designed solely to overcome a clear dismissal of the proceedings to which the Applicant was entitled and as such, was unfair, and amounted to an abuse of process;
4. The Applicant was not afforded a fair hearing as guaranteed by Section 8 of the Constitution.

5. The conduct of the Defendants was unfair and oppressive.

6. There is no alternative form of redress

[12] By order dated the 4th April 2014, Combie-Matyr J [Ag] granted leave to Alexander to "file judicial review proceedings" and at the same time, a hearing date for judicial review was set for 11th June 2014.

[13] On the 11th June 2014,¹ the matter came up before HenryJ [Ag] who made an order in the following terms:

(1) The Defendants are granted an extension of time to file affidavits in response to the application to seek Judicial Review on or before July 4th 2014;

(2) Parties are to file and serve written submissions on or before July 16, 2014;

(3) Defendants to have carriage of the order.

[14] The matter ne)(t came before Henry Jon 16th July 2014 and, for reasons which are unclear,² it was adjourned to a date to be fixed by the Registrar in the New Law Term. In the New Law Term, the matter was listed for hearing before me.

[15] It is to be noted that concurrently with the filing of the Application for leave to apply for judicial review, the Claimant filed a Fixed Date Claim Form, supported by Affidavit sworn by him, seeking similar declarations and orders as those contained in the Without Notice Application including an order prohibiting the further prosecution of the Applicant in relation to the charges dated the 4th day of April 2014.

[16] On 22nd April 2014, an Acknowledgment of Service was filed on behalf of all the Defendants, in which they indicated an intention to defend the claim.

¹ It is probable that by the 11th July 2014, Combie-Matyr J would have completed her stint of service and left the jurisdiction

² Perhaps because of the filing on 10th July 2014, and serving on 11th July 2014, of an amended Fixed Date Claim Form.

[17] An amended Fixed Date Claim Form was filed on 10th July 2014. Apparently, the Fixed Date Claim Form was only amended to annex thereto, documents on which the Claimant intended to rely to support his claim. Apart from the documents annexed to it, the Amended Fixed Date Claim Form contains the same averments/allegations that were contained in the grounds of the application before the learned Judge who granted leave to file judicial review proceedings, and the averments/allegations contained in the original Fixed Date Claim. And it prayed for the same reliefs as prayed for in the said Application for leave to apply for judicial review, and in the original claim.

[18] What is now before the Court, is a double barreled Application brought by the Defendants firstly under CPR 11.16 to set aside the order of Justice Combie-Matyr granting leave to apply for judicial review, and under CPR 26.3 to strike out the Fixed Date Claims. The Application also raises the issue as to whether the Attorney General is a proper party to the action. Mr Delplesche, the Senior Prosecutor swore to an affidavit in support of the Application deposing to what had purportedly transpired in the Magistrate's Court, explaining why he sought the adjournment, referring to the "apparent lacuna in the [Firearms] Act", and the factors taken into consideration in discontinuing the proceedings and bringing a new charge. Ordinarily, this application should be heard by the judge who made the order granting leave. But that judge has completed her stint of service and has left the jurisdiction. Obviously, this court can only entertain the application to set aside by virtue of it being a judge of coordinate jurisdiction. Coming to the Application by the Defendants to set aside and to strike.

Application by Defendants to set aside order granting leave and to strike out Fixed Date Claim

[19] By an Amended Notice of Application filed on 11th July 2014, the Applicants/Defendants herein - The Director of Public Prosecutions, Adolphus Delplesche, Fitzbourne Chambers (Corporal 168) and The Attorney General apply to the court for the following orders:

- (1) That the order granting leave for Judicial Review be set aside
- (2) That the Fixed Date Claim Form filed on 4th April 2014 and the Amended Fixed Date Claim Form filed on 10th July 2014 be struck out.

[20] The grounds upon which the Defendants' application is brought can be summarised as follows:

1. A Without Notice Application for leave for Judicial Review was filed on 4th April 2014;
2. Leave was granted to the Claimant/Respondent to file Judicial Review proceedings on 4th April 2014;
3. The Applicants/Defendants were served with the Order on 9th July 2014.
4. . The Application for leave for Judicial Review does not meet the requisite standard for the granting of leave ex parte;
5. The Application for leave to apply for Judicial Review and the Affidavit in support thereof disclose no reasonable ground which would support the basic requirement of having an arguable case.
6. Leave ought not to be granted against the Attorney General who is not a proper party to these proceedings.
7. A Fixed Date Claim Form was filed on 4th April 2014;
8. On 10th April 2014, [Should be 10th July 2014], an Amended Fixed Date Claim Form was filed, and it was served on the Applicants/Defendants on 11th April 2014; [Should be 11th July 2014].
9. In making the claim for Judicial Review, the Claimant/Respondent has failed to comply with the CPR Part 56.
10. Neither the Fixed Date Claim Form nor the Amended Fixed Date Claim Form disclose any reasonable ground for bringing or defending the Claim;
11. There is no real prospect of succeeding on the Fixed Date Claim Form **Or** the Amended Fixed Date Claim Form;

