

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2011/0278

BETWEEN:

FINTON DE BOURG

Claimant

AND

**(1) CHIEF MAGISTRATE
(2) DIRECTOR OF PUBLIC PROSECUTIONS
(3) ATTORNEY GENERAL**

Defendants

Appearances:

Mr. Cajeton Hood for Claimant
Mr. Darshan Ramdhani, Solicitor General for First and Third Defendants
Mr. Christopher Nelson, Director of Public Prosecution in person

2012: May 18
2012: August 23

JUDGMENT

[1] **ELLIS, J.:** By Amended Fixed Date Claim Form filed on the 24th November 2011, the Claimant claims as against:

The First Defendant:

- i. A declaration that the decision of the First Defendant in committing the Claimant to stand trial at the Criminal Assizes is unreasonable, irrational, based on irrelevant considerations and/or reached in disregard of relevant considerations
- ii. An order of certiorari to remove into this Court and to quash the decision made by the First Defendant to commit the Claimant to stand trial for the offences of fraudulent appropriation of property contrary to section 72 of the

Proceeds of Crime Act and the Falsification of Documents contrary to section 275A 1 (a) and (b) of the Criminal Code.

- iii. Costs of this action
- iv. Further and other relief as deemed fit by the Court.

The Second Defendant:

- i. A declaration that the decision of the Second Defendant in instituting or causing to be instituted, continuing, failing or refusing to discontinue criminal proceedings on indictment against the Claimant for the charges laid against the Claimant pursuant to section 72 of the Proceeds of Crime Act and the Falsification of Documents contrary to section 275A 1 (a) and (b) of the Criminal Code is unreasonable, irrational, based on irrelevant considerations and contrary to law.
- ii. An order of prohibition to prohibit the Second Defendant from proffering any indictment against the Claimant to stand trial at the Criminal Assizes of any other court with respect to the charges laid herein nor any charge which might be laid as a result of any or all of the facts which were presented before the First Defendant at the Preliminary Inquiry which was concluded on May 23, 2011.
- iii. Costs of this action
- iv. Further and other relief as deemed fit by the Court.

The Third Defendant:

- i. A declaration that the decision of the Second Defendant in instituting or causing to be instituted, continuing, failing or refusing to discontinue criminal proceedings on indictment against the Claimant for the charges laid against the Claimant pursuant to section 72 of the Proceeds of Crime Act and the Falsification of Documents contrary to section 275A 1 (a) and (b) of the Criminal Code is unreasonable, irrational based on irrelevant considerations and contrary to law.
- ii. An order of prohibition to prohibit the Second Defendant from proffering any indictment against the Claimant to stand trial at the Criminal Assizes of any

other court with respect to the charges laid herein nor any charge which might be laid as a result of any or all of the facts which were presented before the First Defendant at the Preliminary Inquiry which was concluded on May 23, 2011.

- iii. Costs of this action
- iv. Further and other relief as deemed fit by the Court.

[2] The Claimant filed an affidavit in support of Claim Form on 24th November 2011 in which he *inter alia* deposes that:

1. That he is the founder of Capital Bank International Ltd (the Bank) a private limited liability company incorporated under the Companies Act of Grenada. At the material time he owned approximately 20% of the issued share capital of the Bank.
2. Cap Bank was placed under the control of a receiver on 14th February, 2008 by the then Minister of Finance. On 7th May 2008, the Supreme Court in Grenada ruled that this appointment was unlawful and that the Bank should be returned to its directors and shareholders.
3. The Minister of Finance filed an appeal against this decision and sought a stay of execution of the Court's order pending the determination of the appeal.¹ A stay was granted on 8th May 2008.
4. On 14th May 2008, he was detained, arrested and charged with three counts of fraudulent breach of trust contrary to section 278 of the Criminal Code. A fourth count of fraudulent breach of trust was laid on his first appearance before the Magistrate on 19th May 2008.
5. He was eventually granted bail in the sum of one million dollars. He was required to surrender all travel documents and to report to a police station twice weekly. He was forced to remain in custody for five days because he

¹ Civil Appeal 7 of 2008- (1) Keith Claudius Mitchell, Minister of Finance (2) Attorney General of Grenada v Capital Bank International Ltd.

was unable to promptly secure the necessary sureties and cash bond by the 19th May 2008.

