In The Supreme Court of Bermuda

CIVIL JURISDICTION
2018 No: 192

BETWEEN:

MICHAEL MACLEAN

Applicant

And

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

RULING

Application for Indemnity Costs
Leave to Apply for Judicial Review against
Decision of the Director of Public Prosecutions to Prosecute

Dates of Hearing:	Friday 14 February 2020
Date of Judgment:	Monday 23 March 2020
Counsel for the Applicant:	Mr. Charles Richardson (Compass Law Chambers)
Counsel for the Respondent:	Mr. Rod Attride-Stirling (ASW Law Limited)

RULING of Shade Subair Williams J

Introduction and Procedural Background:

1. This is the Respondent's application for indemnity costs against the Applicant who discontinued his application for leave to commence judicial review proceedings against the DPP.

2. The leave application was first filed on 4 June 2018 in the standard Form 86A under RSC O.53 seeking the following relief:

    i. An order of certiorari or prohibition quashing the said decision of the Respondent;
    ii. All necessary and consequential directions; and
    iii. Costs.

3. The grounds on which the relief was sought were pleaded as follows:

    "*Statement of facts*

    The Applicant, Michael Maclean, was served with a summons on May 5th, 2018 to appear in Magistrates Court to be charged with criminal offences.

    Having been served on May 5th, 2018, with the summons with respect to this matter, the Applicant retained legal counsel who requested disclosure from crown counsel. Upon reviewing the disclosure, it is patently clear that there is no basis for criminal charges.

    Procedural impropriety / lack of procedural fairness

    The Applicant complains that contrary to the provisions of the Constitution Order 1968, the Director of Public Prosecutions (DPP) acted under the direction or control of another person or authority and failed to exercise his own independent discretion. The Applicant submits that the DPP took irrelevant considerations into account and failed to take relevant considerations into account when making his decision to instituted criminal charges.

    Irrationality / inherent unreasonableness (Wednesbury principle)

    The Applicant further complains that the decision of the Director of Public Prosecutions to institute criminal charges against the Applicant is, in all circumstances, unreasonable and unlawful. The Applicant submits that the DPP has, in fact and law, charged the wrong criminal offences with respect to this matter and in any event, there is no basis for any criminal charge."

4. Notably, the Form 86A was unsupported by a verifying affidavit as required under RSC O. 53/3(2)(b).

5. The summons notifying Mr. Maclean of the intended criminal charges was dated 4 May and was made returnable for 4 June 2018 in the Magistrates' Court in respect of the following charges (i) deceptively and dishonestly obtaining US$15,449,858.00 belonging to Mexico Infrastructure Finance LLC ("MIF") with an intention to permanently deprive, contrary to section 345(1) of the Criminal Code; (ii) stealing the sum of US$13,749,858.00 from MIF, contrary to section 337(1) of the Criminal Code and (iii) using

US$13,749,858.00 which represented proceeds of criminal product, contrary to section 45(1)(b) of the Proceeds of Crime Act 1997.

6. By letter dated 11 June 2018, Mr. Richardson wrote to the Registrar clarifying that he wished for his leave-application to be listed for a hearing. RSC O. 53/3(3) provides that a judge may determine a leave application without a hearing, unless a hearing is requested in the notice of application. Accordingly, the matter was listed to be heard before me on 22 June 2018.

7. On 21 June 2018, ASW Law ("ASW") filed a Memorandum of Appearance on behalf of the Respondent. By email sent on the same date from Mr. Richardson's office assistant, Mr. Eron Hill, the Applicant served ASW with a list of case authorities and expressly referred to the hearing listed for the next day:

   "*Dear Mr. Attride-Stirling,*

   Please see a list of cases that our Mr. Richardson intends to rely upon tomorrow. Please note that this list is not exhaustive as counsel is still reviewing cases which may be furnished on you in the morning…"

8. On 22 June 2018 the Applicant filed a verifying affidavit in support of his application, having been prompted by a member of the Registry on the procedural requirement for him to do so. The deponent of the 2-page affidavit subsequently filed was Mr. Michael Maclean himself.

9. At the 22 June 2018 hearing before me Counsel for both sides appeared. Curiously, Mr. Richardson asserted that he was entitled to an *ex parte* hearing and objected to the presence and participation of Mr. Attride-Stirling, notwithstanding Mr. Hill's previous-day email putting ASW on notice of the hearing.

10. In an alternative stance, Mr. Richardson invited me to adjourn his application if it was to proceed on an *inter partes* basis because he had not fully served the other side with all of the documents and authorities on which he intended to rely. Mr. Richardson specified that, contrary to his earlier understanding, he learned that the Court had not been furnished with a disk containing all of the disclosure served on the Applicant by the Office of the DPP (Exhibit-MM2 under Mr. Maclean's affidavit evidence).

11. Mr. Attride-Stirling, however, warned that the effect of an adjournment would prolong the duration of the stay of prosecution imposed by the learned magistrate who was, at that stage, seized of the criminal proceedings. He told the Court that the magistrate, of his own initiative, refused to allow the prosecution to proceed while any judicial review proceedings were pending. Mr. Attride-Stirling further submitted that Mr. Richardson's leave-application could be disposed of very simply and briefly.