ISSUES

(21] The issues arising on the Defendants' Application are:

1. Whether the order granting leave was wrongly made and ought to be set aside; If not

2. Whether the Fixed Date Claim Form filed on 4th April 2014 and the Amended Fixed Date Claim Form filed on 10th July 2014 should be struck out as disclosing no reasonable ground for bringing or defending the claim.
3. Whether the Attorney General should be struck out as a party to the action

WAS THE ORDER GRANTING LEAVE TO APPLY FOR JUDICIAL REVIEW WRONGLY MADE AND OUGHT TO BE SET ASIDE?

Positions of the parties

- [22] Learned counsel Mr Delves in his oral and written submissions submitted that the procedure adopted in the granting of judicial review was troublesome. Counsel set out the test to be applied for the granting of leave for judicial review as established in the case of **Sharma v Browne Antoine and Others** {2006} 69 WIR 379:

¹¹The ordinary rule now is that the court will 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 grant leave to issue proceedings upon a speculative basis which it is hoped the interlocutory process of the court may strengthen."

- [23] Mr Delves also referred to other cases on the point including **R v Director of Public Prosecutions**, (2002) 2 AC 326, where at page 371 Lord Steyne stated:

¹¹My Lords, I would rule that absent dishonesty or mala fides or an exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants is not amenable to judicial review."

- (24) For guidance as to the circumstances under which a court may grant leave for judicial review of the Director of Public Prosecution's power under the Constitution, Counsel cited the case of **Metalulu v OPP** 4 LRC 712 (the Metalulu Guidelines):

"It may be accepted, however, that a purported exercise of powers (i.e. OPP powers under Section 64) would be reviewable if it were made

1. In excess of the OPP's constitutional or statutory grants of power -- such as an attempt to institute proceedings in a court established by a disciplinary law....
2. When, contrary to the provisions of the Constitutions, the OPP could be shown to have acted under the direction or control of another person or authority and to have failed to exercise his or own independent discretion ---if the DPP were to act upon a political instruction, the decision could be amenable to review;
3. In bad faith, for example, dishonesty. An example would arise if a prosecution were commenced or discontinued in consideration of a bribe.
4. In abuse of the process of the court in which it was instituted, although the proper forum for review of that action would ordinarily be the court involved.
5. Where the DPP has fettered his or her discretion by a rigid policy - - e.g. one that preclude prosecution of a specific class of offences."

"There may be other circumstances not precisely covered by the above in which judicial review of a prosecutorial discretion would be available. But contentions that the power has been exercised for improper purposes not amounting to bad faith, by reference to irrelevant considerations or otherwise unreasonably, are unlikely to be vindicated, because of the width of the considerations to which the DPP may properly have regard in instituting or discontinuing proceedings. Nor is it easy to conceive of situations in which such decisions would be reviewable for want of natural justice."

[25] Counsel then discussed the grounds of the Claimant's application for judicial review and then concluded that leave ought not to have been granted and the leave granted ought to be set aside. Counsel's concluding submission was that the Claimant had not met the

standard outlined in **Sharma** for the grant of leave for judicial review because the Claimant failed to present arguable grounds and he failed to establish that there is any reasonable prospect of success in relation to the claim.

