In The Supreme Court of Bermuda

CIVIL JURISDICTION
2022: No. 178

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW UNDER ORDER 53, RULE 3 OF THE RULES OF THE SUPREME COURT 1985

BETWEEN:

ROBERT G.G. MOULDER

Applicant

-and-

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondent

Before: Assistant Justice David Hugh Southey QC

Appearances: Mr Robert G. G. Moulder, Applicant in Person and Ms Judith Chambers, McKenzie Friend.
Mr Delroy Duncan QC for the Respondent

Date of Hearing: 15 July 2022
Date of Judgment: 5 August 2022

SOUTHEY, AJ

Introduction

1. This application for leave to apply for judicial review arises from the work of the Commission of Inquiry into Historic Land Losses in Bermuda ('the Commission of Inquiry'). The Commission of Inquiry was appointed under the Commissions of Inquiry Act 1935 ('the 1935 Act'). On the date I deliver this judgment, I will also deliver judgment in a judicial review of the Commission of Inquiry brought by Raymond Davis and Myron Piper ('the Davis and Piper judgment'). That judgment considers different issues regarding the work of the Commission. That judgment should be read with this judgment as it sets some of the factual background. I will not repeat that judgment, save where necessary.

McKenzie Friend

2. This matter was initially listed on 5 July 2022 to enable the Applicant to seek an adjournment in the judicial review of the Commission of Inquiry brought by Raymond Davis and Myron Piper.

3. On 5 July 2022 Ms Judith Chambers applied to assist the Applicant as a McKenzie Friend. She also applied to speak on behalf of the Applicant. I initially expressed some doubt about a McKenzie Friend speaking as an advocate. However, having consulted *The Equal Treatment Bench Book* ('the Bench Book'), it appeared that Ms Chambers had been authorised to appear as an advocate in the Court of Appeal in an earlier case brought by Mr Moulder. In light of this and the fact that the hearing was not intended to consider the merits of the application, I indicated that I was willing to permit Ms Chambers to appear before the Court as an advocate on behalf of the Applicant.

4. When the application for leave came before the Court, counsel representing the Commission of Inquiry objected strongly to Ms Chambers assisting the Applicant as an advocate. There were a number of objections. The one that struck me as most powerful was summarised in the following paragraphs of the skeleton:

> *(i) Ms. Chambers owed the [Commission of Inquiry] a duty of confidence both expressly in her contract of engagement as an investigator with the [Commission of Inquiry] and as a matter of law based on the fact that any confidential information she would have received would have been from that position of confidence, i.e. her engagement with the [Commission of Inquiry].*
>
> *(ii) Ms. Chambers should not be in a position of an advocate but then be held to a different stand for an advocates removal based on the possession of confidential information. Had Ms. Chambers been a qualified attorney the [Commission of Inquiry] would no doubt have easily been able to apply for and obtain her recusal on the basis of the confidential information she possesses. The COI should not be prejudiced simply because Ms. Chambers is unqualified.*

5. Ms Chambers responded by, among other matters, seeking to assure the Court that she would not disclose confidential information. Nothing that I have seen suggests that confidential material was disclosed.

6. The Bench Book notes that the English Court of Appeal summarised the principles to be applied when deciding whether to authorise a McKenzie Friend in *Paragon Finance plc v Noueiri* [2001] 1 WLR 2357, as follows:

a. A McKenzie Friend has no right to act as such: the only right was that of the litigant to have reasonable assistance.

b. A McKenzie Friend was not entitled to address the court: if he did so, he would become an advocate and require the grant of a right of audience.

c. As a general rule, a litigant in person who wished to have a McKenzie Friend should be allowed to do so unless the judge was satisfied that fairness and the interests of justice did not so require. However, the court could prevent a McKenzie friend from continuing to act in that capacity where the assistance he gave impeded the efficient administration of justice.

7. The Bench Book also notes that McKenzie Friends have acted as advocates in Bermuda. As noted above, that seems to have happened in Mr Moulder's case.