12. I considered the provision under RSC O.53/3(2): "*An application for leave must be made ex parte to a Judge by filing in the Registry*…" but decided that I had an inherent discretionary power to hear the application on an *inter partes* basis in circumstances where the effect of the application together with the relief sought by the application was to stay a criminal prosecution in challenge of the DPP's exercise of his constitutional powers. For these reasons, I ruled that the application would be heard *inter partes*. What followed, thereafter, were oral submissions from both parties.

13. Mr. Richardson alleged on behalf of his client that the DPP had taken irrelevant considerations into account in approving the charges against Mr. Maclean. He contended, in the alternative, that there was a failure to have regard to relevant factors in deciding whether or not his client would be charged. Referring to a detailed chronology of political statements made in the House of Assembly and the development of the Supreme Court proceedings commenced by Mexico Infrastructure Finance LLC (see *MacLean and Others v Mexico Infrastructure Finance LLC* [2015] Bda LR 57), Mr. Richardson outlined the Applicant's underlying complaint that the criminal charges were brought on to appease the authors of the concerns expressed in those forums.

14. Mr. Richardson further described a wrongful nexus between the Attorney General's pursuance of civil recovery proceedings and the decision to charge Mr. Maclean. He explained that the civil recovery application was viewed dimly by the learned magistrate on account of the absence of an underlying criminal prosecution. Mr. Richardson explained that the magistrate directed the Crown Counsel from the AG's Chambers to liaise with the DPP's office to ascertain whether there would likely be a prosecution. Mr. Richardson stated that the magistrate went so far as to direct on 17 April 2018 that a decision regarding a criminal prosecution would need to have been made on or prior to 7 May 2018. This shortly preceded the service of a criminal summons on the Applicant on 5 May 2018.

15. Mr. Attride-Stirling objected to the reliance on any allegation, unsupported by direct evidence, that the DPP was pressured to bring charges. I, however, allowed Mr. Richardson to proceed on the supposition that he was in a position to file supplemental supporting evidence which he envisaged would comprise of a transcript of the oral exchanges between the Magistrates' Court bench and the Crown Counsel from the AG's Chambers.

16. When queried by the Court about the availability of section 31 of the Criminal Jurisdiction and Procedure Act 2015 as an alternative remedy and means of bringing an end to the prosecution, Mr. Richardson accepted that section 31 could be used but that his client still had a right to seek judicial review against the actual bringing of the charges in the first instance. Mr. Richardson pointed out that his client, under the section 31 process, would still have to appear in a public court of law to answer to charges which, he says, were improperly brought. Additionally, if relying on section 31 instead of judicial review proceedings, Mr. Maclean would be unfairly compelled to reappear for subsequent administrative hearings in the Magistrates' Court before the matter would be sent to the Supreme Court on an indictment.

17. Mr. Attride-Stirling impressed upon the Court that decisions *not* to prosecute were subject to judicial review applications because in such cases there would be no subsequent trial wherein the issues of concern would be examined by the production of evidence and the application of the law. Mr. Attride-Stirling submitted that a decision to prosecute (unlike a decision not to prosecute) has never before been challenged under judicial review proceedings in any commonwealth jurisdiction because leave in such cases has always been refused.

18. Mr. Richardson pointed to *Mohit v Director of Public Prosecutions of Mauritius* [2006] UKPC 20 where Lord Bingham of Cornhill delivered the unanimously agreed judgment of the Privy Council. The Board in *Mohit* approved the following passage from the UK Supreme Court's judgment in *Lagesse v Director of Public Prosecutions* [1990] MR 194 [para 13]:

"*There is no doubt that the Director's decision to institute and undertake or take over criminal proceedings against nolle prosequi or indeed not to institute proceedings in any matter is an administrative decision and as such could be liable to be reviewed by the Courts. However, these administrative decisions fall broadly in two categories and the control exercisable by the Courts will differ depending on which category of decision is in issue. The first category of the Director's decisions concerns those cases where the decision is to file a nolle prosequi where a prosecution is already in process or where the decision is not to prosecute. The Courts will undoubtedly not interfere with such decisions for two main reasons. First, the complainant always has a remedy against the suspected tortfeasor and there is no fundamental right to see somebody else prosecuted and, in most cases, the complainant may additionally enter a prosecution himself though, even here, the Director can stop the prosecution except on appeal by the convicted person. Secondly, the Courts would find it inappropriate to substitute what would be their own administrative decision to prosecute, at the risk of jeopardising their inherent role to hear and try a case once it comes before them. The second category of decision is where the Director decides to prosecute. By its very nature and in contradistinction from other administrative decisions, the matter automatically falls under the control of the courts by virtue of sections 10, 76 and 82 of the Constitution*."

19. Lord Bingham referring to the above extract from *Lagesse* stated [para 13] stated:

"*With the concluding paragraph of this passage the Board again, respectfully, agrees: where proceedings initiated by the DPP are before the courts, they must ensure that the proceedings are fair and that a defendant enjoys the protection of the law even if that involves interference with the DPP's discretion as prosecutor. But the Board is not persuaded by the court's reasons for holding that the DPP's decisions to file a nolle prosequi or not to prosecute are not amenable to judicial review. The complainant may, as in this case, have no remedy against any suspected tortfeasor. The alternative course of resort to private prosecution is not an available option where it is a private prosecution which the DPP has intervened to stop. Recognition of a right to challenge the DPP's decision does not involve the courts in substituting their own administrative decision for his: where grounds for challenging the DPP's decision are made out, it involves the courts*

in requiring the decision to be made again in (as the case may be) a lawful, proper or rational manner."