- [26] learned counsel Mr Williams in his oral and written submissions submits to the contrary. He posited that the Claimant's case is not devoid of merit and ought not to set aside or be struck out summarily. Counsel then outlined the factual matrix and then he cited and discussed the law that purportedly support the Claimant's contentions. Counsel also went on to give a legal analysis/opinion seeking to show that the Claimant has an arguable and meritorious case.
- [27] As far as Mr Williams was concerned, the DPP's right to institute fresh proceedings is not an untrammelled right as is being submitted by the Defendants. This right, submitted counsel, must be subject to the concept of fairness and to the operation of fair procedures against the accused. Counsel found support for his contentions in two cases: (1) **The State (at the prosecution of Gerard O'Callahan v Robert O hUadhaigh**, 1977 IR 42; and (2) **R v Swingler (1996]** 1 VR 257.
- [28] In **The State (at the prosecution of Gerard O'Callahan v Robert O hUadhaigh**, Counsel quoted the court as saying, among other things:

"If the contention of the respondent in this case is correct, then it means that in any criminal trial the Director, on meeting a situation in which a ruling or proposed ruling by the trial judge on a matter within his discretion at the trial is unsatisfactory from the point of view of the prosecution, can deal with that problem by entering a nolle prosequi and so avoid the consequences of technical matters that may have arisen in the course of the proceedings up to that point by instituting an entirely fresh prosecution freed from, or cured of, the difficulties which have arisen and which are likely to favour the accused....It is justice which is to be administered *in* the Courts and this concept of justice must import not only fairness, and fair procedures, but also regard to the dignity of the individual. No court under the Constitution has the jurisdiction to act contrary to justice...."

- [29] In **R v Swingler [1996]** where the court stated:

³ Said to be referred to in a paper entitled "The Power of a court to stay a prosecution as an abuse of process" date 18th September 2012.

"We do not say that there can never be a case where the exercise of the power to make presentment on a charge in respect of which a no/le prosequi has been previously entered will amount to an oppressive exercise of prosecutorial power and thus an abuse of the court's process. The categories of "abuse cases", as has often been said, are never closed. We are not however satisfied that this is such a case. An application of this nature is an application in which the court is asked to exercise its discretion. The criteria which govern the exercise of such a discretion have been most recently stated by the High Court in *Walton v Gardner* ... in the following terms: As was pointed out in *Jago*, the question whether criminal proceedings should be permanently stayed on abuse of process grounds, falls to be determined by a weighing process involving subjective balancing of a variety of factors and considerations. Among those factors and considerations, are the requirements of fairness to the accused, the legitimate public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime, and the need to maintain public confidence in the administration of justice."

- [30] Relying on those two cases, and on the **Sharma** case; Mr Williams submitted that the learned judge was correct in making the order granting leave for filing of judicial review proceedings, as the Claimant's claim is an arguable case and has a reasonable prospect of success.

DISCUSSION AND DECISION IN RELATION TO ISSUE N0.1

- [31] The CPR 11.16 provides that a respondent to whom notice of an application was not given may apply to the court for any order made on the application to be set aside or varied and for the application to be dealt with again.
- [32] The respondent must make the application not more than 14 days after the date on which the order was served on the respondent (CPR 11.16(2)).
- [33] An order made on an application of which notice was not given must contain a statement telling the respondent of the right to make an application under this rule {CPR11.16 {3}.

[34] It is not in dispute that no notice was given to the respondent, and it is common ground that this court has jurisdiction under 11.16 to entertain the Defendants' application to set aside. As I previously mentioned, this court can only entertain the application by virtue of the fact that Justice Combie-Matyr was a judge of coordinate jurisdiction.

[35] As to service of the order granting leave, Mr Williams accepted that the order was served on the Defendants on 9th July 2014. The Defendants filed their application to set aside promptly on 10th July 2014; so there was no delay in applying to set aside the order, and indeed no issue was taken in that regard.

[36] By CPR 56.4 (2), a Judge is entitled to hear an application for leave to apply for judicial review without hearing an applicant. However, a judge may direct that a hearing in open court be fixed in the following situations:

- (a) if it appears that a hearing is desirable in the interest of justice;
- (b) if the application include a claim for immediate interim relief, or
- (c) if the judge is minded to refuse the application.

(See CPR 56.4 (3)).

[37] The documents on record show that the application was determined in Chambers without a hearing, suggesting that (a) the judge was satisfied that a hearing was not desirable; and (b) the judge was not minded to refuse to the application, and did in fact accede to it.

[38] Ordinarily, there is no reasoned written judgment on an application made without a hearing; although in some cases, the order will state brief reasons for the decision. Suffice it to say, no reasons have been given for granting leave in this case. The order merely states as follows:

- 1) Leave is granted to the applicant to file Judicial Review proceedings.
- 2) Judicial Review Proceedings filed on 4/4/14 is scheduled for hearing on the 11th June 2014.

[39] Contrary to CPR (CPR11.16 (3), the learned Judge did not make a statement in the order telling the respondent of the right to make an application under this rule, but this was not a ground of application, and it was not argued before me, nor was it advanced in the written submissions.