8. In this case I concluded that Ms Chambers should be permitted to advise as a McKenzie Friend. However, she should not be permitted to address the Court. I reached this conclusion for the following reasons:

a. In general McKenzie Friends should be permitted to advise unless there is good reason for not permitting a McKenzie Friend.

b. Ms Chamber's history of representing Mr Moulder in the past appears to me to be a particularly powerful reason why she should be able to represent him again. Courts appear to have found that representation was in the interests of justice. There is no suggestion that her representation was unhelpful or contrary to the interests of justice.

c. However, the key difference between this case and earlier cases is the obvious conflict of interest. That conflict was not apparently a factor present in the past.

d. It appeared to me that it would be wrong to permit Ms Chambers to appear as an advocate. Advocacy rights are restricted for good reason and so it is exceptional to permit a McKenzie Friend to act as an advocate. Allowing Ms Chambers to act as an advocate when she has a conflict of interest would be to be to permit her to do something that those would regulated advocacy rights cannot do. Ms Chambers cannot be permitted to do more than a barrister.

e. I have wondered whether the conflict of interest means that Ms Chambers should be prevented from advising Mr Moulder. With some hesitation I have concluded that she should not be prevented from advising. I cannot in these proceedings prevent Ms Chambers and Mr Moulder consulting outside of court. The Commission accepts that different proceedings would be required to achieve that objective. Allowing Ms Chambers to advise in court is more efficient as it prevents there being a need for regular adjournments. It also allows the Court to get some sense of what the advice is about so that it has some idea of whether confidential information is deployed. Most importantly, as already noted, there is a long history of Ms Chambers advising Mr Moulder.

9. I should add that, having heard submissions from Mr Moulder advised by Ms Chambers, I am satisfied that the approach I adopted did ensure fairness. Mr Moulder was able to put his case effectively. In doing that, he was clearly dependent upon advice.

Factual background

10. The Davis and Piper judgment describes the establishment and work of the Commission of Inquiry at paragraphs 6 – 18. I will not repeat that summary in this judgment.

11. One matter that I wish to highlight is the fact that that the report of the Commission of Inquiry commented that:

> *The Commissioners determined that any case that had been, could be or was currently being litigated should not be before the COI, except for the purpose of demonstrating a systemic problem.*

Consideration of the Moulder case

12. Mr Moulder complained about being dispossessed of land by a false adverse possession claim. He stated that he had never been compensated for this. There appears to have been no dispute that the land was returned to Mr Moulder by way of an order of the Court of Appeal. It also appears that subsequent proceedings seeking compensation were ultimately dismissed by the Court of Appeal.

13. The Commission of Inquiry's report contains the following statements regarding its approach to the case of Mr Moulder:

    a. The Chairman of the Commission, Norma Wade-Miller, as well as one other Commissioner had recused themselves 'due a perceived conflict of interest'.

    b. The Commission had decided to hear proceedings in camera. This was said to be 'to preserve the integrity of the process'. That did not deny Mr Moulder a fair hearing. The Commission had a discretion as to whether a hearing should be public.

c. Mr Moulder's case was 'an example of a land grab' but his land was returned to him by a court process which he initiated. It was then stated that:

> *A fortiori issues raised by the Claimant regarding his legal challenges post the Court of Appeal Judgment and after the land was returned to him, including his social, economic and psychological wellbeing, are unfortunately matters where the law does not permit the COI to inquire into the circumstances.*

14. The Commission also stated that:

> *… the COI is not empowered in this or any case to review or to consider any material touching and concerning any matter(s) where the Supreme Court and/or the Court of Appeal of Bermuda had rendered a Judgment, as these matters are not within the COI's jurisdiction or mandate.*

In light of this there were no recommendations in Mr Moulder's case.

15. The 1st affidavit of Mr Moulder states that the Commission of Inquiry's website was updated in March 2022. This now stated that:

> *This matter was held in-camera in accord with item 7 of the COI Rules of Procedure and Practice thusly, all evidence, audio & video recordings, transcripts and documentation have been deemed confidential. Information on how to access these files can be found with the Archivists at the Bermuda Archives.*

16. It should be noted that this web posting can be read as suggesting that the records might be obtained from the Bermuda Archives. That is because it refers to information about access to the records.