6. On 12th June 2008, the Director of Public Prosecutions filed a *nolle prosequi* in relation to all four charges against the Claimant and declared publicly that he had found that there was insufficient evidence to lay charges against the Claimant for which he had been arrested.
7. The Civil Appeal filed by the Minister of Finance in the receivership proceedings was listed to be heard on 14th July 2008. It was preceded by a general election in Grenada which saw a change of the Government and appointment of a new Minister of Finance and Attorney General. On 18th September a consent order for discontinuance of the Appeal was concluded and filed in the Court Registry.
8. On 18th September 2008, the Minister of Finance also revoked the Bank's banking licence and re-appointed a receiver to the Bank.
9. On 29th September 2008, the Bank challenged the validity of this second appointment and sought interim declaratory relief.² This Claim was dismissed on a preliminary point in a decision which was delivered in February 2009. The Bank appealed this decision to the Court of Appeal which ordered that the matter be referred back to the High Court to be case managed for trial.
10. On 24th March 2009, he was re-arrested and six fresh charges were laid against him. The facts used to ground the new charges were essentially the same as those in the possession of the State when the first charges had been laid. **Exhibit "FDB- 4" sets out the 6 counts: Count 1 and 6 under section 72 of the Proceeds of Crime Act – Fraudulent Appropriation by a Director or monies belonging to Capital Bank International; Counts**

² GDAHCV2008/484 - Capital Bank International Ltd v (1) Minister of Finance (2) Attorney General of Grenada

2, 3 and 4 under section 275 A (1) (a) of the Criminal Code – wilfully and with intent to defraud falsifying the minutes of the Board of Directors of Capital Bank International; Count 5 under section 275 A (1) (b) the Criminal Code – wilfully and with intent to defraud making a false entry in the account records of Capital Bank International.

11. At the close of the Prosecution's case his attorney submitted to the Magistrate that there has been a clear abuse of the criminal process and that insufficient evidence had been led to justify the his committal on any of the charges and argued that there was no case to answer.
12. On 23rd May 2009 the First Defendant committed him to stand trial on all charges. A written ruling was rendered by the First Defendant in which she overruled the no case submission.

- [3] There were three affidavits filed on behalf of the Defendant.
- [4] In an affidavit filed on 26th October 2011, Sergeant Sheldon Thomas, a member of the Royal Grenada Police Force deposes to the fact that at the time when the first criminal charges were laid against the Claimant, the investigating officer did not appreciate the legal point that monies deposited into the Bank, did not create a trustee relationship between the Bank and its depositors. Consequently there could be no fraudulent breach of trust committed under section 278 of the Criminal Code. Once the Officers received advice from Office of the Second Defendant and it was recognised that the charges were legally flawed, the criminal proceedings were immediately discontinued in order to minimize any prejudice to the Claimant.
- [5] Sergeant Thomas also states that by the time that the *nolle prosequi* was filed, the Claimant had appeared in Court only once on a bail application and that the Preliminary Inquiry had not commenced.
- [6] He states that the matter was subsequently reviewed by the Office of the Director of Public Prosecutions who assigned Counsel to guide the investigation which

continued over a period of nine months. On 24th March 2009, based on the evidence adduced by the extensive and lengthy investigations, the Claimant was arrested and charged with the relevant offences.

- [7] He denies that there was any abuse of process as alleged by the Claimant and states that all the charges brought against the Claimant were proper in law.
- [8] Kathleen Francis-Noel, the Clerk of the First Defendant, in an affidavit filed on 26th October 2011 states that she was advised by the First Defendant that she reviewed the affidavit of Sergeant Sheldon Thomas and that she relies on the contents thereof. Further, she indicates that having formed an opinion that a sufficient case have been made out in relation to each and every charge, the First Defendant committed the Claimant to stand trial on the charges after due consideration of the evidence presented in the Preliminary Inquiry which is contained in the depositions.
- [9] Finally, Crown Counsel Kinna Marrast-Victor filed an affidavit on 26th October 2011 on behalf of the Third Defendant in which she indicates that she was advised by the Third Defendant that the decision of the First Defendant which is the subject matter of this claim cannot be attributed to him. On his behalf she therefore sought an order removing the Third defendant as a party to these proceedings. A formal application seeking the same relief was filed on the 28th October 2011.

THE CLAIMANT'S CASE

- [10] The Claimant asks the Court to find that it was an abuse of process of the court to have brought the charges that were laid against the Claimant and that it was a further abuse of process of the court to have had him committed to stand trial on the said charges.
- [11] The Claimant's written submissions indicates four main grounds.
- [12] First the Claimant submits that it was an abuse of the process of the court to have brought fresh charges based on the same facts alleged in support of the earlier

discontinued proceedings. He also claims that it was an abuse of process of the court to have had him committed to stand trial on the said charges.

[13] Secondly, the Claimant contends that the charges laid under the Proceeds of Crime Act could not have been brought as they were time barred. According to Counsel for the Claimant the relevant offence under the Proceeds of Crime Act with which the Claimant is charged, is identified by that statute as a misdemeanour. Under the Criminal Code, a misdemeanour is a summary offence. He concludes that in the premises, the relevant charges are barred from prosecution by operation of section 69 of the Criminal Procedure Code.

[14] Thirdly, he contends that no or no sufficient evidence has been led before the Magistrate which would entitle her to commit the Claimant to stand trial for the charges laid contrary to section 72 of the Proceeds of Crime Act.