[40] It has been said that the purpose of the requirement for leave to apply for judicial review is to filter out frivolous, hopeless and vexatious cases, and so safeguard the time and work of the court.⁴ In my judgment, the fact that the learned judge granted leave to file judicial review proceedings, and ordered that the judicial review proceedings already filed on 4th April 2014 was scheduled for hearing on 11th June 2014, can have only meant that the learned Judge was satisfied that the Applicant had placed before the court material sufficient to found an arguable case - one that was not hopeless or frivolous - one with a reasonable prospect of success. Indeed, from what I can see from the material that was before the learned judge, and what are before me now, I am fortified in my opinion that the documents that were before the learned judge, and those before me now, are, and were of sufficient materiality to justify granting leave as they show that there was/is at the very least an arguable case. Therefore, having reconsidered the order made by the learned Judge on 4th April 2015, I am not of the view that it was wrongly made and ought to be set aside.

[41] In the premises, the application to set aside the order of Justice Combie-Matyr made on 4th April 2014 is dismissed. I turn now to determine the next question: whether the Fixed Date Claims ought to be struck out.

WHETHER THE FIXED DATE CLAIM FORM FILED ON 4TH APRIL 2014 AND THE AMENDED FIXED DATE CLAIM FORM FILED ON 10TH JULY 2014 SHOULD BE STRUCK OUT AS DISCLOSING NO REASONABLE GROUND FOR BRINGING OR DEFENDING THE CLAIM.

[42] The Defendants say their application to strike out the Fixed Date Claims is made pursuant to CPR 26, without identifying any specific rule. However, they seemed to have focused their attention on 26.3 (1) (b). CPR 26.3 (1) reads:

"26.3 (1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that -

(a) There has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;

⁴The Civil Court Practice 2011, Note 34.21, page 454.

- (b) The statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending the claim;
- (c) The statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings; or
- (d) The statement of case or the part to be struck out is prolix or does not comply with the requirements of Part 8 or 10."

[43] Initially, the Defendants also stated that their application to strike was made pursuant to CPR 15, but during the course of proceedings, Mr Delves quite correctly indicated that the Defendants were withdrawing their reliance on Part 15 because Part 15 excludes Fixed Date Claim Forms.

[44] It is a draconian thing to strike out a claim in its infancy without there being a defence, and or without the matter being tested by the giving of evidence and cross-examination of relevant witnesses. This summary procedure should only be used in the clearest of cases, when it can be seen on the face of it that the claim is obviously unsustainable, cannot succeed, is incurably bad, or in some other way is an abuse of the process of the court (per Sir Dennis Byron C.J. in *Baldwin Spencer v The Attorney General of Antigua and Barbuda et al* (Civil Appeal No 20A of 1997).

[45] in applying the plain and obvious test, the material facts, so far as properly pleaded, are to be taken as true. (per Hon Mde Ola Mae Edwards J.A. in *Citco Global Custody NV v Y2K Finance*, BVI Civil Appeal No 22 of 2009; (Approved, adopted and further discussed by George-Creque J.A. in *Ian Peters v Robert George Spencer*, HCVAP2009/016).

[46] To my mind, this is not a plain and obvious case, because the Claimant's claim, and affidavit, and the legal arguments, opinions and certain points of law raised in the submissions are contentious and raise issues not only of administrative law but of constitutional law involving the principles of natural justice and the scope of the power of the DPP to nolle prosequi a matter following the submission of no case to answer and then recharge an accused with a new offence, based on the same set of facts. Significantly, Mr Williams himself stated that he does not dispute that the OPP is empowered to nolle prosequi a case at any time before judgment and without giving any reason for so doing, but Counsel says that the gravamen of Alexander's

complaint is that the reason why the DPP entered a nolle prosequi in his case was to gain an unfair advantage against Alexander to breach his constitutional right of a fair trial, and a fair procedure used against him to the point where it is contrary to the interest of justice and caused the Respondent to lose faith in the integrity of the judicial system. Seemingly, the claims have raised novel contestable issues about the course of conduct of, and the procedures employed by the OPP, that are to be canvassed at a substantive/inter partes hearing of the claim. It cannot be said at this stage, prior to the filing of a Defence or affidavit in answer to the Claim, and other court procedures, that the Claimant has no reasonable ground for bringing or defending the claim and has no reasonable prospects of success.