17. The 2nd affidavit of Mr Moulder exhibits a series of e-mails between Ms Chambers and the Bermuda Archives regarding Mr Moulder's case. Importantly:

    a. Ms Chambers e-mailed seeking the records on 7 March 2022.

    b. Initially Ms Chambers was told that the records had not been received from the Commission of Inquiry.

    c. However, on 9 June 2022 Ms Chambers was told that the records would remain closed for 50 years. It was said that that decision had been made by the Commission of Inquiry.

Grounds

18. I made it clear during the leave hearing that I was of the opinion that the grounds were insufficiently particularised. I indicated that they would need to be further particularised if leave was granted. It appears to me that it would be wrong to refuse leave on the basis of a lack of particulars for 2 reasons:

    a. As set out below, I believe that it is possible to determine whether the grounds are arguable when those grounds are read with Mr Moulder's 1st affidavit. That affidavit contains further particulars. I have set out below what I understand has been raised.

    b. In general it is wrong to strike out a potentially arguable case on the basis of flawed pleadings without giving a party an opportunity to amend (*Soo Kim v Young* [2011] EWHC 1781 (QB)).

19. Having read the grounds set out in the Form 86a, the 2 affidavits of Mr Moulder and the oral submissions of Mr Moulder, it appears to me that there are essentially 3 grounds of challenge:

    a. The Commission of Inquiry erred by failing to hold Mr Moulder's case in public and failing to disclose the Commission's records regarding the case.

    b. The Commission of Inquiry's reasons for making no recommendation in Mr Moulder's case were flawed. In particular, there was no basis for refusing to consider matters that followed the order of the Court of Appeal returning Mr Moulder's land. The Commission also erred by refusing to consider criminality. The basis of the challenge regarding criminality is a statement in Mr Moulder's 1st affidavit that states:

        > *Mr. Larry Smith was initially appointed to be the Investigator' to investigate my claim and on 8th October 2020 contacted me to arrange a meeting which was held the following day. During the course of that meeting Mr. Smith a few times said that the [Commission of Inquiry] would not be looking at "criminality", and said that this instruction had been given by Mrs. Justice Wade-Miller during a meeting held between him and her.*

    c. The same passage of Mr Moulder's 1st affidavit is relied upon to argue that the work of the Commission was undermined by bias.

Arguments of the parties

20. Mr Moulder essentially made oral submissions that amplified the grounds identified above.

21. The Commission of Inquiry filed a skeleton argument objecting to the grant of leave. This skeleton argued, among other matters, that:

    a. The remedies provided by the Public Access to Information Act 2010 ('the 2010 Act') were an effective alternative remedy.

    b. There had been delay in commencing the claim.

    c. The claim lacked merit.

22. During the leave hearing, the Commission of Inquiry was clear that it would not supplement the skeleton argument and participate further. It was noted that the hearing was formally ex parte and that the 2nd affidavit of Mr Moulder had been filed the day before the hearing limiting the ability of the Commission to engage with it.

Alternative remedy

23. Section 37(1) of the 2010 Act provides that:

> *A record is exempt if its disclosure is prohibited by any statutory provision, other than this Act.*

24. The Commission issued to the Commission of Inquiry states that:

> *I FURTHER DIRECT that, without prejudice to the powers granted to the Commission under the Commissions of Inquiry Act 1935, the Commission shall conduct such parts of the inquiry that it may deem appropriate in camera.*

25. Section 8 of the 1935 Act provides that:

> *The commissioners acting under this Act may make such rules for their own guidance and the conduct and management of proceedings before them, and the hours and times and places for their sittings, not inconsistent with their commission, as they may from time to time think fit, and may from time to time adjourn for such time and to such place as they may think fit, subject only to the terms of their commission.* [Emphasis added]

26. Rules were issued under section 8 of the 1935 Act. Rule 7 of the Rules of Procedure and Practice Commission of Inquiry into Historic Losses of Land in Bermuda ('the COI Rules') provides that:

> *Insofar as it needs to gather evidence, the Commission is committed to a process of public hearings. However, applications on some aspects of its mandate may be made to proceed in camera.*

27. Rule 31 of the COI Rules provides that:

> *Only those persons authorized by the Commission, in writing, shall have access to C transcripts and exhibits.*

C in this context means that transcripts and exhibits relate to an in camera hearing.

28. My practice is to say little in relation to matters that may be argued at a substantive hearing so I avoid appearing to have determined the issues. In summary, in light of the matters above, it appears to me that is arguable that:

a. The Commission of Inquiry directed that matters in relation to Mr Moulder should remain confidential.

b. That decision was taken on powers that have their ultimate origin in the 1935 Act. For example, the Commission was issued under the 1935 Act and that provides for confidentiality.

c. The provisions of the section 37(1) of the 2010 Act apply because the Commission of Inquiry acted under the 1935 Act. As a consequence, there is no right to material under the 2010 Act so that the statutory mechanisms for enforcing rights to obtain information do not apply.

29. I should emphasise that it merely appears to me that the matters above are arguable. I have not heard from the Commission of Inquiry regarding the potential arguments above. If I decide that leave should be granted, the analysis above does not necessarily prevent the Commission from arguing that there is an alternative remedy at the substantive hearing.

Delay

30. Section 68(1) of the Supreme Court Act 1905 provides that:

> *The Court may refuse to grant leave for the making of an application for judicial review, or to grant any relief sought on the application, if it considers that—*
>
> *(a) there has been undue delay in making the application; and*
>
> *(b) the granting of the relief sought would be likely to cause substantial hardship to, or substantially*

> *prejudice the rights of, any person or would be detrimental to good administration.*

31. Order 53, rule 4(1) of the Rules of the Supreme Court Act 1985 (GN 470/1985) provides that:

> *An application for leave to apply for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.*

32. It is clear from the language of order 53, rule 4(1) that an application must be made promptly even if it is made within 6 months (*Perinchief v Public Service Commission et al* (Civ All No 6 of 2009).

33. In *R v Department of Transport, ex p Presvac Engineering* (1991) 4 Admin LR 121 it was held that time runs from date of date of decision challenged in judicial review proceedings and not from when an applicant was aware that they had grounds to apply. However, a lack of knowledge of grounds can be relevant when the court decides whether to extend time.

34. In *R v University College London ex p Ursula Riniker* [1995] ELR 213 Sedley J held that:

> *… the discretion to enlarge time beyond the ordinary 3 months is one which will be sympathetically approached by the court where the applicant in the meantime has not been sleeping on her rights but has been attempting to canvass them by other legitimate means.* (at p215)

35. In *R (Crompton) v Police and Crime Commissioner for South Yorkshire* [2018] 1 WLR 131 it was held that the fact that a challenge to a decision was

in time could be a basis for extending time in relation to other related decisions that were out of time (at least providing that there was no prejudice) [109].

36. Applying the case law above, it appears to me that there is an argument that the application is in time and/or that time should be extended. I have reached that conclusion for the following reasons:

    a. It appears that it is arguable that it was only on 9 June 2022 that Mr Moulder was made aware that the Commission of Inquiry had decided that his records should be withheld. It should be noted that the website update in March 2022 did not suggest material would be withheld for 50 years. It suggested that the Bermuda Archives should be approached, which is what Mr Moulder did (through Ms Chambers). There is no suggestion of delay after 9 June 2022 in commencing proceedings. Arguably the decision to prevent disclosure for 50 years is an aspect of the matters challenged.

    b. It is unclear when the decision was taken that Mr Moulder's records should be withheld. However, even if it was significantly before 9 June 2022, Mr Moulder's lack of knowledge would potentially be a good reason to extend time (*ex p Presvac Engineering*).

    c. It appears to me that other decisions challenged were taken over 6 months before the commencement of proceedings. However, there are at least 2 reasons why it is arguable that time should be extended. Firstly, it appears to me that it is arguable that Mr Moulder was not sleeping on his rights. He was seeking to obtain records relating to his case (*ex p Ursula Riniker*). Secondly, the fact that 1 decision appears to have been challenged in time can be a justification for extending in relation to other matters (*Crompton*). It seems to me to be undesirable to limit my consideration of this case.

37. Again, I should emphasise that it merely appears to me that the matters above are arguable. Again I have not heard from the Commission of Inquiry regarding the potential arguments above. If I decide that leave should be granted, I will expressly leave open the issue of delay as I understand that I am entitled to (*R (Lichfield Securities Ltd) v Litchfield District Council* [2001] 3 PLR 33 at [34].

Leave

38. I am simply considering leave. In *Darrell v Board of Inquiry* [2010] Bda LR 48 noted that:

> *At this stage the question on the merits of the application is simply whether the grounds are arguable. For a statement of the governing principles Mr. Beloff referred me to the opinion of Lords Bingham and Walker in the Privy Council in Sharma v Browne-Antoine [2001] 1 WLR 780 at 787 E:*
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> > *"The 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."*

39. As I believe that some of the matters raised are legally arguable, I will not analyse the legal arguments in detail. I do not want to be seen to prejudge matters when I have not heard detailed argument. In particular I have heard

little from the Commission. I emphasise that I have merely found matters arguable.

In camera hearing and retention of records

40. The common law can require materials to be made available to the public in the absence of good reason for withholding that material (*Kennedy v Charity Commission* [2015] AC 455 at [56]). Further, open justice is a fundamental common law principle (*Al Rawi and Others v Security Service* [2012] 1 AC 531 at [11]). These matters mean that, although the Commission issued to the Commission of Inquiry and the COI Rules appear to give the Commission the power to decide to hold the hearing in camera and withhold material, it is arguable that there are common law restrictions on exercising it. In particular, there must be a good reason for exercising the powers to order a closed hearing and deny disclosure. At the moment, I am unclear if there is a good reason for withholding the material.

The terms of reference

41. In the application brought by Mr Davis and Mr Piper, 'I … concluded that the Commission of Inquiry misdirected itself regarding its terms of reference' [87]. In particular, I found that the Commission's terms of reference required it to consider matters where there had been a historic power imbalance [76]. I found that the Commission had wrongly directed itself that matters needed to be 'systemic' to come within the terms of reference [79]. In addition, it wrongly excluded cases that were a 'commercial dispute' [79]. Applying this judgement and directing myself that the threshold that needs to be crossed before granting leave is essentially a low one, it appears to me that it is arguable that the Commission misdirected itself regarding its terms of reference. I am unclear why matters that followed the judgment of the Court of Appeal are excluded from consideration. I note the remarks in the report

of the Commission about its approach to actual or potential litigation. I am unclear why that is the case.

Impartiality

42. The 2 matters above are the matters in relation to which I am willing to grant leave. I am not willing to grant leave in relation to allegations of bias/lack of impartiality. The evidence before me appears to focus on an allegation that Mrs Justice Wade-Miller had given directions regarding the terms of reference that were applied in Mr Moulder's case. That was despite the fact that she had recused herself. The flaw in that argument is that I do not see how any complaint is material. If the Commission of Inquiry misdirected itself, that is a matter that can be (and is being) raised with the Court. It doesn't matter what the causes of the misdirection are. If there was no misdirection, any involvement of Mrs Justice Wade-Miller did not cause any harm. It should be remembered that I have already concluded in the Davis and Piper application that the Court will determine directly what the Commission's terms of reference mean. That means that I will not be influenced by the approach of the Commission. In light of that and the fact that it is difficult to see how it was workable for the Commission to direct itself regarding the interpretation of the terms of reference without members who had conflicts in individual cases, it appears to me that there can be no challenge to the role of individual members of the Commission in interpreting the terms of reference. What appears to be clear is that the Commission was careful to ensure that its members recused themselves from fact finding in individual cases where they had a conflict of interest.

Conclusion

43. In this judgement I have concluded that 2 of the grounds that I have identified are arguable. I have also concluded that 1 ground, a ground raising issues of impartiality, is not arguable. Normally I would have granted partial leave in

those circumstances. However, as noted above, there are at least 2 procedural objections to this case (delay and alternative remedy). I have explained why it appears to me there may be answers to those procedural objections. However, I am very conscious that I have not heard from the Commission of Inquiry regarding those procedural objections. For that reason I have made it clear that I want to preserve those procedural obligations for the substantive hearing. Having considered how to preserve the procedural obligations, with some hesitation, I have come to the conclusion that the best way of proceeding is to order a rolled up hearing (in other words a hearing that will deal with both leave and, if leave is granted, the substantive merits) in relation to the grounds that are arguable. That is because I am conscious that the Commission of Inquiry may have some knockout blow that means that leave should not be granted.

44. I have already indicated that it appears to me the grounds are not adequately particularised. In light of that the grounds that can proceed to a rolled up hearing are set out in an appendix to this judgement. I refuse leave in relation to any other grounds raised.

Protective Costs

45. The approach to an application for a protective costs order was considered by Hellman J in *Human Rights Commission v Attorney General* [2018] SC (Bda) 14 Civ as follows:

> *3. The principles governing the making of a protective costs order were stated and discussed in the context of the English Civil Procedure Rules by Lord Phillips MR (as he then was), giving the judgment of the Court of Appeal of England and Wales in R (Corner House) v Trade and Industry Secretary [2005] 1 WLR 2600 at paras 72 – 80. They were applied in a Bermudian context by Kawaley CJ in Bermuda Environmental*

Sustainability Taskforce v Minister of Home Affairs (Protective Costs) [2014] Bda LR 68 SC at paras 5 – 9. The principles must be applied flexibly: see Morgan and Baker v Hinton Organics (Wessex) Ltd [2009] CP Rep 26 per Carnwath LJ (as he then was), giving the judgment of the Court of Appeal of England and Wales, at para 40 and the Bermuda Environmental Sustainability Taskforce case per Kawaley CJ at paras 8 – 9. The jurisdiction should be exercised only in the most exceptional circumstances. See Corner House per Lord Phillips MR at para 72.

4. As stated by Lord Phillips MR in Corner House at para 74:

> *"(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that: (i) the issues raised are of general public importance; (ii) the public interest requires that those issues should be resolved; (iii) the applicant has no private interest in the outcome of the case; (iv) having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved, it is fair and just to make the order; and (v) if the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing. (2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO. (3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above."*

> *5. The Court must be satisfied that the applicant has a real (as opposed to fanciful) prospect of success, ie that its case is properly arguable. See Corner House per Lord Phillips MR at para 73. When assessing that prospect in the present case, the Court must bear in mind the test for granting a declaratory judgment. As stated by Lord Dunedin in Russian Commercial and Industrial Bank v British Bank for Foreign Trade Ltd [1921] 2 AC 438 HL at 448:*
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> > *"The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."*
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> *6. This formulation, although not adopted by the other members of the House in that case, has stood the test of time, being cited with approval in, for example, the legal textbook Wade and Forsyth on Administrative Law, 11th edition, and the recent case of R (on the application of The Freedom and Justice Party) v Secretary of State [2016] EWHC 2010 (Admin)."*

46. Applying the approach described above, it appears to me that I should not make a protective costs order:

    a. The making of a protective costs order is exceptional.
    b. Mr Moulder plainly has an interest in the outcome of these proceedings. While that is not necessarily determinative, it is a matter that weighs against the making of a protective costs order.

c. Further, although the Commission of Inquiry is plainly a matter of public importance, the outcome of the specific investigation into Mr Moulder's case is of greater importance to him than it is to the public.

d. I have no reason to believe that these proceedings will not continue without a protective costs order.

Dated this 5th day of August 2022

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DAVID HUGH SOUTHEY
ASSISTANT JUSTICE

Appendix

The grounds that proceed to the rolled up hearing

1. The Commission of Inquiry erred by failing to hold the Applicant's case in public and failing to disclose the Commission's records regarding the case.

2. The Commission of Inquiry's reasons for making no recommendation in the Applicant's case were flawed. In particular, there was no basis for refusing to consider matters that followed the order of the Court of Appeal returning Mr Moulder's land. The Commission also erred by refusing to consider criminality.

ASSISTANT JUSTICE