20. Mr. Richardson further submitted that there was a strong public interest in the DPP's misapplication of the rules codifying prosecutorial conduct in this case and that the threshold for leave in this case was the same as any other case importing the 'arguable' test. On these points, he relied on *Middleton v Director of Public Prosecutions* [2006] Bda L.R. 79, per Ground CJ where *Mohit* was cited.

21. Mr. Attride-Stirling accepted that the Courts have the jurisdiction to challenge the decision of the DPP but emphasized that the appropriate case for challenge applied to the most extraordinary of circumstances. He then produced a bundle of authorities which addressed the law on the general principles applicable to leave applications, referring firstly to Order 53 and the related commentary under the 1999 White Book. Mr. Attride-Stirling also produced the House of Lords decision in *R v Director of Public Prosecutions ex-parte Kebilene* [2000] 2 AC 326 [327E]:

"*…given the availability of remedy within the criminal process and the absence of any claim of dishonesty, bad faith or other exceptional circumstance, the decision of the Director to consent to the prosecution of the applicants was not amenable to judicial review…*"

22. Page 337[D]:

"*Where the grant of leave to move for judicial review would delay or obstruct the conduct of criminal proceedings which ought, in the public interest, to be resolved with all appropriate expedition, the court will always scrutinize the application with the greatest care, both to satisfy itself that there are sound reasons for making the application and to satisfy itself that there are no discretionary grounds (such as delay or the availability of alternative remedies or vexatious conduct by the applicant) which should lead it to refuse leave…*"

23. Page 371[F]:

"*My 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. And I would further rule that the present case falls on the wrong side of that line. While the passing of the Human Rights Act 1998 marked a great advance for our criminal justice system it is in my view vitally important that, so far as the courts are concerned, its application in our law should take place in an orderly manner which recognises the desirability of all challenges taking place in the criminal trial or on appeal. The effect of the judgment of the Divisional Court was to open the door too widely to delay in the conduct of criminal proceedings. Such satellite litigation should rarely be*

permitted in our criminal justice system. In my view the Divisional Court should have dismissed the applicant's (leave) *application*."

24. Mr. Attride-Stirling contended that these passages were so impressive and supportive of the Respondent's case that he could arguably take his seat at this point. However, he went on to fully cite the binding decision of the Privy Council in *Sharma v Brown-Antoine and others* [2007] 1 WLR 780 where it was held:

"…*although a decision to prosecute was in principle susceptible to judicial review on the ground of interference with a prosecutor's independent judgment, such relief would in practice be granted extremely rarely; that in considering whether to grant leave for judicial review, the court had to be satisfied not only that the claim had a realistic prospect of success but also that the complaint could not adequately be resolved within the criminal process itself, either at the trial or by way of an application to stay the criminal proceedings as an abuse of process; that the court's power to stay criminal proceedings for abuse of process should be interpreted widely enough to embrace an application challenging a decision to prosecute on the ground that it was politically motivated or influenced; that the judge had erred in failing to evaluate the extent to which the appellant's challenge could be resolved within the criminal process and in failing to look at the evidence overall and to identify the grounds on which the appellant's challenge was arguable; that the Court of Appeal had therefore been justified in making its own analysis; and that since, in the circumstances, all the issues would best be investigated and resolved in a single set of criminal proceedings, permission for judicial review ought not to have been granted and had rightly been set aside*."

25. Before concluding his submissions, Mr. Attride-Stirling stated that there were many more cases which could be cited to support the importance of availing oneself of alternative remedies but that it was not necessary in his view to go any further on the law.

26. Mr. Richardson, having raised concerns that he did not have the benefit of having been previously served with these case authorities, requested an opportunity to review these cases and to return on a later date. It is against this background that I adjourned the hearing to continue on Monday 25 June 2018 at 2:30pm. Mr. Richardson was given leave to file supplemental affidavit evidence to further verify the Applicant's Form 86A. I then approved Mr. Attride-Stirling's request for a direction that the Applicant's evidence be served by midnight prior to 23 June 2018 so to allow him to have the remainder of the weekend to take instruction on whether any responsive evidence would need to be filed by the Respondent.

27. Mr. Richardson did not file any further evidence or supportive documents in these proceedings. Notwithstanding, on Monday 25 June 2018 ASW filed affidavit evidence from Ms. Cindy Clarke, a Deputy Director of Public Prosecutions and another bundle of authorities on the law behind an 8-page written submission and a 4-page costs submission,

dated 25 June 2018, signed under the names of both Mr. Attride-Stirling and Mr. Nathaniel Turner.

28. Approximately half an hour after having sent the above documents to the Court by email time-stamped 11:33am, Mr. Attride-Stirling further emailed the following message to the Court at 11:58am:

"*Dear Registry Staff*

We have just been informed by Mr. Charles Richardson, counsel to the Applicant (and cc'd here) that he is going to discontinue his application for leave to issue judicial review proceedings. Our client's position is that this should be subject to payment of indemnity costs. Mr. Richardson is considering this position.

We write now to give notice to the Learned Judge that the substantive application will apparently not take place at 2:30pm today. There may still be a need for a hearing today on costs only, subject to Mr. Richardson agreeing this point. We hope to advise the court in advance, failing which we will be in court at the appointed time."