- [47] After having carefully viewed the Fixed Date Claims and the supporting Affidavit, and accepting all properly pleaded primary facts as being true, I find that, on their face, the Fixed Date Claims and supporting affidavit contain sufficient material upon which an arguable case could be based, and have disclosed reasonable grounds for bringing or defending the claim, and thus ought not to be struck out. The allegations of abuse of process, improper conduct/motive on the part of the DPP and the Prosecutor, and the allegation that the purpose of the nolle prosequi was to gain an unfair advantage are allegations which are questions of fact to be decided at trial., with the aid of evidence. Facts need to be proved and evidence of those facts need to be filed and served. I am not inclined to the view that the case is a plain and obvious one for striking out at this stage when all the facts are not yet before the court. Accordingly, I propose to dismiss the application to strike out the Fixed Date Claims, and issue directions for the claim to proceed on its legal and factual merits. No doubt the applicant was expecting the court to dispose of the legal issues summarily but I am of the view that my function at this stage is not to do that, but to determine the specific application before me in accordance with applicable principles, and not to deal with the substantive issues.

Whether the Attorney General is a proper party to the action

- [48] Mr Delves contend that the Attorney General is not a proper party to the action, because there has been no allegation made against the Attorney General. In support of his argument, Counsel seeks to rely on the case of **Otto Sam v Tyrone Burke, SVGHCV2010/399**, in which Her ladyship Thom J, applying the decision in the Privy Council case of **Minister of Home Affairs Trade and Industry v Vehicles and Supplies Ltd and Another**, [1991] 4 All ER 65, stated at paragraph [21]:

"[21] While I agree ... that the Attorney General is the proper party in civil proceedings against the Crown, this is a claim for judicial review of the decision of a public officer .

I agree that the Attorney General is not a proper party to these proceedings. No allegation has been made against the Attorney General and no relief is being sought against the Attorney General."

[49] Mr Williams on the other hand, argued that the Claim is not solely for judicial review. Counsel pointed out that the claim alleges that the Claimant was not afforded a fair hearing as guaranteed by section 8 of the Constitution. Mr Williams further pointed out that two of the Defendants are public officers and thus, he submitted, wherever there is a constitutional element, the Attorney General is a proper and necessary party to the action. In that regard, Counsel referred to the decision in the case of **The Virgin Islands Environmental Council v Attorney General et al, Claim No BVIHCVZ007/0185**, wherein Hariprashad-Charles J, quoted Her Ladyship George-Creque J.A. in **Richard Frederick et al v The Comptroller of Customs and the Attorney General**, HVCAP2008/037, as saying, among other things that: "What is clear is that a claim form seeking constitutional redress must be served on the Attorney General. This however does not preclude other persons being joined as defendants."

[SO] It seems to me, from the **Richard Frederick** case that it is perfectly proper to join the Attorney General in the proceedings since the claim is not grounded solely on judicial review, but also has a constitutional element bearing on the principles of natural justice: That said, I am cognizant that the Defendants have cited the case of **Tappin v Lucas** (1973) 20 WIR 229, on the question of whether the rules of natural justice are excluded from proceedings of this nature, but, as previously indicated, I am not inclined to comment on the legal positions postulated at this stage, and would prefer to make a decision at the inter partes hearing.. Additionally, and in any event, CPR 8.5(1) provides that a claim shall not fail because a person who should have been made a party was not made a party to proceedings, or that a person was made a party who should not have been added.

[51] In the premises, I am inclined to the view that the Attorney General is a proper party to the proceedings, because of the constitutional limb of the claim, and thus, I decline to accede to the application to strike out the Attorney General as a party to the proceedings.

CONCLUSION

[52] For all the reasons expressed, I order that

1. The Defendants' Application to set aside the Order of Combie-Matyr granting leave to file judicial review proceedings is dismissed
2. The Defendants' Application to strike out the Claimant's Fixed Date Claims is dismissed.
3. The Defendants shall file and serve their Affidavit(s) in answer to the Fixed Date Claims and the supporting Affidavit, within 28 days of the date of receipt of a copy of this decision from the court office
4. The Claimant may file and serve an Affidavit in Reply if any, within 14 days of service.
4. Thereafter, the court office shall set down the matter before a judge for first hearing of the Fixed Date Claims.
5. Costs awarded to the Respondent in the sum of \$1000.00.

[53] I am grateful to counsel for their assistance.

A handwritten signature in black ink, appearing to read "Pearlletia E. Lanns". The signature is written in a cursive, flowing style with a horizontal dotted line underneath the main body of the signature.

PEARLETIA E LANNS
High Court Judge [AG]