[15] Finally, he submits that no or no sufficient evidence has been led before the Magistrate to entitle her to commit the Claimant to stand trial for the charges laid contrary to section 275 A (1) (a) and (b) of the Criminal Code.

THE DEFENDANTS' CASE

[16] The Defendants submit that there has been no abuse of process in this case such as to give rise to the relief sought by the Claimant. Further they contend that there is no bar in law for the instant charges to have been preferred and prosecuted. The Defendants also contend that on the totality of the evidence, a prima facie case has been made out in respect of all the charges.

CLAIMANT'S CONCESSIONS

1. Attorney General Not A Proper Party to Proceedings

At the start of the trial the Claimant conceded that there is no basis for the joinder of the Attorney General in this action. As a result the Court ordered that the Attorney General be removed as a party to the proceedings and

that the action be discontinued against him. The Court made no order as to costs.

2. Withdrawal of Grounds 3 and 4 of the Submissions

Additionally, Counsel for the Claimant intimated that he would no longer proceed on the basis of Grounds 3 and 4. The Court was therefore only asked to consider Grounds 1 and 2 or the Claimant's Submissions filed on 15th December 2011.

GROUND 1

- [17] Counsel for the Claimant submitted that the Court has the power to stay criminal proceedings if there is a chance of unfairness to the accused.
- [18] He noted that the criminal charges were filed in the context of a successful challenge against the Government in the collateral civil proceedings which are still ongoing. He submitted these criminal charges were laid in order to negatively influence the Court which will have to deal with the civil litigation and are therefore a deliberate attempt to prejudice the Claimant in the ongoing civil proceedings.
- [19] He contended that when the circumstances of this case are reviewed it is clear that it would be unfair to vex the Claimant twice on the basis of the same facts. Once the initial charges had been discontinued by the Second Defendant, it was unfair and abusive to subject the Claimant to further prosecution in circumstances where no new evidence has been proffered in respect of the charges under section 72 of Proceeds of Crime Act.
- [20] In respect of the charges laid under section 275A of the Criminal Code, he conceded that he could not properly mount a similar challenge. He noted that in respect of those charges the evidence of the alleged falsification of the minutes of the Bank would only have arisen after the initial charges had been discontinued. That evidence could therefore not have been disclosed in the previous case.

[21] However, in respect of the charges under the Proceeds of Crime Act, Counsel maintained that it would be unfair for the DPP to relay these charges where there has been no new evidence. He submitted that the decision not to proceed with the earlier charges under the Proceeds of Crime Act was made on the basis of the same facts and evidence which supports the current charges. This is innately prejudicial to the Claimant.

[22] He also contended that the decision to re-lay the charges is tainted because the earlier charges could have simply been amended in order to cure any perceived defects.

[23] Finally, Counsel for the Claimant asked the Court to look at the entire context of the case, including the prejudice suffered by the Claimant who has been put through tremendous expense and inconvenience including the loss of his liberty.

[24] This ground of review was trenchantly opposed by the Second Defendant who submitted that the Claimant had not brought before the Court anything that would have permitted the First Defendant to uphold an abuse of process argument.

[25] He submitted that although magistrates have the power to stay a summary trial or committal proceedings on the ground of abuse of process, this is a power which must be sparingly exercised. He referred the Court to the learning in Archbold Criminal Practice where at page 329 the case of **R v Horseferry Road Magistrates' Court ex parte Bennett (No.1) [1994] 1 AC 42** was referenced. The writers observed that

“...the House of Lords confirmed that justices have the power to stay criminal proceedings for abuse of process, but held that such power should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom they are dealing such as delay or unfair manipulation of court procedures.”

[26] The Second Defendant noted that apart from the coincidence or timing of certain events and the progress of certain civil matters involving the Claimant, there is nothing else to ground bad faith, improper motive or the manipulation of the

Court's process. He posited that there is no evidence to support the view that the criminal jurisdiction of the court is being used to harass the Claimant in circumstances where the criminal charges are not meritorious. He submitted that the Claimant had not brought forward one iota of proof that the second set of charges was intended to negatively influence what was happening in the civil proceedings or to assist the Minister of Finance in wresting the Bank away from the Claimant.

- [27] The Second Defendant submitted that the Claimant could not hope to prove such an allegation as against the First Defendant, who simply carried out a judicial function. In the same way, he contended that the Claimant had failed to ascribe any improper motive to his Office.
- [28] He stated that an amendment to the earlier charges was not possible as they were wholly misconceived and submitted that the prudent and fair course was to discontinue proceedings. Bearing in mind that his Office would not have been privy to the details of the investigation which led to the original charges, and having regard to the public interest, it was incumbent upon him to thoroughly review the evidence and the investigation. Once this was done, he sought to discontinue the proceedings in order to bring an end to whatever prejudice the Claimant had suffered.
- [29] However, this did not mean that the investigators were precluded from laying further charges where the evidence supported it. The Second Defendant referred the Court to the case of **R v Manchester City Stipendiary Magistrates ex parte Snelson** [1978] 2 All. E.R. 65 where the applicant sought an order of prohibition to prohibit the magistrate from enquiring further into offences alleged to have been committed by the Claimant on the ground that the magistrate had been wrong in law in holding that he could conduct another inquiry when the application had been discharged after previous enquiry into the same offences alleged against him.

- [30] Lord Widgery in rendering the Court's leading opinion in that case noted that no question of *autrefois acquit* could arise by the discharge of the applicant in the earlier committal proceedings. He observed that in order for the Claimant to succeed he would have to show that the Justices had no power to hear the second committal proceedings and in purporting to do so they would be acting beyond their jurisdiction. Lord Widgery was unable to draw that conclusion. He noted, however, that a court has a discretionary power to see that the use of repeated committal proceedings is not allowed to become vexatious or an abuse of process.
- [31] He observed that if on the facts before him, such a point had been reached, then he would have no doubt that an order of prohibition to prevent the repeated use of committal proceedings would be an appropriate remedy. He concluded, however, that such a case had not been made out.
- [32] The Court accepts this is the correct approach.

ABUSE OF PROCESS

- [33] It is clear that abuse of process no longer only arises where there is delay or manipulation or misuse of the rules of procedure. There is now high authority for the fact that the concept is now much wider.
- [34] In **Hunter v Chief Constable of the West Midlands Police** [1982] AC 529 at 536, Lord Diplock spoke of -
- “...the inherent power which any court must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right thinking people. The circumstances in which abuse of process can arise are very varied; ...”
- [35] The Court is therefore obliged to prevent the criminal processes from being used for the purposes alien to the administration of criminal justice under law. It must intervene in any case where it concludes that there is sufficient evidence to show

that the prosecution is being employed for ulterior purposes or is intended to cause oppression.³

[36] In the current action, the Claimant asks the Court to quash the ongoing criminal proceedings on the ground that they are an abuse of the court's process. Regardless of how this is prescribed, there is no doubt that it will have wide ranging implications, not only for the professional reputations involved but it will effectively arrest a criminal process which was instituted pursuant to a constitutional remit.

[37] Any party inviting a court to take such draconian step therefore assumes a considerable burden. He must, in the Court's judgment, establish on primary facts that there is sufficient basis for granting the relief sought. Having reviewed the evidence before the Court and the submissions made by Counsel both orally and in writing, the Court cannot conclude that the facts of this case in any way approach the threshold necessary to prove abuse of process.

[38] The Claimant has not provided any cogent evidence which would lead the Court to conclude that there had been any misconduct on the part of the First or Second Defendant intended to result in serious prejudice to the Claimant. **R. v Horseferry Road Magistrates Court ex parte Bennett (No.1) [1994] 1 A.C. 42.** He failed to prove that the decisions of the Defendants was based on irrelevant considerations and/or reached in disregard of relevant considerations. He failed to provide any direct evidence to support a finding of bad faith or improper motive on the part of the Defendants. Not only was the Claimant unable to prove on a balance of probabilities that the so-called collateral objects actually affected the minds of the Defendants, he also failed to establish how they practically amounted to a manipulation of the court's process either in its criminal or civil jurisdiction.

[39] Rather, the Claimant sought to have the Court draw adverse inferences merely from the factual background and the relevant timeline of events. This did not sufficiently advance his claim. Ultimately, the Claimant could not persuade the

³ Moevao v Department of Labour [1980] 1 N.Z.L.R. 464

Court that were it not for the alleged collateral motives of the parties involved, he would not have been charged and committed. **Panday v Virgil [2008] 1 AC 1386**

[40] Judicial authorities make it plain that a preliminary inquiry can be recommenced for an offence in respect of which the Claimant was discharged in a prior inquiry. This is because the principle of *autrefois acquit* has no application in committal proceedings; there being no jeopardy of conviction of the accused. Consequently, the mere fact that a preliminary inquiry is recommenced in respect of the same charges would not be sufficient to ground an abuse of process argument. There clearly must be something more than that put before the Court. **R v Manchester City Stipendiary Magistrates ex parte Snelson [1978] 2 All E.R. 65** Unfortunately for the Claimant, that crucial key never materialised in this action.

[41] In any event, it did not escaped the Court's notice that the offences with which the Claimant is currently charged differ significantly from those preferred under the previous proceedings. Not only are they brought under different statutory regimes, but also the constituent elements or ingredients of the offences are different. The fact that these charges would have been based on essentially the same evidence does not in the Court's view warrant the remedy sought by the Claimant.

[42] The Court accepts that the Second Defendant acted prudently in discontinuing the previous criminal proceedings. Ultimately, whether the current charges are supported by the evidence is a matter which should properly be explored in the context of the criminal proceedings. In that regard, the Court acknowledges the wise concession made by the Claimant's Counsel in respect of Grounds 3 and 4 of his submissions.

[43] Finally, Counsel for the Claimant pointed to the overall hardship caused to the Claimant by the prosecutions. In the ordinary course this would not *without more* warrant a quashing or stay of the current proceedings. The Court accepts the submissions of the Second Defendant that any prejudice which the Claimant may have suffered could properly be the subject of claim for compensation in collateral

civil proceedings. There are remedies available to the Claimant under tort law, once a case can be made out.

- [44] The Court therefore finds that there has been no abuse of its process on the grounds put forward by the Claimant such as to justify a quashing and/or stay of the criminal proceedings.

GROUND 2

- [45] Counsel for the Claimant also contended that it is contrary to the Laws of Grenada for the charges filed pursuant to the Proceeds of Crime Act to be laid against the Claimant in the manner in which they have been. He further contends that it is contrary to the law for the Claimant to be committed to stand trial in the Assizes on the said charges.

- [46] He noted that the offences under section 72 of the Proceeds of Crime Act are identified under that statute as a "misdemeanour". Based on the combined overall legislative framework of the Criminal Code and the Proceeds of Crime Act, and the cardinal rules of statutory interpretation, he submitted that a charge laid contrary to section 72 of the Proceeds of Crime Act is a summary offence. In the course of his submissions, Counsel referred to the following legislative provisions:

Section 3, 10 and 11 of the Criminal Code:

s.3 - Interpretation

(1) In this Code, unless the context otherwise requires—

"indictable offence" means any offence punishable under Book III of this Code, or punishable on indictment under any other law. An indictable offence on conviction for which a person can, without proof of his or her having been previously convicted of crime be sentenced to death, or to imprisonment with hard labour for three years or more, is a "felony" whether it be actually prosecuted summarily or on indictment;

"indictment" includes a criminal information triable before a jury;

"misdemeanour" means any crime which is not a felony;

s.10 - Exclusion of other laws

No person shall, except as in the next succeeding section provided, be liable to punishment by the Common Law, or in any manner otherwise than according to the provisions of this Code, for any act done within the jurisdiction of the Court.

s. 11- Saving of certain laws

Nothing in this Code shall affect—

- (a) the liability, trial or punishment of a person for an offence against any statute other than this Code; or
- (b) the liability of a person to be tried or punished for an offence under the provisions of any Act relating to the jurisdiction of Colonial Courts, in respect of acts done beyond the ordinary jurisdiction of such Courts; or
- (c) the power of any Court to punish a person for contempt of such Court; or
- (d) the liability or trial of a person, or the punishment of a person under any sentence passed or to be passed, in respect of any act done or commenced before the commencement of this Code; or
- (e) any power of Her Majesty, or of the Governor-General as the representative of Her Majesty, to grant a pardon, or to remit or commute in whole or in part, or to respite, the execution of any sentence passed or to be passed; or
- (f) any of the laws, regulations or articles for the time being in force for the government of Her Majesty's naval, military or air forces:

Provided that if a person does an act which is punishable under this Code, and is also punishable under another law of any of the kinds mentioned in this section, he or she shall not be punished for that act both under that law and also under this Code.

[47] Counsel also referred to Sections 72 and 74 of the Proceeds of Crime Act;

s. 72 - Fraudulent appropriation of property by directors, of etc., companies

Any person, being a director, member or officer of any body corporate or public company, who fraudulently takes or applies for his own use or benefit or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company shall be guilty of a misdemeanour and being convicted thereof shall be liable to imprisonment for seven years.

s. 74 - Standard of proof

Save as otherwise provided in this Act, any question of fact to be decided by the Court in proceedings under this Act is to be decided beyond a reasonable doubt.

- [48] According to Counsel for the Claimant, the Criminal Code now forms the basis for conducting prosecutions in Grenada. This excludes the operation of the common law. He submitted that it was clear that under the interpretation section of the Code that if an offence could not be found under Book Three of the Code, then the "other law" must expressly declare that that offence is triable or punishable on indictment.
- [49] He submitted that section 72 of the Proceeds of Crime Act contains no such provision.
- [50] When asked by the Court whether it is possible for a misdemeanour to be tried on indictment, Counsel for the Claimant responded that this is not possible within the context of the Criminal Code. According to him, sections 10 and 11 show the operational exclusivity of the Criminal Code and demonstrate that all other criminal statutes must be read in line with the Code's provisions.
- [51] In support of this submission he referred to sections 61 – 71 of the Proceeds of Crime Act. He noted that the legislators have clearly prescribed certain offences to be triable on indictment. For example, under section 63 of the Act the offence of organised fraud is specifically designated as an indictable offence. He submitted that there would have been no need for the legislators to specifically provide for a trial by jury for this particular offence, if all of the other public fraud offences were of equal seriousness. He submitted that a review of sections 61- 72 of the Proceeds of Crime Act reveals that there is a gradual shift in the seriousness of the offences.
- [52] In Counsel's view, there is no doubt that section 72 of the Proceeds of Crime Act was intended to be a summary offence and that it is to be tried summarily. Counsel concluded that from the analysis of these sections both counts laid

against the Claimant under the Proceeds of Crime Act are barred from prosecution by operation of statutory limitation imposed by section 69 (2) of the Criminal Procedure Code.

[53] Section 69 provides as follows:

s. 69 (1) - Where no time is specially limited for making a complaint for any summary offence in the statute relating to the offence, the complaint shall be made within three months from the time when the matter of the complaint arose; or, if it arose upon the high seas, then within three months after the arrival of the vessel at her port of discharge in the State.

s. 69 (2)- Notwithstanding anything in subsection (1) of this section contained, the complaint shall be made within six months from the time when the matter of the complaint arose in the case of the following summary offences—

(a) larceny or stealing;

(b) attempting to commit larceny or to steal;

(c) aiding or abetting or counselling or procuring the commission of larceny or stealing;

(d) receiving;

(e) unlawful possession;

(f) obtaining anything, including credit, by false pretences or fraud;

(g) fraudulent breach of trust.

[54] The Second Defendant vigorously opposed the Claimant's submissions made in support of this ground of review. He indicated that section 72 of the Proceeds of Crime Act is described as a misdemeanour punishable by seven years imprisonment. He contended that there is no presumption in law that a misdemeanour is a summary offence.

[55] In fact, he noted that there are several indictable misdemeanours under the Grenada Criminal Code, and referred the Court to sections 366 to 399 of the Criminal Code and submitted that this particular offence has historically been tried on indictment.

[56] The Second Defendant noted that in Grenada, a magistrate court has a specific and limited jurisdiction to hear criminal offences. A summary trial could only be

conducted where there is an express statutory jurisdiction to do so.⁴ On the other hand, he submitted that the High Court is a court of unlimited jurisdiction and has cognizance of all offences committed in Grenada pursuant to section 10 (2) of the **West Indies Associated States Supreme Court (Grenada) Act**. He contended that in designating an offence as a misdemeanour, the legislators do not intend to confer jurisdiction on a magistrate's court. Rather the term is used to simply differentiate less serious crimes from more serious ones.

[57] In support of this submission the Second Defendant referred the Court to the case of **Li Keung Pong v the Attorney General of Hong Kong** PC Appeal No. 10 of 1963.

[58] He contended that the Proceeds of Crime Act creates substantive offences in their own right. He submitted that it is wholly unnecessary in construing and interpreting the legislative provisions of that Act, to call in aid any of the provisions which were referred to by Counsel for the Claimant.

[59] He noted that section 72 of the Proceeds of Crime Act is an almost wholesale adoption of section 20 (1) (ii) of the English Larceny Act 1916 which provided that;

“Every person who-

being a director, member or officer of any body corporate or public company, fraudulently takes or applies for his own benefit or any use or purposes other than the use or purposes of such body corporate or public company, any property of such body corporate or public company

fraudulently converts to his own use and benefit or the use or benefit of any other person, the property or any part thereof of any proceeds thereof; shall be guilty of a misdemeanour and on conviction thereof be liable to penal servitude for any term not exceeding seven years.”

[60] This provision was construed by the Judicial Committee of the Privy Council in **George Nicholas v Magistrate Rajendra Rambachan and Anor. Appeal 77 of 2007** in which a decision rendered by a magistrate in committal proceedings was appealed.

⁴ Section 28 of Magistrates Act Cap 177 of the Laws of Grenada

- [61] The Second Defendant therefore concluded that since section 72 of the Proceeds of Crime Act does not give rise to a summary jurisdiction then the time bar prescribed in section 69 of the Criminal Procedure Code would have no application in this case.
- [62] Counsel for the First and Third named Defendants also strongly opposed the Claimant's submissions on this second ground. He adopted the Second Defendant's submissions and addressed the narrow point of whether the use of the term "misdemeanour" means that the offence is a summary offence. He submitted that section 3 of the Criminal Code does not impose the restriction which Counsel for the Claimant would seek to ascribe. In his view, section 3 of the Code does not demand that there be a specific statement set out in the "other law" to the effect that the offence under that law is indictable.
- [63] He noted section 3 of the Criminal Code is prefaced by the phrase "In this Code unless otherwise requires..." One must therefore have regard to the context of the other law. He submitted that the Proceeds of Crime Act does not leave anyone in any doubt or ambiguity as to the construction of the legislation. There is no ambiguity in the construction of the word "misdemeanour" which is defined in section 3 of the Criminal Code as "any crime not a felony". Section 3 of the Code defines a "felony" as an indictable offence on conviction for which a person can, without proof of his or her having been previously convicted of a crime, be sentenced to death, or to imprisonment with hard labour for three years or more.
- [64] Therein lays the distinction. One cannot impose a sentence involving hard labour on a person who has been convicted of a misdemeanour offence. That does not however make a misdemeanour is summary offence. In fact, there is nothing in the laws of Grenada which prescribes that a misdemeanour must be tried summarily.
- [65] Finally, Counsel for the Third Defendant submitted that there is nothing in section 63 of the Proceeds of Crime Act which can or should limit the meaning of the term misdemeanour in Grenada.

MISDEMEANOUR AND THE SUMMARY JURISDICTION

- [66] In most common law legal systems a misdemeanor is considered to be a "lesser" criminal act which is generally punished less severely than a felony. The term has generally been used in contradistinction to a felony and section 3 of the Criminal Code of Grenada clearly maintains that differentiation.
- [67] Of course, many jurisdictions no longer maintain such designations or distinctions. For example, in England, all distinctions between felony and misdemeanour were abolished by section 1(1) of the Criminal Law Act 1967 and as of 1977, offences became classified in one of three groups: indictable only, triable only, summarily or "triable either way".
- [68] Section 72 of the Proceeds of Crime Act almost mirrors section 20 (1) (ii) of the English Larceny Act 1916 which clearly pre-dated the 1967 Criminal Law Act. Unfortunately, when the Proceeds of Crime Act was promulgated and later amended in Grenada, the relevant legislators chose to ignore the legislative reforms which have taken place in England and many other commonwealth jurisdictions.
- [69] No doubt, this led to the Claimant's contention that where section 72 of the Proceeds of Crime Act categorises the offence of fraudulent appropriation as a misdemeanour, it is Parliament's intention that that offence be tried summarily.
- [70] Fortunately, in 1964, the Judicial Committee of the Privy Council provided useful guidance on the use and application of the term misdemeanour. In **Li Keung Pong v the Attorney General of Hong Kong** the appellant was charged before a magistrate with obtaining credit by fraud contrary to section 51 (a) of the Hong Kong Larceny Ordinance which provided that any person who obtained credit by means of fraud should be guilty of "a misdemeanour triable summarily."
- [71] Thereafter, on the application of the respondent, the Attorney-General of Hong Kong, the charges were transferred to the District Court under section 87 (A)(1) of the Magistrates Ordinance which provided for the transfer of "any indictable

offence" to the District Court on the Attorney-General's application. The question before the Court was whether the District Court had jurisdiction to hear the transferred charges, it being contended by the appellant, and held by the District Court, that the offences (laid as being contrary to section 51 (a) of the Larceny Ordinance) were not indictable offences and that therefore the magistrate had no power to transfer the charges and the District Court, no right to hear them.

[72] The Privy Council found that the use of the term misdemeanour when used in a statute concerning crime, ordinarily denotes an indictable offence which is not a felony.

After reviewing the historical legislative context in Hong Kong (including the Law Revision (Penalties Amendments) Ordinance 1952) they observed that the offence had always been indictable. Their Lordships concluded that a charge of obtaining credit by fraud in Hong Kong, which by the Hong Kong Larceny Ordinance s.51(a) was indictable as well as being triable summarily, and so was properly transferred. Their Lordship's further concluded that the District Court would in any event have jurisdiction under the joint effect of the District Court Ordinance s. 29 (1), and the Criminal Procedure Ordinance s. 69, to allow the case to go forward.

[73] What is more than made clear in this case is that the term misdemeanour is used merely as a contradistinction to a felony. It does not *without more* prescribe how the particular offence is to be tried or dealt with in the Courts.

[74] The distinction which the Claimant asks this Court to draw is unsupported by the laws of Grenada as there are clearly a number of misdemeanors which are triable indictably.⁵ Rather, it is the terms "summary" and "indictable" which determine the manner in which offences are tried or dealt with in the Courts. A summary offence is one which is dealt with by a magistrate, while an indictable offence is one which must be tried before a judge and jury.

⁵ For example section 366- 399 of the Criminal Code of Grenada

- [75] The Proceeds of Crime Act designates the offence under section 72 as a misdemeanor but does not categorize it as indictable or summary. The Claimant submits that this means that the offence must be tried summarily. However he provided no authority which establishes a presumption in law that a misdemeanor is a summary offence. Rather, he argues that in the face of the ambiguity, the matter must, on the basis of the cardinal rules of statutory interpretation, be resolved in his favour.
- [76] The Court is not satisfied that the so called cardinal rules of interpretation or authorities referred to by the Claimant's attorney have any real application here. Given the overall legislative context, the Court does not accept that there is any reason to ascribe to section 72 of the Act, any meaning other than that which it would logically seem to bear.
- [77] What is clear is that a summary offence is an offence under Book II of the Criminal Code or which is punishable on summary conviction, and includes any matter in respect of which a Magistrate's Court can make an order in the exercise of its summary criminal jurisdiction.⁶
- [78] In Grenada, the summary criminal jurisdiction of the Magistrate's Court is expressly defined by statute. The statutory remit is prescribed in Part IV of the Magistrates Act Cap 177 of the Laws of Grenada, section 28 of which reads as follows:

"Each Magistrate shall have jurisdiction within his or her district to hear and determine all charges of summary offences as defined in the Criminal Code, Chapter 72A, and all charges of offences in which summary jurisdiction is by any law expressly given to Magistrates or Justices of the Peace, and also all complaints and information for the recovery of fines, penalties, or forfeitures which are not specially assigned by any law to the High Court."

- [79] It follows that a magistrate's court would only have jurisdiction to hear and determine a charge of offence where the offence is designated as a summary offence under

⁶ Section 3 of the Criminal Procedure Cap 72B of the Laws of Grenada

- [80] This is clearly not the case here. There is no indication in section 72 of the Proceeds of Crime Act that this offence is to be tried summarily. The Court therefore does accept that it vests a summary jurisdiction in the magistrate's court.
- [81] The same cannot be said of the Fifth Schedule to the Drug Abuse (Prevention and Control) Act, Cap 84A of the Laws of Grenada.⁷ That Schedule specifically identifies offences which fall within the summary jurisdiction and which carry very serious punishments.
- [82] How then is the offence under section 72 of the Proceeds of Crime Act to be tried? It is clear that the High Court of Grenada has a much wider statutory remit than the Magistrates Court. Section 7(1) of the **West Indies Associates Supreme Court (Grenada) Act Cap 336** provides that the High Court may have and exercise within Grenada, all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction which is vested in the High Court of Justice in England.
- [83] Section 10 of that Act provides that in its criminal jurisdiction, the High Court shall have the jurisdiction or the power to try **all offences committed in Grenada** or within one marine league of the coasts thereof measured from low water mark, and of all offences authorized to be tried in Grenada under any Statute of the United Kingdom.
- [84] The High Court is therefore a superior court of record with an original and extensive jurisdiction in criminal cases. This broad jurisdiction presupposes that the High Court can hear and determine any charge, including the charge of an offence under section 72 of the Proceeds of Crime Act.
- [85] Having reviewed the judicial authorities and for the reasons indicated, the Court therefore concludes that the proceedings have been properly brought and that the relevant charges would not run afoul of prescribed limitation period under section 69 of the Criminal Procedure Code.

⁷ Referenced by Counsel for the Claimant at page 5 of his written submissions

DELAY

- [86] In his oral reply, Counsel for the Claimant sought to argue that the proceedings were an abuse of process because of the substantial delay between the time when the earlier proceedings were discontinued and the time when the new charges were laid. He argued that there was some nine months delay which added to the prejudice to the Claimant and which therefore amount to abuse of process.
- [87] Counsel never sought to raise this point before the Magistrate hearing the committal proceedings. It was not the basis upon which he obtained leave to apply for judicial review. It was not set out as a ground or his Claim of his written submissions before this Court. He chose instead to raise this legal point for the first time in the context of making his reply to Defendants oral submissions in Court.
- [88] This was clearly irregular and exceeded the accepted remit of a reply.⁸ Nevertheless the Court is obliged to note that the law in this area is settled.
- [89] As was succinctly stated in the case of **R v Dunlop** [2006] EWCA Crim. 1354,
"The passage of time is, of itself, no impediment to the fairness of a retrial."
- [90] Delay per se will not necessarily lead to proceedings being stayed without trial, particularly if there is no evidence of bad faith or manipulation on the part of the prosecution.
- [91] The Court is therefore less concerned with the period of time that has elapsed than the effect that delay can be said to have had on the ability of the Claimant to mount an effective defence. A stay would only be appropriate if (a) there had been inordinate or unconscionable delay due to the Prosecution's inefficiency and (b) prejudice to the defence could either be proved or inferred.
- [92] Having reviewed the affidavit evidence of Sergeant Sheldon Thomas, and bearing in mind the conclusions already drawn in regards to Ground 1 of the Claimant's

⁸ In the Application of Veron Simpson – Civil Appeal No. 28 of 1999 (Jamaica)


submissions, the Court is not satisfied that either limb has been satisfied by the Claimant.

COSTS

[93] CPR 56.13(6) provides that no order for costs may be made against an applicant for an administrative order unless the Court considers that the applicant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. The Claimant's conduct does not fall within this criteria.

[94] **It is therefore ordered as follows:**

- i. The Claimant's claim for judicial review is dismissed.**
- ii. There is no order as to costs.**



Vicki Ann Ellis
High Court Judge