29. At 12:02pm Mr. Richardson wrote:

"*We are considering our position*."

30. Acting Registrar, Ms. Alexandra Wheatley (as she then was) then wrote to Mr. Richardson urging him to state whether the 2:30pm Court fixture should be delisted to which Mr. Richardson replied:

"*Dear All,*

We can advise that we opted to withdraw the adjourned ex parte leave application for judicial review.

The only outstanding matter is whether, since this is a Judicial Review matter at ex parte leave stage, the court should order the Applicant to pay the costs of the Respondent."

31. In an email, time and date stamped 1:12pm Monday 25 June 2018, Mr. Richardson wrote to Mr. Attride-Stirling:

"*You were not required to nor reasonably needed to produce submissions for today*".

32. At 1:14 pm. Acting Registrar Wheatley wrote to the parties:

"*Dear Counsel,*
Please be advised the matter has been delisted for this afternoon.

If the parties wish to be heard as to costs, please file a Form 31TC."

33. Approximately 15 minutes later at 1:29pm Mr. Attride-Stirling wrote to the Acting Registrar Wheatley:

"*Given the failure of the Applicant to agree that costs should follow the event, the hearing today will have to take place. Please find attached the Respondent's Costs Submissions.*

It is noted that the Court has <u>not</u> yet made an order giving the Applicant leave to discontinue (no such order could be made without hearing the parties and then only subject to the usual condition of paying costs). In the premises the hearing today should take place.

In relation to the Applicant's email below (Mr. Richardson's 1:12pm email), with respect this is a matter for submissions. It is customary for parties to civil proceedings to file written submissions in court."

34. At 2:07pm Acting Registrar Wheatley replied:

"*Dear Counsel,*

Please refer to RSC Order 21, Rule 3. Mr. Richardson is directed to file his application for the grant of leave to discontinue which will be listed before A/J Subair Williams in a Thursday's Chambers session.

The listing of this matter for this afternoon was done only to accommodate the urgent application for a stay of a pending prosecution. Given the main dispute is likely to now be centered on costs, the application for leave and costs may be properly addressed in a Thursdays' Chamber session.

Therefore, this matter remains delisted."

35. On 28 June 2018 Mr. Richardson filed a Notice of Application for leave to discontinue pursuant to RSC O. 23/1.

36. Mr. Attride-Stirling now seeks an indemnity costs order against the Applicant for the proceedings related to the 22 June hearing and the wasted preparation undergone in advance of the continuation hearing fixed for Monday 25 June 2018.

37. On Friday 14 February 2020 I heard costs arguments made by both sides and I reserved my decision which I now provide with the reasons herein.

Delay in the listing of the Hearing of the Costs Application

38. Nearly two years has transpired since the filing of the Notice of Application for leave to Discontinue pursuant to RSC O. 23/1 ("the discontinuation notice" / the notice of discontinuation"). I, therefore, consider it necessary to provide an outline of the cause of this delay.

39. Following the delisted continuation hearing on 25 June 2018 and on the day prior to Mr. Richardson's filing of the discontinuation notice, ASW filed a Form 31TC on 27 June 2018 requesting for the continuation of the hearing under a cover letter stating the following:

"*We act for the Respondent in this matter, which was listed for hearing on Monday 26* (sic) *June and delisted despite our protestations that it was inappropriate to de-list this. In her response to our email, the Acting Registrar instructed us (in her email of 25 June) to file a Form 31TC (Request to List in Weekly Thursday Chambers List), which we now do. We would add that the Respondent is entitled to have this matter disposed of promptly. The fact that the Applicant has failed to file an application for leave to discontinue is neither here nor there. The existence of the proceedings creates problems and the Respondent is entitled to have the matter disposed of on the merits (which is what might have occurred on 22 June and should have occurred by latest on 25 June), whether or not the Applicant can be bothered to file anything further. We reserve all of our client's rights and look forward to the matter being listed as soon as possible*."

40. On 16 August 2018 ASW wrote to the Acting Registrar, Ms. Larissa Burgess (as she then was) in the following terms:

"*We act for the Respondent in this matter and refer to our letter to the Registry dated 27 June 2018, to which we have had no response.*

It is, with respect, wholly unreasonable for this matter to be delayed in this way. The continued delay of a decision in this matter is unfair to the Respondent. The only issue outstanding is the issue of costs. Our client's position is that the usual rule should apply and costs should follow the event. Our email to the Court of 25 July fully addressed this point.

We would be obliged to know if this matter is to be listed for hearing or whether the Court will deal with the issue on the papers given that no hearing is being listed."

41. By email dated 22 August 2018 a Court Administrator sent ASW the following message:

"*On behalf of the Acting Registrar Burgess*

In moving forward with the above matter, Acting Registrar Burgess requested you send forth the email described in your letter from Acting Registrar Wheatley dated June 25th as

we do not see any correspondence filed nor within our Supreme Court mailbox. Once filed and reviewed, our offices will follow up with your application to costs

Please acknowledge receipt of this email."

42. Mr. Attride-Stirling replied by letter dated 23 August 2018:

"*We refer to your email of 22 August 2018. You state that "we do not see any correspondence filed" in this matter. Whilst we assume that some of the correspondence is on the file, this statement is nevertheless worrying. We enclose herewith…..*
The letters you cannot find, bear the court 'chop' showing that this was received by the court on the date of the letter.

