EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA & BARBUDA

ANUHCVAP2017/0011

BETWEEN:

LEROY KING

Appellant

and

[1] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[2] THE MINISTER OF FOREIGN AFFAIRS

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal

Appearances:

Dr. David Dorsett, with him Mr. Jarid Hewlett, for the Appellant.

Mr. Reginald Armour, SC with him Ms. Vannesa Gopaul and Mrs. Carla Brookes Harris, Deputy Solicitor General for the Respondents.

Mr. Anthony Armstrong, Director of Public Prosecutions, holding a watching brief on behalf of the Requesting State.

2018: February 16;
September 18.

Civil appeal – Constitutional law – Originating Motion – Habeas Corpus – Extradition – Breach of fundamental rights – Judicial review –Constitution of Antigua and Barbuda – Constitutional Relief – Mutual Legal Assistance Treaty 1997 – Mutual Legal Assistance in criminal matters (Government of Antigua and Barbuda and the Government of the United States) Ratification Act 2000 – Judge's discretion – Evidence by counsel – Statutory interpretation – Grounds of appeal not pleaded

The appellant, Mr. Leroy King, former Administrator and Chief Executive Officer of the Financial Services Regulatory Commission, was in 2010 subject to an extradition request made by the Government of the United States of America ("United States").

Mr. King was committed by a magistrate under the Extradition Act of Antigua and Barbuda in 2011 and in 2012 his application for habeas corpus and certiorari was denied by Michel J. His appeal of the dismissal was then dismissed by the Court of Appeal. On 23rd March 2012, the Minister of Foreign Affairs ("the Minister") signed a warrant for his extradition to the United States and the warrant served on him on 1st April 2012. Prior to that, on 20th March 2012 Mr. King invoked the constitutional jurisdiction of the court by filing an originating motion and further amended his claim on 4th April 2012, claiming breach of his fundamental rights and that the ought not be extradited.

In 2016 the proceedings came before the High Court and Mr. King filed a 'second application' in which he sought leave to apply for judicial review arguing breach of section 3 of the Constitution of Antigua and Barbuda and his right to procedural fairness.

On 19th April 2017, Ramdhani J [Ag.] delivered judgment in the court below. The judgment dismissed the originating motion as well as the application for leave to apply for judicial review. Ramdhani J [Ag.] found that the original application for judicial review was bad in law as it failed to set out grounds on which it was based.

After considering all the evidence and facts, the learned judge found that there was no evidence that the Constitution or any of Mr. King's fundamental rights were breached. He also found that there was no interference with Mr. King's right of access to justice and protection of the law. In relation to the second application for leave for judicial review, he found that there was no arguable case of unlawful or unreasonable acts conducted by the Minister.

Being dissatisfied, Mr. King appealed, contending among other things that the learned judge erred in exercise of his case management powers, that he failed to have regard to relevant considerations in respect of the Mutual Legal Assistance Act and that he had misconstrued the provisions under the Extradition Act as it related to Mr. King's access to justice.

Held: dismissing the appeal and awarding costs to the respondent of a portion of the proceedings to be assessed unless agreed upon within 21 days, that:

1. The court has a duty to actively manage its cases. The Civil Procedure Rules 2000 ("CPR") provides the court with the power among other things, to promptly decide which issues need full investigation at trial and those which may be summarily disposed; identify the issues at an early stage; dismiss or give judgment on a claim after a decision on a preliminary issue and try two or more claims on the same occasion. It is clear from his judgment that the learned judge, based on the formulation of the issues by counsel for appellant, as well as his own understanding of the issues, found it unnecessary to separate the originating motion from the leave application. He was entitled, pursuant to his case management powers under the CPR, to adopt such an approach if it facilitated an expeditious and just disposition of the matters.

   Parts 25 and 26 of the Civil Procedure Rules 2000 applied.

2. A minister exercising powers of return under section 14(2)(a) of the Extradition Act is not required in all cases to examine the quality of evidence on which committal for extradition was based and that such examination should only be in rare cases and for good cause. The learned judge in the case at bar accordingly held that having regard to the conclusions of the magistrate and the High Court judge, there was no arguable case that the Minister ought to, in the exercise of his judgment, personally examine afresh the quality of the evidence. The learned judge committed no error in so holding based on the evidence which was before him.

   R (on the application of Allison) v Secretary of State for Home Department [2001] EWHC Admin 506 applied; R v Secretary of State for Home Department ex p. Susan Hagan and Sally Anne Croft (unreported, 15th December 1993) applied; Extradition Act Act No. 12 of 1993, Laws of Antigua and Barbuda applied.

3. The principles upon which an appellate court will interfere with the exercise of discretion are well settled. The function of an appellate court in such instances is not to exercise an independent discretion or to interfere with the learned judge's decision simply because this Court would have exercised the discretion differently. This Court would defer to the decision of the learned judge and would only intervene where he did not properly exercise the discretion by error of law or misapprehension of the facts.

   Michel Dufour et al v Helen Air Corporation Ltd. et al (1996) 52 WIR 188 applied.

4. The principle for leave to apply for judicial review is that an applicant must show that there is an arguable case, one that is not frivolous or hopeless. The learned judge was correct in refusing the grant of leave for judicial review. The learned judge considered all the issues before him and looking at the matter in the round he weighed the actions of the Minister against the relevant provisions of the Extradition Act in order to determine whether they were in conformity with the Act. There is no arguable case that the Minister's decision is bad in law as in each instance complained of, the actions taken by the Minister fell squarely within the provisions of the Act.

   Sharma v Antoine and others [2006] UKPC 57 applied; Lord Justice Brook, the White Book 2007: Civil Procedure Rules Vol. 1 (Sweet and Maxwell, 2007) considered; Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited) Claim No. 2009 HCV04798 (delivered 23rd October 2009) applied.

5. A party is not permitted to re-litigate an issue or matter simply because he wishes to present a different argument. Having failed to exercise his right to apply to the Court of Appeal to have the committal order reviewed, and having not presented any fresh evidence to demonstrate that there is a different factual basis on which

this Court may revisit the lawfulness of the committal order, the appellant cannot now through this appeal mount a collateral attack on the committal order. To do such is an abuse of the process of the court.

Hunter v Chief Constable of the West Midlands Police [1982] AC 529 applied; Hoystead v Commissioner of Taxation [1926] A.C. 155 applied.

6. An appellant is not allowed to argue or rely on any ground not mentioned in the notice of appeal without permission of the Court. In this case, the appellant did not submit any application before this Court seeking permission to raise an additional ground of appeal. The Court therefore does not entertain it.

Rule 64.4(8) of the Civil Procedure Rules 2000 applied.

7. The court must be able to correct obvious drafting errors but Parliament is presumed to know the law when passing legislation. In suitable cases, the court will add words, or omit words or substitute words where there are drafting mistakes. Caution must be had when adding, omitting or substituting words in legislation as a statute is expressed in language approved and enacted by the legislature. The Court must consider these three factors before interpreting a statute in the manner described: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. It is clear that Parliament did not intend to replicate the UK Extradition Act 1989. Section 8(9) of the Extradition Act 1993 of Antigua and Barbuda represents a deliberate drafting change in view of allowing the right of review of the committal order to be made directly to the Court of Appeal. No absurdity is thereby created. In the circumstances, a rectifying construction is not required in relation to section 8(9) of the Act,

Driedger on the Construction of Statutes Driedger on the Construction of Statutes, (3rd ed., Butterworths, 1994) p. 288 applied; **Attorney General's** Reference SLUHCVAP2012/0018 (delivered 24th May 2013, unreported) applied; Inco Europe Ltd. and Others v First Choice Distribution (a firm) and Others [2000] 1 All ER 109 considered; Section 8(9) of the Extradition Act 1993 Laws of Antigua and Barbuda applied; Section 6(9) UK Tradition Act 1989 distinguished.

JUDGMENT

[1] PEREIRA CJ: This appeal arises from the judgment of the trial judge made on 19th April 2017, in which he dismissed the appellant's claim for constitutional relief, as well as his application for judicial review and made no order as to costs. The

appellant's complaints against the decision of the trial judge rests on four main planks, namely:

(i) The trial judge delved into the entirety of the claim rather than treating with the application for leave to bring judicial review proceedings;

(ii) The trial judge failed to give a rectifying construction to section 8(9) of the Extradition Act;[1] A corollary of this is the appellant's complaint that the Act does not provide equal treatment under the law as guaranteed by the Constitution of Antigua and Barbuda;[2]

(iii) He erred in failing to recognise a violation of the Mutual Legal Assistance Treaty in criminal matters between the Governments of the United States and Antigua and Barbuda;

(iv) He erroneously decided points of foreign law without the benefit of evidence from an expert on foreign law.

Background Summary

[2] Regrettably, this matter has had a protracted journey through the court system of Antigua and Barbuda before coming on for a hearing for reasons which are far from clear. I take the liberty of reproducing much of the background facts which was extensively set out in the judgment of the trial judge so as to place the appeal in context.

[3] In 2010, the Government of the United States of America made a request to the Government of Antigua and Barbuda to extradite the appellant, Mr. Leroy King ("Mr. King"), the former Administrator and Chief Executive Officer of the Financial Services Regulatory Commission ("FSRC"). In 2009, a Grand Jury in Texas, in the United States of America, indicted Mr. King jointly with four other persons, including Mr. Allen Stanford, on 21 counts alleging violations of Title 18 of the United States Code.

[1] Act No. 12 of 1993, Laws of Antigua and Barbuda.
[2] The Antigua and Barbuda Constitutional Order 1981 Cap. 23, Revised Laws of Antigua and Barbuda 1992.

[4] In 2011, Mr. King was committed by a magistrate under the Extradition Act 1993 ("the Act"). Following his committal, he applied pursuant to section 13 of the Act for habeas corpus and also sought an order of certiorari to quash the committal. On 6th February 2012, Michel J denied Mr. King's application for habeas corpus and the order for certiorari. He affirmed the committal in relation to eleven of the charges, but nullified the committal insofar as it related to ten of the other charges. Subsequently, by letter dated 10th February 2012, the Minister of Foreign Affairs ("the Minister"), pursuant to his powers under the Act, gave notice to Mr. King that he should show reasons why an order of return should not be made against him pursuant to section 14 of the Act.

[5] On 16th February 2012, Mr. King appealed Michel J's decision to the Court of Appeal. On 21st March 2012, the Court of Appeal dismissed the appeal on the basis that it had no jurisdiction pursuant to section 31(2)(a) of the Eastern Caribbean Supreme Court Act[3] to hear an appeal which arose "from any order made in a criminal cause or matter". On 23rd March 2012, the Minister signed a warrant for the extradition of Mr. King which was served on him on 1st April 2012.

[6] Prior to the issuance of the warrant on 26th March 2012, Mr. King invoked the constitutional jurisdiction of the court by filing an originating motion seeking a number of declarations and orders under the Constitution. On receipt of the warrant, he amended his claim on 4th April 2012 essentially contending that his fundamental rights had been breached during the extradition process and that he ought not to be returned. He sought declarations to the effect that: (a) he had a fundamental right to protection of the law guaranteed by section 3 of the Antigua and Barbuda Constitution ("the Constitution"), and that his right had been breached by the Act failing to provide him with a right of appeal beyond the High Court; and (b) that to grant a right of appeal beyond the High Court to requesting states when no such access was given to the person who was the subject of the request, was discriminatory and in breach of section 14 of the Constitution. On

[3] Cap. 143, Revised Laws of Antigua and Barbuda 1992.

these bases and other grounds, Mr. King sought an order to prohibit his return. The motion also included an application for leave to apply for judicial review of the Minister's decision to order Mr. King's return to the United States. That application contained no grounds and did not otherwise comply with rule 56.3 of the Civil Procedure Rules 2000 ("CPR").

[7] Four years later, these proceedings eventually came before the High Court in September 2016, were case managed several times, and the matter was finally listed for hearing on 28th November 2016. Before the matter came on for hearing, Mr. King, through his attorneys filed a 'second application' on 17th October 2016, seeking, among other things, for the originating motion to be deemed a notice of application for leave to apply for judicial review, and that the constitutional relief and the judicial review claims be joined. In setting out the grounds upon which leave was being sought, Mr. King contended that the Minister's decision was bad in law for being: (a) in breach of section 3 of the Constitution and of Mr. King's right to procedural fairness and access to the court; (b) illegal and in breach of the Minister's duty to sufficiently acquaint himself with relevant information, fairly presented and properly addressed, and to have regard to all relevant considerations; and (c) unreasonable and irrational, in that the Minister failed to have due regard to all legal considerations.

[8] After the matter was heard, Mr. King, without the court's leave, caused to be filed numerous affidavits, documents and submissions, on matters which he contended were new and previously unavailable to him. Mr. King presented to the High Court the original indictment as well as evidence of two so called "superseding indictments" which had been filed in 2011 in the United States, but which he had not known about before. He argued that the United States' Government and the DPP who held a watching brief in the court had failed in their duty of continuing candour by failing to disclose the 'superseding indictments' which had named Allen Stanford and others, and excluded Mr. King.

[9] Mr. King contended that the new 'superseding indictments' meant that there was no subsisting accusation against him and that the request for extradition could not be lawfully executed under the Act. In reply, the respondents filed an affidavit from Mr. Anthony Armstrong, the Director of Public Prosecutions ("the DPP"). Attached to the DPP's affidavit was a declaration from a Mr. John Pearson ("Mr. Pearson"), Deputy Criminal Chief of the Major Fraud Section of the United States Department of Justice effectively stating that the original indictment was still pending, and that the superseding indictment was irrelevant to Mr. King's extradition, as it did not affect the validity of the original indictment which had been laid against him.

[10] In the submissions filed on Mr. King's behalf, one of Mr. King's main arguments was that the decision of the Minister to return Mr. King was bad in law as the Minister had failed to consider whether the Government of the United States had acted in bad faith. In support of this contention of bad faith, it was submitted that the fact that Mr. Pearson's declaration was executed by the trial judge who dealt with Allen Stanford, showed that the trial judge had "either initiated, permitted, and in fact engaged in ex parte communication" with the prosecution. He said that the Minister failed to have regard to this circumstance, which in his view showed bad faith, thus a failure to adhere to the requirements of section 14(2)(a)(iii) of the Act. It was also argued that the conspiracy charges related to the FSRC against Mr. King spanned the period 1999 to 2009, when Mr. King had only joined the FSRC in 2002. Additionally, he asserted that no regard was given to the fact that the superseding indictment showed that some of the charges had been effectively withdrawn against him. Finally, it was contended that the Minister failed to have due regard to representations made and failed to follow Michel J's judgment setting out the charges for which Mr. King was committed.

[11] On 28th March 2017, Mr. King's attorneys filed an application praying for orders that all of the documents filed by him after the hearing were properly before the court.

Decision of the learned trial judge

[12] The learned trial judge handed down a written judgment in April 2017. He dismissed the original application for leave for judicial review contained in the originating motion as being bad in law as it failed to set out the grounds on which it was based. Notwithstanding the inordinate delay of more than four years in filing a free-standing application for leave for judicial review, on this occasion containing grounds, the learned judge proceeded on the basis that there were two applications for his consideration: the originating motion seeking constitutional relief and the application seeking leave for judicial review.

[13] In relation to the claim for constitutional relief contained in the originating motion, the learned trial judge ruled that while there is no right to appeal against a habeas corpus application, Mr. King had the right under section 8 of the Act to apply to the Court of Appeal for a review of the committal order, and subsequently a possible right of appeal from the Court of Appeal's decision to the Privy Council, pursuant to section 122 of the Constitution. Therefore, there was no interference with Mr. King's right of access to justice and protection of the law. The learned trial judge further held that Mr. King was unsuccessful in his discrimination claim, as he failed to show that the differences inherent in each sides' right of access resulted in different treatment attributable to his place of origin. The court was not satisfied that Mr. King proved that the Act contravened the Constitution or that any of his fundamental rights were breached.

[14] In relation to the application for leave to apply for judicial review, the learned trial judge found that there was no arguable case that the Minister acted unreasonably or unlawfully by failing to have regard to any relevant matters. He held, inter alia, that:

(a) The original application for leave to apply for judicial review having failed to set out the grounds upon which the application was based as required by CPR 56.3 was bad in law and accordingly dismissed.

(b) Bearing in mind the fact that Mr. King did not apply to the Court of Appeal to review the committal order nor indicate an intention to make such an application, the Minister acted properly by awaiting the outcome of the 'appeal' on the habeas corpus application before ordering Mr. King's return. There was therefore no abuse of power or abuse of process by the Minister.

(c) The Minister was not required by law to independently examine the evidence when this was already extensively done by the Chief Magistrate and High Court judge, who found that there was a prima facie case established against Mr. King. The Minister was therefore entitled to take into account the decisions of the Chief Magistrate and the High Court judge in assessing whether there was any reason not to return Mr. King to the United States.

(d) The correspondence between the Minister and Mr. King made it clear that the Minister had considered Mr. King's medical condition before arriving at his decision to return Mr. King.

(e) Based on the United States' authorities cited by Mr. King's counsel (Mr. Harris), the 'superseding indictment' filed against Mr. Stanford and others had no relevance to the validity of the original indictment against Mr. King which remained valid.

[15] The learned trial judge therefore dismissed the originating motion as well as the application for leave to apply for judicial review and made no order as to costs.

[16] Mr. King sets out in his notice of appeal the following grounds:

(1) The learned judge erred in treating and disposing of the matter before him as two proceedings: (1) an originating motion proceeding and (2) a judicial review proceeding, when there was a single proceeding before

him, namely an application for leave to bring a hybrid administrative law application.

(2) The learned judge erred in dismissing the application for leave to bring a hybrid administrative law application when it was arguable that the application for leave raised serious constitutional issues.

(3) The learned judge erred in dismissing the application for leave to bring a hybrid administrative law application by delving into the depth of the matter when all that was before him was an application for leave.

(4) The learned judge erred in failing to recognise that a violation of the Mutual Legal Assistance in Criminal Matters Treaty between the United States' Government and the Government of Antigua and Barbuda was illegal.

(5) The learned judge erred in failing to give a rectifying construction to the Extradition Act 1993 so as to avoid a manifest absurdity.

(6) The learned judge erred in dismissing the application when there was not yet before the court a properly filed or substantive fixed date claim form.

(7) The learned judge erred in deciding points of foreign law in the absence of expert evidence.

(8) The learned judge erred by relying on inadmissible evidence contained in an affidavit deposed by counsel appearing in the matter.

[17] Ground 6 was not argued at the hearing of the appeal and to my mind for good reason. It would have been an uphill task to succeed on such a ground having regard to counsel's contention in respect of the issuance of a further fixed date

claim, while at the same time contending for a rolled-up claim or as counsel for the appellant termed it "a hybrid administrative claim" by way of originating motion.

Grounds 1, 3 and 4 **– The judge's case management powers**

[18] These grounds concern the judge's exercise of his case management powers and will accordingly be dealt with together.

Appellant's submissions

[19] Counsel for Mr. King, Dr. David Dorsett, contends that the judge did not properly deal with the hybrid application that was before him and erred in law and in fact when he held that Mr. King did not have an arguable case for the grant of leave. This he says is because the trial judge elected to treat the matter as two separate applications and proceeding on a full hearing on both, rather than as a single rolled up proceeding. The gravamen of his complaint is that the judge embarked upon a full detailed review of the facts of the case rather than simply determining the question of whether there was an arguable case. He says that the test for arguability is to simply consider the grounds put forward in the application and have a general outline of the facts as presented by the applicant.

[20] As it pertains to ground four, Dr. Dorsett contends that the learned judge erred in law by failing to recognise that acts contrary to the Mutual Legal Assistance Treaty[4] were illegal and that there was therefore an arguable case for granting leave for judicial review on the ground of illegality and bad faith. Learned counsel pointed out that the Mutual Legal Assistance in Criminal Matters (Government of Antigua and Barbuda and the Government of the United States of America) Ratification Act 2000[5] ("the Mutual Legal Assistance Act") prescribes certain procedures that must be followed by the authorities of both the United States and Antigua and Barbuda as it relates to criminal matters. He argues

[4] Ratified by the Act No.12 of 2000 Mutual Legal Assistance in Criminal Matters (the Government of Antigua and Barbuda and the Government of the United States of America) Ratification Act 2000 Laws of Antigua and Barbuda.

[5] Ibid.

therefore that activities conducted contrary to the procedures thereby established would render the action(s) unlawful. On this basis he contends that: (i) the direct approach made by the United States' Securities and Exchange Commission ("SEC") to Mr. King as head of the FSRC was a failure of the US authorities to comply with the Mutual Legal Assistance Act and was thus an illegality; (ii) the decision of the US authorities to indict Mr. King for his denial of assistance to the SEC was an act of bad faith since Mr. King had lawfully denied assistance; and therefore (iii) the Minister should not have ordered Mr. King's return as the accusation against him was not made in good faith and in the interests of justice as provided for by section 14(2) of the Extradition Act 1993.

Respondents' submissions

[21] In countering Mr. King's contentions, Mr. Reginald Armour, SC for the respondents submits in summary that: (i) on the face of it, Mr. King's filed documents support the learned judge's finding that there were two separate but related claims before him – the originating motion and the application for leave for judicial review; (ii) by hearing the originating motion and application together, although addressing and ruling on each separately, the learned judge was exercising his discretion to case manage the matters before him as he saw fit; (iii) the learned judge's exercise of his case management discretion should not be lightly interfered with by this Court unless Mr. King can demonstrate that the judge was plainly wrong; and (iv) Mr. King's contention is pedantic and a second hearing (that is, a substantive judicial review hearing) will serve no useful purpose.

[22] In relation to Mr. King's contention that there was illegality arising from contraventions of the Mutual Assistance Act 2000, Mr. Armour, SC submits that this line of argument should not be entertained as, firstly, it is in essence a collateral attack on the committal order and Michel J's decision in which Mr. King was properly committed, for, inter alia, the offences of conspiracy to obstruct the SEC investigation and obstruction of the SEC investigation; secondly, it invites this Court to examine and assess impermissibly: (i) the evidence in a criminal cause or

matter and (ii) whether Mr. King has a good defence to these offences; and thirdly, without prejudice to those arguments, a review of the indictment reveals that the offences do not rely solely on Mr. King's refusal to provide information to the SEC, but on a combination of acts, including making or causing to be made false statements regarding Stanford International Bank's value, investment strategy and use/management of investor funds.

Discussion

[23] A useful starting point in considering the approach adopted by the learned trial judge on the hearing of the motion and the application for leave to bring judicial review is with the relevant rules of procedure.

[24] Part 56 of the CPR governs applications for leave to apply for judicial review and applications for constitutional relief. Rule 56.3 provides that an application for judicial review must, inter alia, be supported by an affidavit, state the grounds on which relief is sought and indicate whether an alternative form of redress exists. In relation to applications for constitutional relief, leave is not required. In order to seek this remedy, an applicant must file a fixed date claim form headed "Originating Motion" as required by rule 56.7(2). A supporting affidavit stating, inter alia, the constitutional provisions which have been allegedly breached must accompany the fixed date claim form. Rule 56.11 dictates that at the first hearing, the judge should give any directions that may be required to ensure the expeditious and just trial of the claim.

[25] Parts 25 and 26 of the CPR speak to the court's duty to actively manage its cases and provide the court with the power, among other things, to promptly decide which issues need full investigation at trial and accordingly disposing summarily of others; identify the issues at an early stage; dismiss or give judgment on a claim after a decision on a preliminary issue and try two or more claims on the same occasion.

The learned **judge's treatment of the originating m**otion

[26] Before the learned judge in the case at bar was a fixed date claim form headed "Originating Motion" which sought two things: (i) constitutional relief and (ii) leave to apply for judicial review. I already mentioned that the judge correctly dismissed the first application for leave contained within the fixed date claim for its failure to comply with CPR 56.3. Mr. King some three or more years later filed a free-standing application for leave containing the grounds on which he was relying together with an affidavit in support. In his complaint that the learned judge failed to treat the originating motion as a hybrid application, Dr. Dorsett in my respectful view is attempting to make a distinction without a difference between combining in one matter the claim for constitutional relief and the application for leave to apply for judicial review and hearing them together, versus the learned judge's decision to treat the claim for constitutional relief and the leave application as two separate matters but nonetheless hearing them over the same period together.

[27] It is clear from his judgment that the learned judge, based on the formulation of the issues by counsel for Mr. King, as well as his own understanding of the issues, found it unnecessary to separate the originating motion from the leave application. This in my view enabled the learned judge to better focus his mind on the issues relevant to the determination of each. He was entitled, pursuant to his case management powers under the CPR, to adopt such an approach if it facilitated an expeditious and just disposition of the matters. There had been a four-year delay in hearing the matter and the judge cannot be faulted for seeking to further the overriding objective by expeditiously handling the case and getting on with both matters at the same time. Mr. King suffered no prejudice by the court adopting this course of action. As a matter of fact, despite the undue delay the learned judge, to Mr. King's benefit, extended time in order to hear the leave application. Mr. King had an opportunity to fully deploy his case and the record shows that he participated fully.

[28] Mr. King's complaint that he has lost the opportunity of having a substantive hearing of his judicial review application because the learned judge determined the constitutional issues with finality is without merit. This complaint belies the manner in which the complaints were being made to overlap. At the hearing, the learned judge determined legal issues based on undisputed facts that were common to both applications. He was clearly of the opinion that he had received sufficient assistance from the parties which would enable him at that time to give a final ruling on the constitutional matters as he was empowered to do by Part 26. Furthermore, there is no evidence that Mr. King was prejudiced by this course of action, nor can it be reasonably contended that he was prejudiced. I am in agreement with learned Senior Counsel Mr. Armour that at the end of the day Mr. King accomplished what he sought to do, that is, to have a court hear and determine his application for leave for judicial review, as well as his claim for constitutional relief. I am satisfied that no basis has been shown warranting interference by this Court. I would therefore dismiss this ground of appeal.

Leave to apply for Judicial Review

[29] As mentioned above, there was a significant delay of over four years in bringing the application. However, as the learned judge had regard to "the draconian consequences of dismissal involving questions of liberty for [Mr. King], and the fact that the respondents were prepared not to oppose the application for leave", he did not bar the second freestanding application for leave on the discretionary ground of delay, but instead considered it on its merits.

The learned judge's findings

[30] The provisions of the section 14 of the Extradition Act which bears on this aspect of the matter are in the following terms:

> "(1) Where a person is committed under section 11 and is not discharged by order of the High Court, the Minister may by warrant order him to be returned unless his return is prohibited, or prohibited for the time being, by this Act or the Minister decides under this section to make no such order in his case.

(2) Without prejudice to his general discretion as to the making of an order for the return of a person to a foreign state or Commonwealth country-

(a) the Minister shall not make an order in the case of any person if it appears to the Minister in relation to the offence, or each of the offences, in respect of which his return is sought, that-

(i) by reason of its trivial nature; or

(ii) by reason of the passage of time since he is alleged to have committed it or to have become unlawfully at large, as the case may be; or

(iii) because the accusation against him is not made in good faith in the interests of justice,

it would, having regard to all the circumstances, be unjust or oppressive to return him; and

(b) the Minister may decide to make no order for the return of a person accused or convicted of an offence not punishable with death in Antigua and Barbuda if the person could be or has been sentenced to death for that offence in the country by which the request for his return is made."

[31] Having considered the merits of Mr. King's application for leave for judicial review, the learned judge in his judgment ruled that a minister exercising powers of return under section 14(2)(a) of the Extradition Act is not required in all cases to examine the quality of evidence on which committal for extradition was based and that such examination should only be in rare cases and for good cause. He said that in the normal case, the Minister would act properly if he chooses to rely on the court's analysis of the evidence to validate a finding that the underlying accusation is justified. The learned judge noted that in this case, the offences for which Mr. King was committed for extradition was examined not only by the magistrate, but also by a High Court judge. He referred to the case of R v Secretary of State for the Home Department ex p. Susan Hagan and Sally Anne Croft[6] in which Russell LJ explained that:

[6] Unreported 15th December 1993, p. 11-12E.

> "… there is no obligation on the part of the Home Secretary to reconsider the facts presented to the Magistrate and it is no part of his function to review the decision of the Magistrate, or for that matter in this case the Divisional Court. On the contrary, the Secretary of State is entitled to have regard to the fact that the Magistrate and the Divisional Court have found a prima facie case to exist. They are relevant factors in his decision-making process."

This passage was quoted with approval in R (on the application of Allison) v Secretary of State for the Home Department[7] where Silber J stated that:

> "… the Secretary of State has a wide and unstructured discretion to take into account such matters as he regards as suitable in deciding how to react to representations on defences to charges in respect of which the Magistrate has found a prima facie case. The width of this discretion means that the Secretary of State is entitled to consider the representations of an applicant on the basis that the Magistrate has satisfied himself that, as a matter of law, there is a prima facie case made out against the person, whose case he is considering".

[32] The learned judge in the case at bar accordingly held that having regard to the conclusions of magistrate and the High Court judge, there is no arguable case that the Minister ought to, in the exercise of his judgment, personally examine afresh the quality of the evidence. In my view, he committed no error in so holding.

[33] The judge further ruled that there was no arguable case that the extradition request was tainted by bad faith. He was of the view that there was no merit to contentions that the US Government had engaged in improper ex parte communication with the trial judge in the USA who is expected to try Mr. King should he be returned. He also found there is no arguable case that the US Government had acted improperly by failing to disclose the superseding indictments and that had the superseding indictments been presented to him it would have made a difference to his decision-making, as it has not been shown to be relevant. I can find no error in his conclusions based on the evidence which was before him and his application of the relevant principles of the law to those facts.

---

[7] [2001] EWHC Admin 506, para. 17; [2001] All ER (D) 41 (Jul).

[34] The learned judge also held that there was no arguable case in respect of the complaint that the fact that certain conspiracy charges were omitted from the superseding indictments meant that the charge for conspiracy against Mr. King had lost its basis, as it is no defence to a conspiracy charge in Texas that one or another of the co-conspirators have not been prosecuted. He also found there is no arguable case that the superseding indictments against persons charged with Mr. King on the original indictment, had caused the dismissal of, or nullified the original indictment, and thus the underlying accusations against Mr. King. I agree.

[35] The learned judge found further that there was no arguable case that the Minister had not taken relevant matters into account by not considering whether his decision to return Mr. King was constitutionally sound, as well as whether Mr. King had further rights of appeal. He stated that there was nothing preventing Mr. King from taking steps to exercise any of the rights he believes he had and noted that Mr. King did not exercise his right to make an application to the Court of Appeal to review his committal. The learned judge pointed out that the Extradition Act is very clear that once habeas corpus is refused and no possibility of appeal exists, the Minister may proceed to act. In Mr. King's case, the Court of Appeal actually ruled that there was no right of appeal and it was therefore unnecessary for the Minister to consider whether Mr. King had any pending right of appeal. Furthermore, the Minister acted quite properly by waiting until this 'appeal' to the Court of Appeal was disposed of before making the order of return. Based on the foregoing, he found that the Minister's decision to order the return was therefore not bad in law for being an abuse of power or an abuse of process. I discern no flaw in this reasoning.

Mr. King's challenge

[36] Mr. King now challenges the learned judge's refusal to grant leave to review the decision of the Minister on the basis that he had an arguable case: firstly, that the Minister's actions were unconstitutional and in breach of Mr. King's right to procedural fairness and right of access to the court; secondly, that the Minister's

actions were illegal and in breach of his duty to sufficiently acquaint himself with relevant information, fairly presented and to have regard to all relevant information; and thirdly, that the same decision was unreasonable and irrational, in that he failed to have regard to all relevant information.

The central issue

[37] The central issue that arises in relation to this aspect of the appeal is whether the learned judge erred in the exercise of his discretion when he found that Mr. King did not have an arguable case and proceeded to dismiss his originating motion and refused to grant him leave to apply for judicial review.

Discretion and the appellate purview

[38] The purview of this Court in an appeal against the judge's exercise of his powers/discretion is to determine whether there is any basis for interfering with the trial judge's decision. The principles upon which an appellate court will interfere with the exercise of discretion are well settled. They have been oft repeated, applied and examined in numerous judgments of this Court. In the locus classicus Michel Dufour et al v Helen Air Corporation Ltd et al[8] Sir Vincent Floissac CJ, stated:

> "We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate Court is satisfied: (1) that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and; (2) that as a result of the error or the degree of the error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[39] In short, the function of an appellate court in such instances is not to exercise an independent discretion or to interfere with the learned judge's decision simply because this Court would have exercised the discretion differently. This Court

[8] (1996) 52 WIR 188.

would defer to the decision of the learned judge and would only intervene where he did not properly exercise his discretion by error of law or misapprehension of the facts.

The standard required for leave

[40] An applicant for leave is required to show that there is an arguable case, one that is not frivolous or hopeless. This is to prevent busy-bodies from wasting the court's time with misguided or trivial complaints. In the Privy Council decision of The Honourable Satnarine Sharma v Carla Browne-Antoine and Others,[9] Lords Bingham and Walker elucidated the test for the grant of leave in the following terms:

> "The ordinary rule now is that the court will refuse leave to claim judicial review unless satisfied that there is an arguable ground for judicial review having a realistic prospect of success and not subject to a discretionary bar such as delay or an alternative remedy: ... But arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application."

This requirement is also stated in the White Book 2007: Civil Procedure,[10] in relation to comparable rules in the English jurisdiction. Section 54.4.2 states:

> "Permission will be granted only where the court is satisfied that the papers disclose that there is an arguable case that a ground for seeking judicial review exists which merits full investigation at a full oral hearing with all parties and all the relevant evidence, (R v Legal Aid Board Ex p. Hughes (1992) 5 Admin L. Rep. 623".

[41] Having carefully read the learned judge's decision and having thoroughly examined the written and oral submissions of both parties and the evidence placed before him, I am of the considered opinion that the learned judge was correct in refusing the grant of leave for judicial review. The learned judge considered all the issues before him and looking at the matter in the round he weighed the actions of the Minister against the relevant provisions of the Act in order to determine whether they were in conformity with the Act. There is indeed

[9] [2006] UKPC 57, para. 14.
[10] Lord Justice Brooke (ed.) vol. 1, (Sweet and Maxwell, 2007).

no arguable case that the Minister's decision is bad in law as in each instance complained of, the actions taken by the Minister fell squarely within the provisions of the Act.

[42] Furthermore, the criticism levied by Dr. Dorsett against the learned judge in relation to the length of his judgment as an indication that he did not properly treat with the application for leave to file judicial review is of no merit. As was stated in Sharma v Browne-Antoine, "… arguability cannot be judged without reference to the nature and gravity of the issue to be argued. It is a test which is flexible in its application".[11] It does not suggest that a judge adopts a superficial approach to the complaints in his examination of the matters which are put forward as giving rise to the complaint. Rather, he must satisfy himself as to whether a full investigation at a full trial is merited. A proper evaluative exercise must be carried out.

[43] The test in Sharma was applied by Sykes J in the Jamaican decision of Regina v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited).[12] At paragraphs 57 and 58 of his judgment, the learned judge said:

> "There must be in the words of Lord Bingham and Lord Walker, 'arguable ground for judicial review having a realistic prospect of success'.... The point then is that leave for application for judicial review is no longer a perfunctory exercise which turns back hopeless cases alone. Cases without a realistic prospect of success are also turned away. The judges, regardless of the opinion of the litigants, are required to make an assessment of whether leave should be granted in light of the now stated approach.' …an applicant cannot cast about expressions such as 'ultra vires', 'null and void', 'erroneous in law', 'wrong in law', 'unreasonable' without adducing in the required affidavit evidence making these conclusions arguable with a realistic prospect of success. These expressions are really conclusions".

I associate myself with these observations by Sykes J.

---

[11] [2006] UKPC 57, para. 14.

[12] Claim No. 2009 HCV04798 Supreme Court of Jamaica (delivered 23rd October 2009, unreported).

[44] In the instant case, the learned judge looked at the nature of each complaint made by Mr. King in order to make an assessment as to whether it was an arguable ground against the Minister's decision. This Court can find nothing to suggest that the learned judge did not correctly apply the arguability test and sees no reason which justifies interfering with the learned judge's decision. I would therefore dismiss this ground of appeal.

Challenge to the legality of **the Minister's** actions under the Mutual Legal Assistance Act

[45] Sections 8(9)(c) and 8(9)(d) of the Act provide that a challenge to a committal order may be carried out through either an application to the High Court for habeas corpus, or by an application to the Court of Appeal for a review of the committal order respectively. Section 15 of the Act expressly provides for judicial review against the Minister's order of return. The substance of Mr. King's complaint in relation to obstruction charges laid down against him by the SEC is that he cannot be lawfully indicted for same as his conduct was not unlawful under Antigua and Barbuda's laws. Essentially, Mr. King is seeking to challenge the legality of the committal order in relation to the obstruction charges.

[46] However, Mr. King did not mount this challenge through the manner prescribed by section 8(9)(d) of the Act by applying to the Court of Appeal for review of the committal order. Instead, he applied solely to the High Court for a discharge and dismissal of the committal order and for leave to apply for a writ of habeas corpus. In that application, Mr. King challenged the lawfulness of his committal on the obstruction charges on the same basis that he is now attempting to argue before this Court; that is, his conduct was not unlawful under Antigua and Barbuda's laws.

[47] It is clear that both the Chief Magistrate and the High Court considered that an overwhelming prima facie case had been made out against Mr. King and formed the view that there was a sufficient legal and evidential basis to justify his committal. This Court is quite cognisant of the fact that Mr. King attempted to

overturn the High Court's decision by way of appeal to this Court, which appeal was of course denied as there was no right of appeal in a criminal cause or matter. Having failed to exercise his right to apply to the Court of Appeal to have the committal order reviewed, and having not presented any fresh evidence to demonstrate that there is a different factual basis on which this Court may revisit the lawfulness of the committal order, Mr. King cannot now through this appeal mount a collateral attack on the committal order. To do such is an abuse of the process of the court.

[48] It is well settled that a party is not permitted to re-litigate an issue or matter simply because he wishes to present a different argument. The renowned House of Lords decision of Hunter v Chief Constable of the West Midlands Police,[13] Lord Diplock addressed the issue of a collateral attack in this way:[14]

> "My Lords, collateral attack upon a final decision of a court of competent jurisdiction may take a variety of forms … But the principle applicable is, in my view, simply and clearly stated in those passages from the judgment of A L Smith LJ in *Stephenson v Garnett [1898]* 1 QB 677, 680-681 and the speech of Lord Halsbury LC in *Reichel v Magrath* (1889) 14 App Cas 665, 668 which are cited by Goff LJ in his judgment in the instant case. I need only repeat an extract from the passage which he cites from the judgment of A L Smith LJ:
>
> > '... the court ought to be slow to strike out a statement of claim or defence, and to dismiss an action as frivolous and vexatious, yet it ought to do so when, as here, it has been shewn that the identical question sought to be raised has been already decided by a competent court.'
>
> The passage from Lord Halsbury's speech deserves repetition here in full:
>
> > 'I think it would be a scandal to the administration of justice if the same question having been disposed of by one case, the litigants were to be permitted by changing the form of the proceedings to set up the same case again.'"

[13] [1982] AC 529.
[14] Ibid at p. 542.

Lord Shaw in the Privy Council case of Hoystead v Commissioner of Taxation[15] stated the principle as follows:

> "Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle."[16]

[49] It is clear that in the instant case Mr. King is attempting to impermissibly re-litigate the same issue that has already been decided by a competent court via a different avenue. In order to determine whether there is merit to Mr. King's contention that the charge against him was made in bad faith, this Court would be required to engage in an enquiry and then make a finding that his conduct was in fact lawful. I am in complete agreement with Mr. Armour, SC that making such a finding will in turn require this Court to examine and assess the evidence in circumstances where it has no jurisdiction to hear an appeal in a criminal cause or matter.

[50] On another jurisdictional issue, this Court also wholly agrees with learned Senior Counsel Mr. Armour that the determination of whether Mr. King's actions were a lawful response to the SEC is an issue which ought properly to be left to the criminal court or jury hearing the indictment. The cross-examination of witnesses at trial is critical to the proper examination and assessment of the facts on which the indictment is based, as well as those on which Mr. King mounts his defence. Indeed, if this Court were to engage in making a determination on the lawfulness of Mr. King's actions, it would be usurping the role of the criminal court or jury.

[51] In the absence of fresh evidence, it would be most inappropriate for this Court to revisit the lawfulness of the committal order in respect of the obstruction charges

[15] [1926] A.C. 155.
[16] ibid at pp.165-166.

against Mr. King. I would accordingly also dismiss this ground of appeal as an abuse of process.

Grounds 2 and 5 – Access to justice

[52] The essence of Mr. King's complaint in both these grounds of appeal concerns unequal access to justice via an appeal to the Court of Appeal after having undergone judicial review proceedings in the High Court.

Appellant's submissions

[53] In his second ground of appeal, Dr. Dorsett contends that the learned judge erred in dismissing the application for leave when it was arguable that it raised serious constitutional issues, including the issue that the requesting state has a right of appeal to the Court of Appeal after judicial review proceedings in extradition matters, while the party being sought does not have such a right. This, Dr. Dorsett argues, is in breach of Mr. King's right to protection of the law. In his written submissions, he complains that the Minister's actions in issuing the warrant for Mr. King's committal also contravened his right to protection of the law guaranteed by sections 3, 5, 14 and 15 of the Constitution. He argues that as the Minister's actions and decisions are based on unconstitutional provisions of the Act, it follows that the Ministers actions are liable 'to be tainted with unconstitutionality'. He submits that the presence of serious constitutional issues meant that the application presented an arguable case and accordingly leave should have been granted.

[54] In response, Mr. Armour, SC points out to the Court that Mr. King included in his leave submissions arguments on the alleged breach of his constitutional rights, but noted that his notice of appeal does not contain any challenge to the learned judge's findings on the alleged breach of his constitutional rights nor any grounds in support of same. Learned Senior Counsel submitted that as Mr. King has not received the permission of the Court, it is not open to him to raise or pursue grounds which are not contained in his notice of appeal.

Discussion

[55] I am in agreement with Mr. Armour, SC on this point. In his notice of appeal, Mr. King's focus in respect of this ground was the judge's error in refusing to grant leave on the basis of arguability. He did not challenge the specific findings of the learned judge in relation to alleged constitutional rights breaches nor did he provide any grounds in support of the challenge. He cannot now in his submissions seek to raise constitutional issues that were not set out in his notice of appeal. CPR 64.4(8) states that the "appellant may not rely on any ground not mentioned in the notice of appeal without the permission of the court". No application has been made before this Court on behalf of Mr. King seeking permission to raise this additional ground of appeal and I would therefore not entertain it.

Rectifying construction to section 8(9) of the Extradition Act

[56] Dr. Dorsett also argues that the learned judge erred by failing to give a rectifying construction to section 8(9) of the Act in order to avoid a manifest absurdity. Section 8(9)(d) of the Act provides:

> "In this Act "appropriate authority" means –
> (a) the Minister;
> (b) the court of committal;
> (c) the High Court on an application for habeas corpus;
> (d) the Court of Appeal on an application for review of the order of the committal."

Dr. Dorsett contends that section 8(9)(d) should be read with the words "appeal from":

> "In this Act "appropriate authority" means –
> (a) the Minister;
> (b) the court of committal;
> (c) the High Court on an application for habeas corpus;
> (d) the Court of Appeal on [appeal from][17] an application for review of the order of the committal."

[17] My insertion.

[57] Dr. Dorsett posits three reasons why this rectifying construction should be adopted. Firstly, he submits that the Extradition Act 1993 was intended to mirror the UK Act and extradition regime. He points out that the UK Act does not provide for judicial review to be undertaken by the Court of Appeal and is of the view that having the Court of Appeal serve as a court of first instance engaged in judicial review would "turn the law on its head and bring unparalleled confusion and manifest absurdity into the law of judicial review".

[58] Secondly, Dr. Dorsett argues that the UK extradition regime allows the person being sought, a right of appeal (with leave) to the UK's apex court. He submits that it is on account of a drafting error that the Act does not provide an avenue for the person being sought to have access to Antigua and Barbuda's apex court. Learned counsel opines that as currently drafted, section 8(9)(d) of the Act is nonsensical as an appeal to the Court of Appeal by the requesting state only arises when there is no order of committal.

[59] Thirdly, learned counsel posits that the substance of the provision which Parliament would have made, had the error been noticed, is certain, as the rectifying provision entails only a slight modification of the current provision. He submits that rectification by insertion of the words "appeal from" accomplishes the intended purpose of the Act and avoids absurdity of the Court of Appeal serving as a court of first instance performing judicial review functions.

[60] Senior Counsel Mr. Armour argues that while there are principles of law which allow a court to employ a rectifying construction to correct drafting errors and/or ambiguities which could lead to absurdity, Mr. King's contention in this case is misconceived when one has regard to Parliament's intention.

[61] Mr. Armour SC submits that a comparison of the Act and the now repealed UK Extradition Act[18], in particular sections 8(9)(d) and 6(9), respectively, shows that

[18] Extradition Act 1989, United Kingdom.

Parliament did not intend to replicate the UK Extradition Act as posited by Dr. Dorsett. He points out that section 6(9) of the UK Act does not contain a right of appeal to the Court of Appeal but rather restricts the review process to the High Court. Section 6(9) of the UK Act reads:

> "In this Act 'appropriate authority' means –
> (a) The Secretary of State;
> (b) The court of committal;
> (c) The High Court or High Court of Justice on an application for habeas corpus or for review of the order of committal."

[62] He has brought to the Court's attention the fact that the Parliament of Antigua and Barbuda when drafting the comparable section, section 8(9) made three noteworthy changes: firstly, the right to review the order of committal from the High Court was removed; secondly, that right was vested in the Court of Appeal; and thirdly, a fourth subsection was created to so do.

[63] Learned Senior Counsel submits that Dr. Dorsett's contention that it is nonsensical for the Act to allow an aggrieved person to bypass the High Court and appeal directly to the Court of Appeal is misguided and reminds this Court that in judicial review proceedings of this nature, what is being reviewed is a judicial act by a lower court, namely, a committal order by the Magistrates' Court.

Discussion

[64] It is trite that Parliament is presumed to know the law when passing legislation. Professor Ruth Sullivan in Driedger on the Construction of Statutes[19] stated that:

> "The legislature is presumed to know its own statute book and to draft each new provision with regard to the structures, conventions, and habits of expression as well as the substantive law embodied in existing legislation. … It is presumed that the legislature does not intend to contradict itself or to create inconsistent schemes."[20]

[65] Parliament would therefore have been well aware of the pre-existing right of appeal directly from the Magistrates' Court to the Court of Appeal which was

[19] Ruth Sullivan, Driedger on the Construction of Statutes, (3rd ed., Butterworths, 1994).
[20] ibid p. 288.

limited to a power of review. Learned Senior Counsel Mr. Armour properly reminds this Court that an aggrieved person bypassing the High Court to the Court of Appeal is not unforeseen in this jurisdiction. Section 167 of the **Magistrate's** Code of Procedure Act[21] permits appeals from the Magistrates' Court directly to the Court of Appeal in cases of magisterial convictions. Section 170 of the same Act restricts the general right of appeal to errors of law, unreasonableness, fraud, corruption or bias on the part of a Magistrate. Indeed, the right of appeal provided by section 167 of the **Magistrate's Code of** Procedure Act and the statutory right of review under section 8(9) of the Extradition Act vests a similar right in an aggrieved person. I am in agreement with Mr. Armour, SC that this right is akin to a power of review and therefore it is likely that it was Parliament's intention to confer the same power of review on the Court of Appeal in respect of a Magistrate's committal order. This does not mean, as Dr. Dorsett contends, that the Court of Appeal is acting a first instance judicial review court.

[66] In **Attorney General's Reference**[22] this Court in considering whether a rectifying construction should be adopted in relation a section of St. Lucia's Constitution referred to the House of Lords decision of Inco Europe Ltd. and Others v First Choice Distribution (a firm) and Others[23] where Lord Nicholls of Birkenhead, in construing a provision of the UK Arbitration Act 1996 concerning rights of appeal to the Court of Appeal stated as follows:

> "... It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, Statutory Interpretation, 3rd ed. (1995), pp. 93-105. He comments, at p. 103:
>
> > 'In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role.'

[21] Cap. 255, Revised Laws of Antigua and Barbuda 1992.
[22] SLUHCVAP2012/0018 (delivered 24th May 2013, unreported), para. 8.
[23] [2000] 2 ALL ER 109, p. 115.

> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see per Lord Diplock in Jones v. Wrotham Park Settled Estates [1980] A.C. 74, 105-106."

[67] Dr. Dorsett's contention that section 8(9) of the Act reflects a legislative error is therefore unsustainable. It is clear that Parliament did not intend to replicate the UK Act. Section 8(9) of the Act represents a deliberate drafting change in view of allowing the right of review of the committal order to be made directly to the Court of Appeal. No absurdity is thereby created. In the circumstances, this Court is not of the view that a rectifying construction is required in relation to section 8(9) of the Act and would accordingly dismiss this ground of appeal.

Reliance on Texas criminal law in the absence of expert evidence

[68] Mr. King contends that the learned judge erred in deciding points of foreign law in the absence of expert evidence. He says that he had regard to the Texas Criminal Code and American case law placed before him and referred to by counsel on both sides in relation to the effect of the 'superseding indictments', when there was no expert evidence on the point.

[69] Dr. Dorsett refers to Green v Saint Jean[24] in which this Court cited Dicey and Morris[25] in considering the mode of proof required for proving foreign law. In the text, the learned authors state that it is well settled that foreign law must in general

[24] DOMHCVAP2012/0001 (delivered 11th March 2013, unreported).
[25] Sir Lawrence Collins, Dicey, Morris & Collins: The Conflict of Laws (14th edn., Sweet & Maxwell 2006).

be proved by expert evidence and not merely by citing foreign decisions. Dr. Dorsett submits that in the circumstances, expert evidence underlies the need for there to be a full and proper hearing upon the issuance of directions at a first hearing as prescribed by Part 56 of the CPR.

[70] Mr. Armour, SC, in response, submits that this ground of appeal is unsustainable because: firstly, the Texas Criminal Code and American case law is just one of the factors which the learned judge took into consideration, in passing, in arriving at his decision that the superseding indictment did not render the indictment against Mr. King nugatory; secondly, the substantive basis on which the learned judge arrived at his decision was with reference to case law cited by Mr. King's counsel and; thirdly, Mr. King has not shown that the learned judge's omission to invite submissions on the Texas Criminal Code before ruling, substantially affected the merits of the case before him and/or that the application of federal law would have led to a different outcome before the learned judge.

Discussion

[71] This point can be dealt with briefly. It is the most basic premise of law that he who asserts must prove. Mr. King introduced to the court the evidence concerning the superseding indictments and foreign law and therefore the onus of proving his assertion rested on him. Mr. King had the duty to provide the expert on foreign law for the court's assistance. He failed to do so and did not discharge his burden by adducing sufficient evidence to prove the effect of the superseding indictment on the original indictment. In my view, it is therefore unfair to level this criticism at the judge and more so when one has regard to the manner in which the matter was placed before him. In any case, the Texas Criminal Code was just one bit of the material considered by the judge and he did so in passing. After having examined all the evidence, the learned judge found the superseding indictments to be irrelevant and ruled that they did not render the original indictment against Mr. King nugatory. In the circumstances, I would also dismiss this ground of appeal.

Admission of evidence from counsel

[72] In respect of this ground of appeal, Dr. Dorsett submits that in arriving at his decision to refuse Mr. King's application for leave, the learned judge erred in admitting the affidavit evidence of the DPP in relation to the superseding indictment because he was one of the counsel appearing before the judge.

[73] In response, Mr. Armour, SC concedes that while it was contrary to good practice for counsel to swear an affidavit while appearing before the learned judge, he opines that the criticism of the judge is unjustified in this case. Learned Senior Counsel submits that a review of the judge's decision shows that although he made reference to the evidence of the DPP, it was not a determining factor in respect of the legal effect of the superseding indictments, and the learned judge instead examined the legal effect of the superseding indictments with reference to the case law cited and relied upon by Mr. King's counsel.

Discussion

[74] It is well settled that it is most undesirable for counsel with conduct of a matter or an application to swear an affidavit in that matter. It essentially equates to giving evidence from the bar table – an improper and completely inappropriate practice. Lewis CJ in Casimir v Shillingford and Pinard[26] explained the fact that "it puts the court which has to pronounce upon the acceptability of the affidavit in an embarrassing position, when the person who has made this affidavit as solicitor appears before it in the same cause as counsel".

[75] However, having reviewed the judgment of the learned judge, I am not of the view that this affidavit was given any significant weight by the learned judge in arriving at his decision in relation to the superseding indictments. It is clear that in making his decision the learned judge primarily focused on other factors, particularly the fact that the March 2017 application concerning the superseding indictments

[26] (1967) 10 WIR 269.

concerned information which would have been available to Mr. King with reasonable due diligence, and the fact that Mr. King was raising points in relation to the first indictment which he ought to have raised earlier in the proceedings. The learned judge rightly found these actions to be an abuse of process and ruled that in any case these issues did not provide him with a basis to find an arguable case to allow judicial review of the Minister's decision. This ground of appeal is unmeritorious.

Conclusion

[76] For the reasons given, I would dismiss the appeal. Being mindful of the provisions of CPR 56.13(6), I would order that Mr. King bears the costs of the respondent associated with the filing of all evidence and applications related to the superseding indictments which were found to be an abuse of process, such costs to be assessed unless agreed within 21 days. Otherwise, I would make no order as to costs.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar