

THE EASTERN CARIBBEAN SUPREME COURT

**IN THE HIGH COURT OF JUSTICE
FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT
(CIVIL)
A.D. 2014**

CLAIM NO. SKBHCV2013/0090

**In the Matter of Section 52 (6) of the
Constitution of St. Christopher and Nevis.**

**And in the Matter of an Application for
Declaratory, Injunctive and Other Relief
pursuant to Section 96 of the Constitution of
St. Christopher and Nevis.**

BETWEEN:

**HON. MARK BRANTLEY
(Leader of the Opposition)
HON. EUGENE HAMILTON
HON. VANCE AMORY
HON. SAM CONDOR
HON. DR. TIMOTHY HARRIS**

Claimants

- and -

**HON. CURTIS MARTIN
(Speaker of the National Assembly)**

Defendant

**THE ATTORNEY GENERAL OF
ST. CHRISTOPHER AND NEVIS**

Intervening Party

Appearances:-

Mr. Douglas Mendez, S.C. with Mr. Christopher Hamel-Smith, S.C. for the Claimants, with him Mr. Vincent Byron and Ms. Talibah Byron instructed by Mr. Delara MacClure Taylor.

Mr. Anthony Astaphan, S.C. and Dr. Henry Browne, Q.C., for the Defendant, with them Mr. Sylvester Anthony, instructed by Ms. Angelina Sookoo

Lord Peter Goldsmith, Q.C., for the Intervening Party, instructed by Mrs. Simone Bullen-Thompson, Solicitor General

2014: December 19th
December 22nd

RULING

- [1] **CARTER J.:** This is an application of disclosure. The applicant seeks the following:

“ 1. That the Claimants have permission to cross examine the Defendant, the Hon. Curtis Martin, on his affidavit evidence filed herein on the issue of his refusal or failure to list the Motion of No confidence for debate in the National Assembly;

2. That the Defendant, the Hon. Curtis Martin, do disclose to the Claimants all documents, including correspondence, e-mails and other communications, that are or have been in his possession, custody or control that are relevant to his decision whether or not to list the Motion of No Confidence for debate in the National Assembly. “

Submissions by the Parties:

- [2] Learned Senior Counsel for the applicants has submitted to the court that what is being sought is ordinary general disclosure, that the defendant in his general duty of disclosure is under an obligation to provide or disclose all documents bearing upon all issues in the case. Learned Senior Counsel contends that central to this matter is the fact that the defendant has not provided any explanation as to why the Motion of No Confidence has not been listed. He submits that this fact is a

core issue in this matter. While Learned Senior Counsel agrees that there is no allegation of bad faith or fraud on the part of the defendant being alleged now or on the applicants' pleadings, his submission to this Court is that the disclosure sought will shed light on matters surrounding this core issue in the case.

[3] Learned Senior Counsel submitted that the documentary disclosure and the cross examination of the defendant being sought on this application were inextricably tied. He argued that taken together the disclosure that was being sought was relevant to the proceedings. He further argued that it was necessary to the applicants' case, in anticipation of arguments that the defendant may seek to put before this Court as to how it should exercise its discretion, should the court makes certain findings of law on the substantive relief sought in these proceedings.

[4] Learned Counsel for the defendant opposed the application on a number of grounds. Counsel argued that the applicants had not pleaded this issue of fact, the consequence of which was that the applicants should be precluded from obtaining the disclosure that they now sought. In response to the application, Learned Counsel submitted that the defendant has given reasons for his decision. These reasons had not been challenged or attacked by way of evidence from the applicants. He argued that there was no pleaded allegation or evidence of misconduct, fraud or collusion against the defendant, no pleaded or contested issue of fact, concerning the defendant's conduct in this matter upon which the applicants could ground the present application for disclosure and cross-examination.

[5] Learned Counsel invited the court to find that the present application is nothing more than a fishing expedition; that there is no evidence to show that there was any correspondence of the nature sought by the applicants in relation to the decision of the defendant not to list the motion for debate in the National Assembly.

- [6] Specifically in relation to that part of the application relating to cross examination of the defendant, Learned counsel for the defendant invited the court to apply the principles that a court would consider on an application to cross-examine in judicial review proceedings, in arriving at its decision on the instant application. Counsel contended that a similar approach should be taken in cases where, especially, as in this case, the claim for constitutional redress is grounded substantially on issues of construction and law. He further submitted that if the court agreed with this view the court should adopt the approach taken in those cases: that there was no general right to cross examine a deponent on an application for judicial review; that cross examination is allowed but only in exceptional circumstances where the court considers that the interests of justice so require; and that cross examination should not be allowed if there is no seriously disputed issue of fact or where the central issues in the case concern issues only of construction and law.
- [7] Counsel submitted that there was no reason in principle why these considerations should not apply in this case. In this regard Counsel cited the case of ***R v Secretary of State for Foreign and Commonwealth Affairs ex parte Olivier Bancoult***¹ and ***R v Secretary of State for Health, ex parte London Borough of Hackney***.²
- [8] In answer to the respondents arguments on that part of the application relating to cross examination of the defendant, Learned Senior Counsel for the applicant referred the court to the case of the ***Speaker v Phillip***³ to illustrate his point that the court's discretion is not so limited in constitutional proceedings as it may be in dealing with similar applications in judicial review proceedings. He invited this Court to consider the contrasting approach of the court in that case. Learned Senior Counsel also sought to distinguish the approach taken in ***ex parte Olivier Bancoult*** on the basis that there would already have been relevant disclosure in such judicial review matters whereas in the instant case the defendant was now

¹ [2012] EWHC 2115 (Admin.)

² 29th July 1994 unrep.

³ Phillip v Speaker [1990] SILR 227

being requested to comply with ordinary or general disclosure, to come to the court as Learned Senior Counsel described, with all cards face up.

The Applicable Law:

[9] Part 28.4 states that a party required to give standard disclosure must “disclose all documents which are directly relevant to the matters in question in the proceedings”. While Learned Senior Counsel for the applicants invited the court to consider the application as falling within that scope of general or standard disclosure, it appears to this Court that what is being sought in this application is more akin to an application for specific disclosure under Part 28.5. The court notes that on such an application, Part 28.5(5) specifies that “an order for specific disclosure may require disclosure only of documents which are directly relevant to one or more matters in issue in the proceedings” and that in Part 28.6 (1) the court must consider “whether specific disclosure is necessary in order to dispose fairly of the claim or to save costs”.

[10] The court has also considered the provisions of Part 56.11(2)(e) which empowers the court on the first hearing of an application for an administrative order to -

“make orders for –

- i. Witness statements or affidavits to be served;*
- ii. Cross-examination of witnesses; and*
- iii. Disclosure of documents. “*

Originating motions for relief under the **Constitution** are considered an administrative order under the Part.

[11] The considerations for a court for the grant of orders for cross-examination, disclosure and witness statements are not specified in Part 56. However, given that Part 56 contemplates that applications for judicial review also fall within its ambit, the court considers that it can examine the approach taken with regard to these matters in relation to other administrative orders, specifically that in relation to such applications in judicial review proceedings. The court is careful to bear in

mind always that each proceeding is different in nature and that in each the court is called upon to exercise a separate jurisdiction.

[12] In judicial review, generally, the court is not concerned with the merits of the decision but rather with the lawfulness of the decision-making process: that is, how the decision was made and the fairness of it. As pointed out in **ex parte Olivier Bancoult**, in such proceedings ***“the defendant public authority may normally (but not invariably) be relied upon to disclose its relevant documents, thus fulfilling its duty of candour in relation to its documents.”***⁴ Essentially for this reason, disclosure in judicial review proceedings is not automatic as in other civil proceedings and it will be ***“appropriate in fewer cases and is likely to be more circumscribed”***⁵

[13] In **Tweed v. Parades Commission for Northern Ireland**, it was recognized that, *“The basis of this approach is that disclosure should be limited to documents relevant to the issues emerging from the affidavits,”*⁶ However in that case, the House of Lords went on to apply a much less restrictive approach to disclosure. At paragraph 32 Lord Carswell states:

“I do consider, however, that it would now be desirable to substitute for the rules hitherto applied, a more flexible and less prescriptive principle, which judges the need for disclosure in accordance with the requirement of the particular case, taking into account the facts and circumstances.”

[14] Even given this less restrictive approach, a court’s consideration on applications for disclosure in judicial review proceedings is guided by the principle of fairness between the parties. As stated by Lord Bingham in the case of **R v. Secretary of State for Health, ex parte London Borough of Hackney**:

“Discovery will be regarded as necessary for disposing fairly of the action, or application, if a party raises a factual issue of sufficient substance to

⁴ Ibid, note 1, at para. 14

⁵(R v. Secretary of State for the Home Office, ex p. Harrison [1988] 3 All E. R. 86, CA).

⁶[2007] A.C. 650.

lead the court to conclude that it may or will be unable to resolve the issue fairly, fairly that is to all parties, without discovery of documents bearing on the issue one way or the other.”⁷

- [15] On the issue of the cross examination of deponents in judicial review proceedings, the court has already referred to **ex parte Olivier Bancoult** and the court was also reminded by Leaned Counsel for the defendant of the relevant applicable principles framed by Lord Diplock in **O’Reilly v Mackman**⁸. It is instructive to the court that on all these authorities cited⁹ the courts, while noting the limited jurisdiction in the exceptional case to order cross examination of a deponent in judicial review applications, emphasized that the court’s discretion was always to allow such cross examination where the court considered it necessary in order that justice may be done between the parties.

The Court’s Findings:

- [16] This Court has considered the nature of the proceedings in which this application is being brought: An application for the declaration of a constitutional right. It has also considered the principles relevant to the grant of an order for disclosure an also disclosure and also disclosure in proceedings of a similar public law character. The court considers that it is not bound to follow the approach taken to disclosure in judicial review proceedings, however it notes that even in such proceedings the approach of the courts has been to apply a more flexible, less restrictive principle as it considers the need for disclosure. The court also notes that the determining factor is not too far different in such cases than that demanded on an application for specific disclosure of which this is a kind, that the court must consider whether such disclosure is necessary in order to dispose fairly of the claim as between the parties.

⁷Ibid, at note 2.

⁸ [1983] 1 AC 237 at page 282

⁹ Counsel for the Defendant also cited the case of *George v Secretary of State for the Environment* [1979] 38 P&CR 609

[17] In the instant case, having heard the submissions on both sides, the court is not persuaded that the reason(s) behind the decision of the defendant not to list the Motion of No Confidence for debate in the National Assembly is the core issue to be determined at this stage. While the court cannot anticipate whether or not it will become relevant at a later stage of this matter, the court has looked to the relief sought by the applicants on the originating motion, what has been deposed by the applicants in their affidavit in support thereof, as well as the affidavit evidence of the defendant in response. The applicants have not disputed the respondent's submission that the originating motion is one to determine issues of construction and law. It is not intended to be an extensive hearing dealing with disputed facts and up to this stage that is the basis upon which this matter has proceeded.

[18] The court is satisfied that the matters raised in support of this application were never before specified as being relevant to a disputed issue of fact in this case and were never pleaded as such. Even apart from this procedural reality, more importantly in relation to the present application, this Court is not convinced that the disclosure either of the documents related to the decision of the defendant or of the need to cross examine the defendant in relation to such documents, has been shown to be relevant to the core issue in this case and necessary to dispose fairly of the issues between the parties. As stated by the applicants on this application –

“ The principal issue in this case is whether this inaction on the part of the Speaker infringes the Claimants’ right to have a resolution of no confidence in the Government scheduled, debated and voted on within a reasonable time.”

[19] Consequently, the application for disclosure is dismissed. The costs on the application will be costs in the cause.

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Justice Marlene I Carter
Resident Judge