We would only observe that we seem to be running into this problem too frequently with the Registry, ie (sic) *that correspondence sent to the Registry disappears without trace. We would be obliged if this letter was brought to the attention of the Chief Justice, so that we make take this ongoing problem up with him as well. Hopefully this problem can be addressed in the near future.*"

43. On 18 October 2018 ASW wrote to the Registrar:

"*We refer to our letters to you and requesting that cost hearing of this matter be listed (27 June, 2018, 16 August 2018 and 23 August 2018).*

We have been awaiting a response from the Registry for some time. It simply is not fair to litigants to be kept waiting for such extensive periods of time, and is contrary to the way the Bermuda Registry has always operated.

We have been trying to get a hearing in relation to our application for costs for over 16 weeks. Can you please provide a response to our above correspondence?"

44. In reply, a Court administrator wrote confirming a 28 January 2019 hearing date for the costs application:

"*Good day Mr. Attride-Stirling,*

Your letter dated 18 October 2018 refers.

This is to confirm that the above-captioned matter has been listed for Monday 28 January 2018 (sic) *at 9:30am.*

Also we would like to confirm that we are in receipt of all material further to your letter of 23 August 2018 at (sic) *email sent on 27 August 2018.*

We humbly apologize for the delay."

45. The 28 January hearing was delisted by agreement, however, due to illness suffered by Mr. Richardson. As such, a new hearing date was set for 31 January 2019. However, Mr. Richardson's assistant, Ms. Kimberley Grimes, promptly advised that Mr. Richardson would not be available to attend on that date. Consequently, the Registry staff member invited the parties to agree amongst themselves a mutually convenient date for the costs hearing.

46. Two months later on 27 March 2019, Mr. Turner of ASW wrote to Mr. Richardson:

"*Dear Mr. Richardson,*

We are still waiting to hear from you regarding your availability. Can you please indicate your availability in March/April so that we can dispose of this matter as soon as possible? If we do not hear from you by close of play tomorrow, we will simply ask that the matter to (sic) *be listed for hearing on the first available date convenient to the court and our firm*."

47. By a same day reply, Mr. Richardson emailed:

"*I was under the impression we were waiting on the court to set a date.*

I can indicate that I have availability in the third week of April. March is all but gone now. Outside of that I can do May provided its before mid(-)May when I have a lengthy Coroners (sic) inquest to conduct."

48. Mr. Turner subsequently wrote to the Registry on the same day requesting a hearing date to be listed during the week of 15-19 April 2019 with a follow-up email in the same regard on 1 April 2019.

49. While the Court file does not report why a hearing date was not listed for the requested timeframe, I can take judicial notice that I was out of office on maternity leave from March 2019 and returned to office on 7 July 2019.

50. On 7 October 2019 Mr Turner wrote directly to a Court administrator:

"*Dear…*

I am following up again on the matter below in hopes that the costs hearing can be finally set down for determination. As you know, this matter has, for the most part, languished due to the unavailability of Mr. Richardson. Although the parties agreed dates back in March (which was followed up in April) and subsequently by phone, it appears that the listing may have fallen through the cracks. In the circumstances, we ask that the costs hearing be listed before one of the commercial court judges this week or next with a time estimate of 10-15

minutes. If it assists, we can also indicate the following availability over the next two months…"

51. Mr. Turner's email went without a timely response and on 2 December 2019 he sent a follow-up email to the Registry which again was met with a non-reply. Thus on 14 January 2020 Mr. Turner sent the following email to the Assistant Registrar, Ms. Cratonia Thompson:

"*Dear Assistant Registrar,*

I refer to the email chain below and seek your assistance in listing this matter for hearing. As you will see from the emails, we have been trying to list the Costs Hearing since January 2019 and have struggled to receive a response from Mr. Richardson or the Court despite several attempts. I would be grateful if you could assist in listing this matter on either of the following (January/February) *dates with a time estimate of 30 minutes…*"

52. On 15 January 2020 Mr. Richardson replied:

"*Is the applicant for costs aware that the charges we challenged as being erroneously brought against our client was summarily dismissed in the Supreme Court due to insufficient evidence (section 31)?*

I'm curious as to why it's still being pursued."

53. Mr. Turner, unsurprisingly, fired the following same-day response:

"*Dear Mr. Richardson,*

We are well aware of the Ruling (in the criminal context). Regrettably, you advised your client to bring and actually did bring an application for Judicial Review in the civil context. Having elected to bring the application in the wrong arena, the answer to your question is obvious: the JR application ought never to have been brought in the first place nor our client subjected to the wasted time and expense incurred in responding to your client's defective application.

Your client's application was refused out of hand and our client is entitled to an award of costs. Indeed, once you were pointed to the correct line of authorities your client applied to discontinue the application. That is why the costs claim is pursued.

You are welcome to raise whatever your client considers relevant at the costs hearing, although there is clear authority which gives the lie to your assertion that our client's costs' (sic) *application should no longer be pursued in light of the criminal court's finding. For this reason, and unless there are reasons to depart from the normal order that 'costs follow*

the event' and/or the usual costs rules on discontinuance, it is difficult to understand the basis upon which you can seriously contest a costs order being awarded against your client.

It makes little sense to debate this any further in correspondence and therefore I would ask the Asst. Registrar to set the matter down for determination at the Court's earliest opportunity. The issue has languished long enough and should not be delayed any further.

My available dates are below and I would ask that you indicate your availability today to the Court so that this matter can be set down ASAP (excluding 4 February…)

54. Minutes later, Assistant Registrar Thompson acknowledged receipt of the correspondence and advised that the parties would be contacted in short course concerning a hearing listing. This was followed by a further same-day follow up on 15 January fixing the costs hearing down for 23 January 2020.

55. However, on 21 January 2020, Mr. Richardson's office assistant, Ms. M'aiesha Weeks, wrote the following message on behalf of Mr. Richardson:

"*Good day,*

I am writing on behalf of Mr. Richardson with regard to the MacLean matter. He is engaged in a murder trial at the moment and will not be able to attend the matter listed for the 23rd of January as the Judge is not willing to release him. Sorry for any inconvenience caused. Please let me know how you choose to proceed in light of this.

Regards"

56. Mr. Richardson's adjournment request provoked the follow same-day reply from Mr. Attride-Stirling:

"*Dear Registrar,*

We refer to the email sent on behalf of Mr. Charles Richardson.
We have been waiting for a court date for more than a year and a half. We have written many times already about this and it is difficult to understand how it has taken so long to get a court listing in this matter.

Mr. Richardson had every opportunity to provide us and the Court with dates on which he was available and dates on which he was not.

For over a year we have been trying to get a court hearing listed and Mr. Richardson has done little to assist in this process. (For example, (he) failed to respond to our emails seeking dates, of 7 October 2019, 2 Dec 2019, 14 Jan 2020). As such, if the court hearing has been fixed on a date that is not convenient to him he has no one but to blame but himself.

Further, he has known about this date since 15 January 2020 and taken no steps in relation to this before now. For example, given that this is a simple costs application, Mr. Richardson could have passed the file to someone else, in another firm if necessary. The same applies at our end. Mr. Turner was due to deal with this matter but is unavailable on the date fixed by the Court, so someone else from our firm will deal with it.

In our respectful submission the hearing should take place as fixed by the Court.

Please advise if there will be a hearing on Thursday 23 January 2020. Further, can you please confirm which judge and in which court room the matter will be heard and that counsel need not be robed?"

57. In a 22 January 2020 email reply from Ms. Thompson she advised that the matter would not be delisted in the absence of an agreement to do so between the parties. However, recognizing the likelihood of an adjournment request, she directed the parties to submit mutually convenient alternative hearing dates for February in advance of the 23 January hearing.

58. On 23 January, Mr. Attride-Stirling appeared before me and strenuously objected to an adjournment of the costs hearing. Mr. Richardson was foreseeably absent and otherwise engaged in an ongoing murder trial. His office assistant, however, appeared and confirmed his availability for a 12 February hearing.

59. On 12 February both Mr. Attride-Stirling and Mr. Richardson appeared before me. However, Mr. Richardson advised that he was only available for a short period as the same murder trial had not yet concluded and that he was only able to appear on account of a Court recess break from the ongoing trial.

60. I then fixed the matter to be heard two days later on 14 February 2020.

Decision and Analysis

Whether Costs should follow the Event

61. Mr. Richardson did not raise any serious challenge to the Respondent's request for costs to follow the event in respect of the 22 June 2018 hearing. While he encouraged the Court to remain mindful that leave applications are, as a matter of usual practice, *ex parte* applications, he did not focus his objections on how the Court ought to assess costs for the 22 June hearing itself.

62. In my judgment, costs should follow the event. Mr. Richardson specifically requested a hearing of his leave-application and served the other side with notice in advance of that hearing. While it was proper, in any event, for an application of this nature to be heard *inter-partes*, it was Mr. Richardson himself who invited the attendance of the Respondent

at the 22 June hearing. The Respondent cannot be faulted for having appeared and partaken in the hearing. Thus, the Respondent should have their costs for having successfully resisted the application, even if that was indirectly achieved by a notice of discontinuation. For these reasons, I agree that costs should follow the event in respect of the 22 June hearing and any preparation undertaken in advance of the 22 June hearing.

Whether to Award Indemnity Costs for Legal Fees incurred for the 22 June hearing

63. The next question is whether such an order for costs should be awarded on an indemnity basis. Mr. Attride-Stirling argued that '*the Applicant was guilty of serious material non-disclosures of fact and law*' (Respondent's Costs Submission para 5) thereby making it necessary for the Respondent to remove the Court's blindfold. Mr. Attride-Stirling also pointed to a letter of correspondence from Deputy Director, Ms. Cindy Clarke, sent to Mr. Richardson on 21 June 2018 clarifying that she headed the charge approval process as opposed to the DPP himself, Mr. Larry Mussenden. She sought for Mr. Richardson to withdraw his application for leave given Mr. Mussenden's non-involvement in the matter and reserved the right for her letter to be placed before the Court at a costs hearing.

64. However, Mr. Richardson clearly stated at the 22 June hearing that the commencement of these proceedings had nothing to do with the involvement or participation of any individual prosecutor. The Applicant's case was always that the charge approval was based on irrelevant considerations, no matter which prosecutor was at the helm of the charge approval process.

65. The legal principles governing the Court's jurisdiction and discretionary powers to award indemnity costs are well established.

66. RSC O. 62/3(4) provides:

"*The amount of his costs which any party shall be entitled to recover is the amount allowed after taxation on the standard basis where… unless it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis*."

67. RSC O. 62/12 outlines the distinction between costs on a standard basis and costs on an indemnity basis. Simply put, a standard basis allows for a reasonable amount of all reasonable costs to be allowed by the Registrar in the course of a taxation. However, for an indemnity costs order, the successful party is entitled to 100% of all reasonable costs incurred.

68. The learned Justice Mr. Richard Ground (as he then was) made the following remarks about indemnity costs in *DeGroote v MacMillan* [1991] Bda LR 27 [p.4]:

"*… I consider that an award of indemnity costs, as against a defendant, should be reserved for exceptional circumstances, involving grave impropriety going (to) the heart of the action and affecting its whole conduct*."

69. *DeGroote* was cited by Bell J (as he then was) in *Phoenix Global Fund Ltd v Citigroup Fund Services (Bermuda) Ltd* [2009] Bda LR 70, both of which were later cited by the Court of Appeal in *American Patriot Insurance v Mutual Holdings* [2012] Bda LR 23. In the leading judgment of the Court Evans JA stated:

"*In our judgment, it would be wrong to say that indemnity costs should be ordered in every case where fraud is proved, but equally wrong to suggest that they can only be ordered when the proceedings have been misconducted by the losing party. Both "the way the litigation has been conducted" and the "underlying nature of the claim" (per Kawaley J in Lisa SA v Leamington and Avicola at para 6) may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just*."

70. In the present case, the Applicant claimed that the Office of the DPP (whether it was Mr. Mussenden, Ms. Clarke or any other prosecutor) erroneously approved criminal charges against Mr. Maclean at the implicit, but not so discreet, beckoning of the same magistrate who was seized of the related civil recovery application. Mr. Richardson underscored the close timeframe within which the criminal charges were approved following the magistrate's direction for the AG's Crown Counsel to liaise with the Department of Public Prosecutions.

71. While the allegations made by the Applicant in these proceedings were of a serious nature, I do not find that underlying claim was infected with mischief or any other kind of grave impropriety. Mr. Maclean's position was that he had been unfairly charged by the DPP's office as a result of political pressure to recover and account for the missing MIF loan proceeds. He then sought relief in these proceedings as a means of avoiding the bringing of these unfair charges. His Counsel argued that a section 31 application could not relieve him of the unfair humiliation of having to appear before a public Court of law to answer to such charges. The fact that the application was later agreed to be misconceived or without merit does not mean that it was gravely improper to commence the application.

72. As for the Respondent's complaint that the Applicant did not provide the Court with full and frank disclosure on 22 June 2018, I find that Mr. Richardson's non-disclosures were more of the kind attributable to a lack of preparation as opposed to dishonesty or malfeasance. The missing exhibit from Mr. Maclean's affidavit was a disk of the disclosure served on the Applicant by the Respondent in the criminal proceedings itself. Mr. Richardson was upfront about the late-filing of this information which explained the likely reason why such information was not before me at the 22 June hearing. Further, the submissions made from both sides on 22 June did not invite the Court's assessment of the quality or volume of the evidence relied on by the Crown in approving the charges.

73. Mr. Richardson also relied on statements made by a magistrate in open Court at the hearing of the civil recovery application without producing a sworn or agreed transcript of the particular remarks. Mr. Attride-Stirling categorized this as vague and unsubstantiated evidence which was of such a serious nature that it could only be supported by direct evidence. I do not accept this criticism. Mr. Richardson specified that the magistrate issued a direction on 17 April 2018 that a decision regarding a criminal prosecution would need to have been made on or prior to 7 May 2018. Mr. Richardson further detailed that service of a criminal summons on the Applicant occurred on 5 May 2018. It was crystal clear on 22 June 2018 that this was the height of the evidence that was or would be produced and that the Court was being asked to draw an irresistible inference from these seemingly uncontentious occurrences. (Notably, Ms. Clarke's affidavit evidence, which was sworn after the 22 June hearing, made no reference to the civil recovery proceedings or any communications received by the Attorney General's Chambers).

74. We are now in the era where it is open to a Court to take judicial notice of statements made openly in another Court room. As a matter of standard practice, all Court proceedings are audio-recorded which forms part of the official Court record. Although it is true that a well-funded and well-prepared advocate would likely produce a written transcript of any relevant statements made in an open Court hearing, I do not find in this case that Mr. Richardson's omission to produce a written transcript of an open Court proceeding constitutes a material non-disclosure.

75. For all of these reasons, I find that an order for indemnity costs relating to the 22 June 2018 hearing and the preparation leading up to 22 June is unwarranted.

Whether to Award Indemnity Costs for Legal Fees incurred after the 22 June hearing

The Respondent's Affidavit Evidence

76. At the close of the 22 June hearing, I gave Mr. Richardson leave to file further evidence. He was not compelled or directed to do so; he was merely given the opportunity to file supplemental evidence. I also gave the Respondent leave to file evidence in reply at Mr. Attride-Stirling's request. Mr. Richardson would argue that any evidence filed by the Respondent following the 22 June hearing was uncalled for given the Applicant's refrain from filing further evidence. However, at the outset of the 22 June hearing I directed that the leave-application would proceed on an *inter partes* basis. As such the Respondent had a right to reply to Mr. Maclean's affidavit evidence which had been belatedly filed on 22 June 2018.

77. The fact that the Applicant did not file supplemental evidence did not preclude or otherwise prohibit the Respondent from filing reply evidence. I would go further. It was not unreasonable for the Respondent to file its reply evidence. The Respondent had every right to clarify in evidence that the charges were not approved improperly. Thus the Respondent

cannot be criticized for its efforts to evidentially dispel any notion that the prosecutorial rules of conduct were not breached.

78. For these reasons I find that the Respondent is entitled to its costs related to the preparation and filing of its evidence. Of course, this might have been avoided had Mr. Richardson been more timely in his notice to Mr. Attride-Stirling of his intention to discontinue his application.

The Respondent's Main Written Submissions

79. Mr. Attride-Stirling's application for indemnity costs extends to ASW's weekend case-preparation of its main written submissions between 23 and 25 June 2018. This preparation came subsequent to Mr. Attride-Stirling's forceful oral submissions made at the 22 June hearing.

80. During that hearing, Mr. Attride-Stirling presented very persuasive arguments as to why the Applicant was duty-bound to avail himself of the criminal process itself in asserting that there had been an abuse of process through the approval of the criminal charges against Mr. Maclean. Mr. Attride-Stirling delivered thorough submissions over the course of an approximate 25 minute timeframe, having commented at the outset of the hearing that Mr. Richardson's leave-application could be disposed of very simply and briefly.

81. At the 22 June hearing, Mr. Attride-Stirling produced a binder of authorities containing a print-out of the provisions under Order 53 and the related commentary under the 1999 White Book. He also took the Court through the Privy Council's binding decision in the *Sharma* case and through the House of Lord's decision in the *Kebilene* case. Mr. Attride-Stirling, himself, said that those submissions were arguably sufficient for him to take his seat. In other words, he considered that he had achieved the '*slam dunk*' before he even completed his oral submissions that day. And it is evident that he had. This, no doubt, explains why he remarked to the Court at the close of his oral submissions that he could produce more authorities to support his arguments but that it was not necessary in his view to go any further than he had on the law.

82. At paragraph 6 of the Respondent's Costs submission, it is argued:

"*The Applicant was invited to withdraw the claims and application on Thursday and again on Friday. At latest they could have done so on Friday night, when they made a decision to not file further evidence, as ordered by the Court. Instead they remained mute, forcing the Respondent to continue to prepare through the weekend and file its written submissions and evidence on Monday morning. They only notified their discontinuance close to mid-day on the Monday*."

83. A certificate for two Counsel is also sought on the ground that the Respondent had a very narrow timeframe within which to prepare for the 22 June 2018 hearing and for the 25 June 2018 continuation hearing.

84. As a matter of standard practice in civil matters, written submissions are prepared under the direction of a judge during a chambers appearance which invariably precedes the substantive hearing. When the Court issues any such direction, the judge will always be guided by the Overriding Objective. RSC O.1A/1 provides:

1A/1 The Overriding Objective
(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as is practicable-
(a) ensuring that the parties are on equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv)to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases

85. In this instance, I did not direct the filing of written arguments and I was not invited by either party to do so. This was for good reason. The full thrust of the parties' arguments had been made before I adjourned on 22 June. This fact is unchanged by the Respondent's late filing of a formal Notice of Discontinuation. Further the Respondent's evidence from Ms. Clarke did not raise any new legal arguments which had not already been made at the 22 June hearing.

86. There could have been no reasonable expectation for a lengthy discourse by either side on the return date. All that was anticipated by the Court was a reply from Mr. Richardson on the authorities raised by Mr. Attride-Stirling and an evidential clarification on any unsubstantiated fact asserted at the 22 June hearing.

87. Applying the principles stated under the Overriding Objective, I find that it would have been a waste of both time and expense to sanction the exchange of written submissions following the 22 June hearing. The issues before the Court were of no particular complexity and need not have been repeated or re-outlined on 25 June. This, in my judgment, would have been a most disproportionate manner of managing the case.

88. For these reasons, I find that the Respondent has no entitlement to costs in respect of its written submissions prepared after the 22 June hearing. I also find that this is not a case appropriate for a certificate for two Counsel.

Costs in this Application

89. Finally, I turn to costs of this application. There has been a clear and inordinate period of delay in the hearing of this application.

90. Undeniably, the administrative wing of the Court must shoulder a real portion of the blame for the delay in listing this costs application which ought to have been heard and disposed of as far ago as June/July 2018.

91. The Applicant's conduct (via his Counsel) also frustrated the timely listing of this matter. At one point, Mr. Richardson was non-responsive for up to a period of months, falling just short of the kind of conduct punishable by an indemnity costs order. This left the Respondent in a vacuum of unilateral efforts to secure a costs hearing.

92. Accordingly, it is without any reservation that I find that the Respondent is entitled to its costs of this application.

Conclusion

93. Costs shall follow the event in favour of the Respondent for the 22 June 2018 hearing and any preparation undertaken prior to that hearing. Such costs are awarded on a standard basis to be taxed if not agreed.

94. Costs related to the filing of affidavit evidence on behalf of the Respondent are also awarded to the Respondent on a standard basis to be taxed if not agreed. However, I make no order as to costs in respect of the Respondent's preparation of the written submissions filed on 25 June 2018.

95. Costs for this application shall be awarded to the Respondent on a standard basis to be taxed if not agreed.

Monday 23 March 2020

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT