HOUSE OF ASSEMBLY
SPECIAL SELECT COMMITTEE
REPORT

26th May 2022

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APPENDICES

BRITISH VIRGIN ISLANDS COMMISSION OF INQUIRY

Under section 2 of the Commissions of Inquiry Act 1880 (Chapter 237 of the Revised Laws of the Virgin Islands) and in an instrument dated 19 January 2021, the former Governor, His Excellency Augustus Jaspert, appointed The Rt Hon Sir Gary Hickinbottom as sole Commissioner in respect of a full, faithful and impartial inquiry into whether there was information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public, may have taken place in recent years; if there were such information, to consider the conditions which allowed such conduct to take place and whether they may still exist; and, if appropriate, to make independent recommendations with a view to improving the standards of governance and the operation of the agencies of law enforcement and justice in the Territory of the Virgin Islands.

Under the Instrument of Appointment, Sir Hickinbottom was required to prepare and submit a written Report to the Governor within six (6) months from the commencement of the Inquiry. For various reasons, which are addressed in the report, it proved impossible to meet either that date or the extended date of 19 January 2022; and, by an Instrument dated 10 January 2022, an extension was granted for the period for submission of the Report on 19 April 2022.

After his appointment, Sir Hickinbottom brought in a team of lawyers from the United Kingdom to assist him in his inquiry. These comprised of: Bilal Rawat, a barrister called to the bar of England and Wales in 1995; Andrew King, a solicitor admitted in England and Wales in 2009; and Rhea Harrikissoon, a solicitor admitted in England and Wales in 2012. **None of which were admitted as legal practitioners in the Territory of the Virgin Islands.**

LEGAL PROCEEDINGS
CLAIM NO: BVIHCV 2021/0210

27 August, 2021

By Claim No: BVIHCV 2021/0210, the then Speaker of the House of Assembly, Honourable Julian Willock, brought an injunction as the claimant, seeking to restrain the defendants Mr. Rawat, Mr. King and Ms. Harrikissoon from acting as barristers or solicitors in the Commission of Inquiry, contrary to sections 18(1) and (2) of the Legal Profession Act 2015, unless and until they were admitted as BVI legal practitioners. Sir Hickinbottom and the Attorney General were also listed as a defendant.

In a judgment dated 27th August 2021, His Lordship Justice Jack (Ag.) ("Justice Jack") addressed the issue of Mr. Willock's standing to bring the action. He surmised that Mr. Willock appeared to be bringing the claim as part of his public duties as Speaker of the House of Assembly, though the papers filed did not identify the statutory basis on which Mr. Willock was acting. The learned judge opined that permission is required for a claimant to bring such proceedings and also found that Mr. Willock had not yet requested permission from the Attorney General, before bringing the proceedings. The matter was adjourned to 2nd September 2021 to allow Mr. Willock to make some amendments to the claim.

2 & 13 September, 2021

Following the judgment of 27th August 2021, on 1st September 2021 the claimant served a notice of dis-continuance, however the defendants were already finalizing and filing their skeleton arguments in opposition to the injunction application. Justice Jack decided to treat the 2nd September hearing as one, with respect to any consequential costs orders. The first four defendants (Hickinbottom, Rawat, King and Harrikissoon) served a costs schedule claiming $71, 388.59 and the Attorney General served a schedule claiming $6, 084.00. In each case, further costs in respect of the hearing on 2nd September and work subsequent thereto would also have been incurred.

Following submissions from counsel for the claimant, which was made on two bases, the first was that the action was an administrative action and that it was in the public's interest that it be brought: The learned judge rejected that argument. He held that the claim is not an administrative action, but that even if it were, the claimant had acted unreasonably and would be liable for costs pursuant to Civil Procedure Rules (CPR) 56.13(6). The second basis was that since the BVI Government was paying claimants legal costs and would pay any costs order made against him, the Court should not make an order moving money from one Government pocket to another. The learned judge found the evidence as to the funding arrangements of the claimant unclear and allowed the claimant an opportunity to explain the position. The learned judge ordered that by 4 pm on Tuesday 14th September 2021, the claimant and a person with knowledge of the facts from Silk Legal(BVI) Inc. each make, swear and file an affidavit giving

evidence of the specific requested information. Once this further information is filed, a decision would be made on whether a determination of costs could be reached, or whether to invite further submissions.

28 & 30 September, 2021

Upon review of the contract of retainer between Silk Legal (BVI) Inc and the Speaker of the House of Assembly, the learned judge found that the client to the contract was indeed the Government of the Virgin Islands. He found that, amongst other things, Clause 7(iv) of the contract does not included in Silk Legal's work in the proceedings at hand, there was no evidence that the then Premier or anyone else able to vary the contract, approved any variation on behalf of the Government, the variation was not in writing and had never been (and would never have been) approved by the Attorney-General and there was no express term, whereby the Government of the Virgin Islands agreed to indemnify the claimant against adverse costs orders.

Accordingly, the learned judge ordered that the claimant pay the defendants' costs.

It must be noted that this decision was made public and many persons agreed with it, notwithstanding the details of the case were not known. The then Premier, in his wisdom, thought it best to carry out an investigation into the events leading up to the judge making this decision. This was the genesis of the creation of the Select Committee to objectively look into this matter and report on it.

Resolution of Appointment of Special Committee (No. 19 of 2021)

On 4 November 2021, the House of Assembly passed a resolution to appoint a Special Committee, with no more than five (5) members but no less than three (3), to consider and report as to which of the following recommendations is to be made to the House of Assembly.

WHEREAS a Commission of Inquiry into Governance in the Virgin Islands was announced by the Governor of the Virgin Islands and the United Kingdom Secretary of State in January 2021, and the House of Assembly and its Members have been recognized as participants in the Commission of Inquiry and have been called to give evidence to the Commission of Inquiry, which proceedings are taking place in the Territory;

WHEREAS it is an offence punishable on summary conviction under the Supreme Court Act and Legal Profession Act of the Virgin Islands for any person who is not entitles as a legal practitioner to, amongst other things, make use of any name, title or description implying that he or she is entitled to be recognized to act as a legal practitioner in the Virgin Islands;

WHEREAS the said laws apply to all persons whether they belong to this Territory or are visitors;

WHEREAS certain person, without having been enrolled in the Virgin Islands as legal practitioners, may have been engaged as such by the said Commission of Inquiry currently taking place in the Territory;

WHEREAS the Honourable Speaker of this Honourable House commenced an action in his official capacity to prevent those said persons possibly acting as legal practitioners in contravention of the aforesaid laws;

WHEREAS as a result of a procedural technicality, the action commenced by the Honourable Speaker had to be discontinued, and as a result of the discontinuance, costs were awarded against the Honourable Speaker;

WHEREAS the said attorneys have since belatedly applied to the High Court to be admitted to practice as Solicitors in this Territory, which applications remain pending, and by making such applications it substantiates the fact that those persons may have been practicing law in the Virgin Islands contrary to the requirements of the laws of the Territory at the time the Honourable Speaker filed the matter in the courts;

WHEREAS following consultation with the Members of the Government's caucus it was revealed that discussions were held with select Honourable Members and while it was implied that approval was given to the Speaker to file an injunction against the persons who were alleged to be practicing law in the Territory in breach of the laws of this jurisdiction, however indeed there were no expressed permission by the House of Assembly;

AND WHEREAS having acted in his official capacity as Speaker there are three (3) possible considerations that could be determined by the House of Assembly, namely;

a) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is deemed warranted and with merit and as a result the payment of costs would be approved by the House of Assembly;

b) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is deemed warranted and with merit but the payment of costs should not be approved by the House of Assembly; and

c) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is not deemed warranted and is without merit and as a result there should be no consideration of the matter by the House of Assembly.

1. The Committee submit its Report to the House in no more than two (2) months on which of the above recommendations should be adopted by this Honourable House.

2. The Members of the Special Select Committee are:

   Hon. Mark Vanterpool;

   Hon. Julian Fraser;

   Hon. Vincent Wheatley;

3. The quorum of the Special Committee will be two.

Minutes of Two Meetings

1. **Friday, 19th April 2022**

Present:	Hon. Vincent Wheatley	Chairman
	Hon. Mark Vanterpool	Member
	Ms. Phyllis Evans	Secretary
Absent:	Hon. Julian Fraser	Member
In attendance:	Hon. Julian Willock	Speaker

2. **Friday, 6th May 2022**

Present:	Hon. Vincent Wheatley	Chairman
	Hon. Mark Vanterpool	Member
	Ms. Phyllis Evans	Secretary
Absent:	Hon. Julian Fraser	Member
In attendance:	Hon. Neville Smith	Deputy Speaker
	Hon. Dawn Smith	Attorney General
	Mrs. Fiona Forbes-Vanterpool, International Relations Counsel	

Honourable Speaker's Testimony

1. Prior to the meeting the Chairman formulated a series of questions for which the Speaker gave written responses.

2. At the meeting the Speaker gave a summary of the legal proceedings:

   i. The Speaker indicated that he would like the record to reflect the injunction which must be taken in context as part of the whole legal strategy that was employed by the House of Assembly.

   ii. Firstly, the Speaker stated that the House of Assembly made a decision to seek legal counsel for Members which was agreed to by all Members that was made via a vote.

   iii. Secondly, he stated that the lawyers of SILK had discovered that the three lawyers for the COI were engaged in work illegally in the British Virgin Islands. This was further discussed with Members about filing objections. It was agreed, that the Deputy Speaker and the Speaker file an objection to the application as they were working four months later. He indicated that while the Attorney General did not object, she agreed in writing to a senior member of the Bar indicating that the lawyers were working illegally in the BVI but she made it clear that she did not object.

   iv. After the objection application was filed by the Speaker and Deputy Speaker, the COI went on break, therefore Judge Vicki – Ann Ellis set a date to have that the object hearing would have been heard on 26 October, 2021. Two weeks later the COI announced that they would resume their hearings in September.

   v. The Speaker and Deputy Speaker were advised by SILK that since a date was set for the hearing to object the application. A part of the application is to file an injunction to prevent the lawyers from returning to work until the hearing. An injunction is an emergency and time was of the essence for them to file it with urgency. Due to time constraints, the Speaker stated that he consulted with the Minister of Finance, Hon. Julian Fraser, the Deputy Speaker and the lawyer informing them of his decision. Both him and the Deputy Speaker filed the injunction. Once the injunction was filed the Speaker informed all Members.

   vi. The Speaker said that the injunction was not to prevent the COI from conducting their inquiry but to halt the inquiry until the hearing was heard in October.

   vii. The Speaker stated that once the injunction was filed the Judge asked them if they had permission from the Attorney General. He said that prior to all of the legal strategies no one indicated that they needed permission from the Attorney General.

   viii. He said at an informal meeting and prior to a vote being taken, he wrote to the Attorney General advising her of the position of the Members in that they were interested in having

their own legal counsel. He further indicated that the day in which the meeting of the vote was being taken the Attorney General was unable to attend. The Speaker said after the meeting he wrote to her advising her of the positions of the Members of the HoA.

ix. The Speaker said that the Judge had asked him and the Deputy Speaker before they were forced to continue the injunction if they had received permission from the Attorney General. He then wrote to the Attorney General following the rule of the Judge to seek permission. The Attorney General did not respond to his letter. He said since the Attorney General did not respond they discontinued the injunction. The Judge had since indicated that since permission was not received from the Attorney General the Speaker would have to pay costs out of pocket.

3. In his written responses to the questions provided by the Chairman prior to the meeting, the Speaker stated in summary:

i. The Speaker acknowledged that the House of Assembly is made up of 15 members (13 elected members), a Speaker elected by the Members and the Attorney General.

ii. As Speaker there are times when he speaks on behalf of the House, especially in areas that it is agreed to by the majority of Members and any Bill, resolution or petition approved by the members, and also whatever collective decisions is made by the majority, both formally and informally.

iii. He received expressed verbal support from the then Minister of Finance, the Deputy Speaker and Hon. Julian Fraser to pursue the injunction against the lawyers for the COI.

iv. He believed that permission was implied by the Members of the House of Assembly, to file the injunction, because they had already agreed to him and the Deputy Speaker filing the objection to the three lawyers being called to the Bar after the fact, and the Speaker served the injunction simply because of the implied permission.

v. That by virtue of section 78 the House of Assembly, acting within its powers, could bring any petition on behalf of the Legislature.

vi. The reasoning behind him bringing his claim in his official capacity as Speaker of the House of Assembly is that it was as a result of a larger legal strategy. The Members of the House of Assembly supported his and the Deputy Speaker filing an application to object to the three lawyers being called to the bar and thus implied permission to file an injunction which was seen and agreed by Silk Legal was part of the application objections legal strategy.

vii. That as Speaker he is only an agent for all the Members of the House of Assembly i.e. the Legislature and not for the Government.

viii. The Attorney General, as stated in the Constitution, is the principal legal advisor to the Government. Further that as there are three branches of Government, no one has clarified whether she is representing one branch. The Speaker then stated that the Attorney General

represents the Executive and the Legislative Branches and that creates a conflict between the two.

ix. The Speaker stated that prior to the filing of the claim there had been several conversations and correspondence with the Attorney General as it related to the wishes of the Members and once they were advised by a judge after the injunction was filed that they needed her advice he immediately wrote seeking advice in a letter dated 30 August 2021.[1] The Speaker stated that the Attorney General never responded to his correspondence.

x. The Speaker stated that he was advised by Silk Legal that the injunction would be successful on its merits because 1. the Attorney General had placed in writing that they were operating in the BVI illegally; 2. a senior member of the BVI Bar Association also objected to their application.

xi. The Speaker stated that since they had 2 votes to hire a legal representative and a vote to the objection, perhaps in retrospect if time permitted he should have come back to the Members and said he wanted to do an injunction and requested a vote. He stated that he thought the Members were not aware of the injunction.

[1] Speaker provided evidence subsequent to 19 April 2022 meeting

Deputy Speaker's Testimony

The Deputy Speaker stated that the Premier asked that he (Deputy Speaker) be the liaison between the Premier and the Speaker. He was ordered by the Premier to inform the Speaker that the Government was in support of it (the injunction) but he (the Speaker) would need to dialogue with the Opposition.

The Deputy Speaker stated that the Opposition was on board as well, but he (the Speaker) did not ask to what extent.

The Deputy Speaker stated that there was nothing in writing to him to convey to the Speaker.

Honourable Attorney General's Testimony

1. The Attorney General was asked to respond to the questions posed to and responses given by the Speaker. The Attorney General stated in summary:

   i. The Speaker did not seek legal advice or opinion from the Attorney General before pursing any claims against the lawyers for the Commission of Inquiry. She further noted that after a Sitting of the House of Assembly, the Speaker approached the Premier and her and informed them that the proceeding for the injunction had begun and that is when she became aware of the proceedings.

   ii. The Attorney General indicated that the Speaker had written to her seeking permission to file the injunction after he had already filed the proceeding. She presented the judgment of 27 August, 2021 and referred to paragraph 13 "*So far as appears from the papers, Mr. Willock, has not yet requested the Attorney General's permission to bring the current proceedings. That is a matter which will be to be addressed at the hearing of the application on 2nd September. It is arguable that unless and until the Attorney General gives permission Mr. Willock has no standing to seek an injunction.*"

   iii. The Attorney General stated that Members would have been aware of written correspondence that she sent to the Speaker immediately after she became aware that the Speaker had filed the proceedings seeking an indication from him as to whether he had the authority to bring those proceedings, indicating to him the possibility of personal liability and matters of that nature.

   iv. The Attorney General stated that she was the first person to raise the question of the admission of Mr. Rawat to the BVI Bar, however she took the view that if the Government was committed to having the Commission of Inquiry go through and cooperate, then any problems should have been rectified and have the person(s) admitted to move on with the Commission of Inquiry. She stated to any objection to the lawyers being admitted would not have supported that objective.

   v. The Attorney General stated that she did not agree with the Speaker that the proceedings were part and parcel of what Silk Legal was hired to do, based on their letter of engagement with the Government of the Virgin Islands. She stated that the engagement with Silk Legal was restricted to the representation before the Commission of Inquiry for Members of the House of Assembly and not commencing legal action in respect of the Commission of Inquiry itself or against its lawyers.

2. The Attorney General was asked to respond to the questions posed to the Speaker. In her written responses to the questions provided by the Chairman the Attorney General stated in summary:

   i. There is no constitutional provision or provision in the Standing Orders which grants the Speaker authority to speak on behalf of the House of Assembly.

   ii. The Attorney General has not located any correspondence from the Speaker and does not recall any oral communication prior to the filing of claim BVIHCV 2021/210. Immediately after she

became aware of the filing, she sent a letter to the Speaker making inquiries as to the authority, funding and whether he was aware of the nature of a personal undertaking. [2]

iii. The Speaker acted ultra vires to the Constitution and the Standing Orders when he initiated the claim against the attorneys for the Commission of Inquiry. The engagement of Silk Legal was clearly limited to the representation of the members of the House of Assembly in relation to the Commission of Inquiry only. Further, it is the Attorney General and not the Speaker who is the guardian of the public interest. The Speaker's actions therefore usurped the function of the Attorney General and accordingly the costs of the claim.

[2] The Attorney General provided correspondence dated 18 August, 2021

i.

Conclusion

Based on the evidence as provided and the judgment of the learned judge, it is concluded that the Speaker should not have brought the proceedings against the lawyers for the COI and he did not have expressed permission to do so on behalf of the House of Assembly.

As a result, we have accepted the latter half of Section (c) of the Resolution which states, "The action is not deemed warranted and it is without merit and as a result there should be no consideration of the matter by the House of Assembly".

APPENDIX I

THE HOUSE OF ASSEMBLY OF THE VIRGIN ISLANDS

RESOLUTION NO. 19 OF 2021

[Gazetted , 2021]

WHEREAS a Commission of Inquiry into Governance in the Virgin Islands was announced by the Governor of the Virgin Islands and the United Kingdom Secretary of State in January 2021, and the House of Assembly and its Members have been recognised as participants in the Commission of Inquiry and have been called to give evidence to the Commission of Inquiry, which proceedings are taking place in the Territory;

WHEREAS it is an offence punishable on summary conviction under the Supreme Court Act and the Legal Profession Act of the Virgin Islands for any person who is not enrolled as a legal practitioner to, amongst other things, make use of any name, title or description implying that he or she is entitled to be recognised to act as a legal practitioner in the Virgin Islands;

WHEREAS the said laws apply to all persons whether they belong to this Territory or are visitors;

WHEREAS certain persons, without having been enrolled in the Virgin Islands as legal practitioners, may have been engaged as such by the said Commission of Inquiry currently taking place in the Territory;

WHEREAS the Honourable Speaker of this Honourable House commenced an action in his official capacity to prevent those said persons possibly acting as legal practitioners in contravention of the aforesaid laws;

WHEREAS as a result of a procedural technicality, the action commenced by the Honourable Speaker had to be discontinued, and as a result of the discontinuance, costs were awarded against the Honourable Speaker;

WHEREAS the said attorneys have since belatedly applied to the High Court to be admitted to practice as Solicitors in this Territory, which applications remain pending, and by making such application it substantiates the fact that those persons may have been practicing law in the Virgin Islands contrary to the requirements of the laws of the Territory at the time the Honourable Speaker filed the matter in the courts;

WHEREAS following consultation with Members of the Government's caucus it was revealed that discussions were held with select Honourable Members and while it was implied that approval was given to the Speaker to file for an injunction against the persons who were alleged to be practicing law in the Territory in breach of the laws of this jurisdiction, however indeed there were no expressed permission granted by the House of Assembly;

AND WHEREAS having acted in his official capacity as Speaker there are three (3) possible considerations that could be determined by the House of Assembly, namely:

(a) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is deemed warranted and with merit and as a result the payment of costs would be approved by the House of Assembly;

(b) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is deemed warranted and with merit, but the payment of costs cannot be approved or considered by the House of Assembly; and

(c) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, the action is not deemed warranted and is without merit and as a result the House of Assembly ought not to approve payment of the costs.

NOW THEREFORE BE IT RESOLVED:

1. That this Honourable House by Order appoints a Special Committee, with no more than five (5) Members but no less than three (3), to consider and to report as to which of the following recommendations is to be made to the House of Assembly; that:

(a) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is deemed warranted and with merit and as a result the payment of costs would be approved by the House of Assembly;

(b) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is deemed warranted and with merit, but the payment of costs should not be approved by the House of Assembly; and

(c) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, the action is not deemed warranted and is without merit and as a result there should be no consideration of the matter by the House of Assembly.

2. That the Committee submit its Report to the House in no more than two (2) months on which of the above recommendations should be adopted by this Honourable House.

3. The Members of the Special Select Committee are:

Hon. Mark Vanterpool;
Hon. Julian Fraser;
Hon. Vincent Wheatley;

4. The quorum of the Special Committee will be two.

Passed by the House of Assembly this 4th day of November, 2021.

Neville A. Smith,
Deputy Speaker.

Phyllis Evans,
Clerk of the House of Assembly.

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM No: BVIHCV 2021/0210

BETWEEN:

HONOURABLE JULIAN WILLOCK
SPEAKER OF THE HOUSE OF ASSEMBLY

Claimant

And

(1) THE RIGHT HONOURABLE SIR GARY HICKINBOTTOM
AS COMMISSIONER OF THE COMMISSION OF INQUIRY
(2) BILAL RAWAT
(3) ANDREW KING
(4) RHEA HARRIKISSOON
(5) ATTORNEY GENERAL

Defendants

Determined on paper with no written submissions

2021 August 27

JUDGMENT

[1] **JACK, J [Ag.]**: On 18th January 2021 the then Governor of this Territory appointed a Commission of Inquiry under the **Commissions of Inquiry Act 1880**[1] to inquire into a number of matters, but primarily "to establish whether there is information that corruption, abuse of office or other serious dishonesty in relation to officials, whether statutory, elected or public may have taken place in recent years." The Rt Hon Sir Gary Hickinbottom, a retired Lord Justice from the English Court of Appeal and the first defendant in these proceedings, was appointed as the commissioner.

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[1] Cap 237, Revised Laws of the Territory of the Virgin Islands.

[2] The appointment of the commission has given rise to much political controversy and dispute. These political issues are not matters for this Court to determine in the current proceedings, which are brought by the Honourable Julian Willock, the Speaker of the House of Assembly, as claimant.

[3] After his appointment, Sir Gary brought in a team of UK lawyers to assist him in his inquiry. These comprised: Bilal Rawat, a barrister called to the bar of England and Wales in 1995; Andrew King, a solicitor admitted in England and Wales in 2009; and Rhea Harrikissoon, a solicitor admitted in England and Wales in 2012. These are respectively the second, third and fourth defendants. None have been admitted as legal practitioners in this Territory, although an application that they be admitted is due to be heard on 26th October this year. The fifth defendant is the Attorney-General of this Territory.

[4] The relief sought by the claimant in the current application, which is listed for hearing on 2nd September 2021, is an injunction restraining Mr. Rawat, Mr. King and Ms. Harrikissoon acting as barrister or solicitor in the Commission of Inquiry unless and until they are admitted as BVI legal practitioners.

[5] Before considering the interlocutory relief sought, I should mention one matter of drafting. In both the amended claim form, the various applications and the three affidavits which Mr. Willock has sworn, he refers to the Commission of Inquiry as "the Inquisition". This in my judgment is inappropriate. Mr. Willock no doubt has strong views on the legitimacy of the inquiry. The Court, however, requires parties before it to behave with civility to each other. The Court will not tolerate abusive language of any description. Describing the Commission of Inquiry as an Inquisition does not meet this standard. Nor does any implied comparison of Sir Gary with the late Tomás de Torquemada. The Court will not entertain political point scoring by litigants before it.

[6] Accordingly, I shall give permission to the claimant by 4pm on 1st September 2021 to amend his claim form and applications so as to substitute "commission" in place

of "inquisition." In default of such amendment, I shall strike out the claim. I shall also strike out the claimant's three affidavits but permit him by the same time to re-swear and file them on the e-Litigation Portal, but with the amendment which I have stated.

[7] Because this order is made *ex parte*, the claimant has the right to apply to the Court to vary or discharge this order.

[8] The substantive point raised by Mr. Willock is that Mr. Rawat, Mr. King and Ms. Harrikissoon are practising BVI law without being admitted to the roll of legal practitioners in the BVI. This question has been the subject of three recent decisions. The first is of the Court of Appeal in **Yao Juan v Kwok Kin Kwok,**[2] on appeal from me[3]; the second and third are decisions of mine, **Re Summer Fame Ltd (In Liquidation)**[4] and **Re Lenux Group Ltd; JSC Mezhdunarodniy Promyshlennіy Bank v Lenux Group Ltd.**[5] None directly address the point raised by Mr. Willock as to whether the work Mr. Rawat, Mr. King and Ms. Harrikissoon do in assisting the Commission of Inquiry amounts to "practising [BVI] law".

[9] The **Legal Practitioners Act 2015**[6] provides:

> "2(1) In this Act, unless the context otherwise requires,
> ...
> 'costs' includes fees for any legal business done by a legal practitioner;
>
> 'fees' includes charges, disbursements, expenses and remuneration;
> ...
> 'legal practitioner'... means a person whose name is entered on the Roll in accordance with this Act;
> 'practise law' means to practise as a legal practitioner or to undertake or perform the functions of a legal practitioner, as recognised by any law whether before or after the commencement of this Act;

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[2] [2021] ECSCJ No 577, BVIHCMAP2018/0042 (1st June 2021).
[3] [2020] ECSCJ No 148, BVIHC (COM) 162 of 2013 (23rd April 2020)
[4] [2021] ECSCJ No 585, BVIHC (COM) 2020/0055 (9th June 2021).
[5] [2021] ECSCJ No 605, BVIHC (COM) 2020/0188 (28th June 2021).
[6] No 13 of 2015, Laws of the Territory of the Virgin Islands.

...

13(1) Every person whose name is entered on the Roll in accordance with this Act shall be known as a legal practitioner and,

(a) subject to subsection (2), is entitled to practise law and sue for and recover his or her fees for services rendered in that respect;

(b) subject to subsection (2), has the right of audience before any court;

(c) is an officer of the Supreme Court.

(2) No person may practise Virgin Islands law unless his or her name is entered on the Roll in accordance with this Act.

(3) A person who practises law in contravention of subsection (2) or section 15(1) is not entitled to institute or maintain any action for recovery of any fee on account of or in relation to any legal business done by him or her in the course of such practice

...

18(1) Subject to this Act, where a person whose name is not registered on the Roll

(a) practises law;

(b) wilfully pretends to be a legal practitioner; or

(c) makes use of any name, title or description implying that he or she is entitled to be recognised or to act as a legal practitioner,

he or she commits an offence and is liable on summary conviction to a fine of not less than fifteen thousand dollars or to imprisonment for a term of not less than three years, or both.

(2) A person who, not being entitled to act as a legal practitioner, acts in any respect as a legal practitioner in any action or matter or in any court in the name or through the agency of a legal practitioner entitled so to act, commits an offence and is liable on summary conviction to a fine of not less than ten thousand dollars or to a term of imprisonment of not less than two years, or both.

(3) No fee in respect of anything done by a person whose name is not registered on the Roll or to whom subsection (2) relates, acting as a legal practitioner, is recoverable in any action, suit or matter by any person."

[10] It will be seen that practising BVI law in this Territory without being admitted to practice is a criminal offence with stiff minimum sentences. Whether a criminal offence has been committed and whether it is in the public interest for the offence to be prosecuted is normally a matter for the Director of Public Prosecutions and the Attorney-General.

[11] In the current case, Mr. Willock seeks an injunction restraining the three lawyers from allegedly breaching section 18(1) and (2). This raises a question as to Mr.

Willock's standing to bring the current action. The current claim appears to raise no private law cause of action on Mr. Willock's part. Instead, he appears to be bringing the claim as part of his public duties as speaker of the House of Assembly. The papers filed to date do not, however, identify any statutory basis on which he might be acting. (In England, for example, local authorities can bring injunction proceedings of this type, but this is specifically permitted by statute.[7]) There is no general power of public authorities to obtain such injunctions.

[12] At common law, the only way to bring injunction proceedings to prevent a breach of the criminal law is to bring a *relator* action: **Gouriet v HM Attorney-General.**[8] The permission of the Attorney-General is required for a claimant to bring such proceedings. That is a discretionary matter for the Attorney-General: see Sam Silkin QC A-G's explanation of his function in **Gouriet** at pp 442-444.

[13] So far as appears from the papers, Mr. Willock has not yet requested the Attorney-General's permission to bring the current proceedings. That is a matter which will need to be addressed at the hearing of the application on 2nd September. It is arguable that unless and until the Attorney-General gives permission Mr. Willock has no standing to seek an injunction.

[14] Ellis J, who is hearing the application for admission of Mr. Rawat, Mr. King and Ms. Harrikissoon to the roll of practitioners on 26th October 2021, has considered the question of standing for opponents of their admission. The test for standing in *relator* proceedings, however, is different.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Dep. Registrar

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[7] Local Government Act 1972 (UK) (c. 70) section 222.
[8] [1978] AC 435.

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM No: BVIHCV 2021/0210

BETWEEN:

HONOURABLE JULIAN WILLOCK
SPEAKER OF THE HOUSE OF ASSEMBLY

Claimant

And

(1) THE RIGHT HONOURABLE SIR GARY HICKINBOTTOM
AS COMMISSIONER OF THE COMMISSION OF INQUIRY
(2) BILAL RAWAT
(3) ANDREW KING
(4) RHEA HARRIKISSOON
(5) ATTORNEY GENERAL

Defendants

Appearances:

Mr. Daniel Fligelstone Davies of Silk Legal (BVI) Inc for the Claimant
Mr. Andrew Sutcliffe QC, with him Mr. Oliver Clifton and Ms. Yegâne Güley of Walkers (BVI) for the First to Fourth Defendants
Mrs. Fiona Forbes-Vanterpool of the Attorney-General's Chambers for the Fifth Defendant

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2021 September 2
September 13

JUDGMENT ON COSTS

[1] **JACK, J [Ag.]**: The background to this matter I summarised in my judgment of 27th August 2021. I wrote that judgment in order that the hearing of the claimant's application for an injunction listed for 2nd September 2021 might be fully effective. Following that judgment, on 1st September 2021 at 1.33pm the claimant served a notice of discontinuance. The defendants were already finalising and filing their

skeleton arguments in opposition to the injunction application. I therefore directed that any party seeking an order for costs should serve a schedule of costs and that I would treat the hearing on 2nd September 2021 as a hearing in respect of any consequential costs orders.

[2] The first four defendants have served a costs schedule claiming $71,388.59. The Attorney-General has served a schedule claiming $6,084. In each case, further costs in respect of the hearing on 2nd September and work subsequent thereto will have been incurred.

[3] Before dealing with costs issues, I should mention a problem which arises from the current need to hear cases virtually. The default position is that the Court hears all matters in open court. When the Court hears matters face-to-face there is rarely any issue about whether a matter is in open court or not. Someone who wants to observe a case has merely to attend the courthouse. With a virtual hearing, an observer has to ask the Court for the Zoom details, so he or she can log in to a hearing. In the current case, a notice of the time and date hearing was due to be posted on the eccourts.org website, but that was withdrawn when the notice of discontinuance was served. When it became apparent that the costs hearing was going to go ahead, I asked that a notice of that hearing be posted on the website, but that was not done in time. It may be that the relevant Court user groups and representatives of the press should consider how this problem can be avoided in the future. In the meantime, any journalists or members of the public who wish to follow a case should leave their details with the Court so that notifications of hearings can be given to them, if problems of this type reoccur.

Mr. Davies' submissions

[4] On 2nd September, Mr. Davies appeared on behalf of the claimant. He submitted that the Court should make no order for costs. He made this submission on two bases. Firstly, the current action was not an ordinary private law action. Rather it was an administrative action, which Mr. Willock in his capacity as Speaker of the House of Assembly could properly bring without the Attorney-General's *fiat*, as

would have been required for a *relator* action. Mr. Willock was acting in the public interest. CPR 56.13(6) provides that there should be no order for costs against him unless he acted unreasonably. Secondly, there was no point making a costs order. The BVI Government was paying Mr. Willock's legal fees and would be responsible for liability for the legal costs of other parties. There was no point, he submitted, moving monies from one Government pocket to another Government pocket.

Public interest

[5] So far as the first point is concerned, CPR 56.1, so far as material provides:

> "(1) This Part deals with applications —
>
> (a) by way of originating motion or otherwise for relief under the Constitution of any Member State or Territory;
>
> (b) for a declaration in which a party is the State, a court, a tribunal or any other public body;
>
> (c) for judicial review; and
>
> (d) where the court has power by virtue of any enactment or at common law to quash any order, scheme, certificate or plan, any amendment or approval of any plan, any decision of a minister or government department or any action on the part of a minister or government department.
>
> (2) In this Part — such applications are referred to generally as 'applications for an administrative order'."

[6] Mr. Davies submitted that the current action was brought as an application for an administrative order under CPR 56.1(1)(b). The Commission of Inquiry was "a tribunal" for the purpose of that rule. In addition, by CPR 56.1(4) the Court may "[i]n addition to or instead of an administrative order... without requiring the issue of any further proceedings, grant (a) an injunction..." The Speaker, he submitted, had, in that capacity, standing to apply for an administrative order under those provisions. The Speaker was now contemplating bringing fresh judicial review proceedings. When dealing with the costs of an administrative claim, the Court had a greater discretion as to costs than in ordinary private law actions. The current action was brought in the public interest. The default provision is no order for costs: CPR

56.13(6). In any event in all the circumstances the appropriate order was no order for costs.

[7] There are a number of difficulties with this submission. Firstly, I have reread the claim form and affidavit in support. There is no hint in those documents that Mr. Willock was bringing a claim under CPR 56.1(1)(b). The application for an injunction appeared to be being brought on ordinary private law grounds.

[8] Secondly, in my judgment, the Commission of Inquiry is not a "tribunal" for the purposes of CPR 56.1(1)(b). Although in the past, the term has had a wider meaning,[1] now-a-days a tribunal determines legal issues. Usually a tribunal decides cases *inter partes*, but this is not essential. A tribunal like the UK Gender Recognition Panel,[2] which gives legal recognition to applicants living in the other gender, determines matters *contra mundum*. By contrast, the Commission is purely investigatory. There are no parties. Without applicants or respondents, it determines no rights. An essential feature of a tribunal is that it is a judicial or quasi-judicial body. The Commission in this case does not determine rights; it is therefore not acting in a judicial or quasi-judicial capacity. CPR 56.1(1)(b) does not therefore apply to the current action.

[9] Thirdly, if Mr. Davies' submission is right, then it is the answer to the problem I raised as to whether the Attorney-General's permission needed to be sought. However, the right course would have been to argue the point on the return date of the application for an injunction. There was no reason to serve a notice of discontinuance, if the action was, as Mr. Davies argues, perfectly well brought.

[10] Fourthly, Mr. Davies has only baldly asserted that the Speaker has standing to bring an administrative action. I will assume without deciding that the test for making a claim under CPR 56.1(1)(b) is the same as that for a party seeking judicial review

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[1] See, for example, the Tribunals of Inquiry (Evidence) Act 1921 (11 & 12 Geo V c. 7), but cf the distinction subsequently drawn between tribunals and inquiries in the Tribunals and Inquiries Act 1972 (c. 62) (both UK Acts now repealed).
[2] Established in the United Kingdom by Schedule 1 to the Gender Recognition Act 2004 (c. 4).

under CPR 56.1(1)(c). There is a lot of law on what gives *locus standi* to bring a claim for judicial review. Mr. Davies has cited none of it. The learned editors of **De Smith's Judicial Review** point out:[3]

> "Where there are strict rules as to standing there is always the risk that no one will be in a position to bring proceedings to test the lawfulness of administrative action. It is hardly desirable that a situation should exist where because all members of the public are equally affected no one is in a position to bring proceedings: such a situation would impede the rule of law."

It may thus be properly arguable that Mr. Willock does have standing. The time for doing that, however, was on the substantive application for an injunction as part of the entitlement to seek an injunction, not as a side-wind in a costs determination without citation of any authority.

[11] Fifthly, any problems as to standing could have been addressed at the substantive application for an injunction. Mr. Willock could have asked the Attorney-General for permission to bring the claim as a *relator* action. She would then have had to decide whether to give it or not.

[12] The Attorney-General is always in a constitutionally odd position. In some matters she is a mere advisor of her client, in other situations she has to make decisions herself. As I said in **Trustees of the John Mackintosh Educational Trust v Attorney-General and Charity Commissioners** (a case where trustees of a charity in Gibraltar sought a change in the objects of the trust under the *cy-près* doctrine):[4]

> "48. The Attorney-General has a large number of different rôles. The application of a public interest test is different in relation to each. Some of the duties are as follows. First, he is the Government's and the Governor's chief legal adviser. In that capacity, he acts as a normal lawyer and is subject to his client's instructions. Issues of public interest are in these cases, in principle, for the branch of the Government which is his client to

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3 8th Ed (2020) by Lord Woolf, Jeffrey Jowell and Andrew Le Sueur at para 2-006.
4 [2015] Gib LR 365 TRUSTEES of the JOHN MACKINTOSH EDUCATIONAL TRUST v. ATTORNEY-GENERAL and CHARITY COMMISSIONERS (gibraltarlaws.gov.gi)

determine, not for him. Secondly, he is ultimately responsible for public prosecutions,[5] including bringing applications to commit for public contempt of court. He has a general power to prosecute or not, depending on his view of the public interest. As such, he is not subject to anyone's instructions, so the Government of the day cannot direct him how to act, but he is subject to judicial review. Thirdly, he can authorize the bringing of *ex relatione* proceedings, whereby a private individual is authorized to seek an injunction against a defendant committing a public wrong. When doing so, he acts 'in his absolute discretion... in the public interest' and is therefore arguably not subject to judicial review: **Gouriet v Attorney-General.**[6] Fourthly, historically, he sat as acting Chief Justice in the absence of the Chief Justice.[7] When so sitting, he would exercise a completely independent judicial function, answerable to no one save the Privy Council.[8] As such, he was obliged to give judgment in accordance with the law, regardless of his own view of the public interest (*fiat justitia ruat caelum*).

49. In carrying out his duties in charity cases, the Attorney-General has a different function again. Exercising the *parens patriae* prerogative, he is seeking to ensure that the charitable trusts established by the settlor or testator are carried out in accordance with the wishes expressed in the deed or will establishing the trust. The fact that a trust is charitable is of itself sufficient to show that the trust is in the public interest, so the Attorney-General does not need to, and would be wrong to, consider whether the enforcement of the terms of the charitable trust is in the public interest. The Attorney-General has no power to consent to a breach of the terms of a charitable trust on public interest grounds. Unless the conditions for the making of a *cy-près* scheme existed, he could not properly, for example, consent to moneys of the John Mackintosh Education Trust being spent for primarily non-educational purposes."

[13] It cannot be assumed that the Attorney-General would have refused her *fiat*, had it been requested. She would have had to balance (a) the view she takes as to whether the three English lawyers were "practising [BVI] law" (including the question as to whether it was at least arguable that they were) and (b) her view as to the

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[5] In this Territory, the Attorney-General's rôle in criminal prosecutions is affected by the existence of the Director of Public Prosecutions, a post which was only subsequently created in Gibraltar: Director of Public Prosecutions Act 2018 (Gibraltar Act No 2018-17).

[6] [1978] AC 435 at p 442, *per* Mr. Samuel Silkin QC, the Attorney-General, although the point was left open by the House of Lords, *ibid* at p 475, *per* Lord Wilberforce.

[7] See John Restano, Justice so Requiring (2012) at p 88.

[8] There was no Court of Appeal, so appeals went directly to the Privy Council. The 1969 Constitution of Gibraltar established the Court of Appeal for the first time: Gibraltar Constitution Order 1969 (unnumbered prerogative order SI 1969, II p 3602), Schedule, section 57.

public interest in preventing them so doing (assuming she took the view they were or might be practising BVI law). If she refused her *fiat*, potentially her decision might be subject to judicial review. The "absolute discretion" (and with it the immunity from judicial review) claimed by Mr. Silkin QC for his decisions as Attorney-General to grant the power to bring proceedings *ex relatione* was left open by the House of Lords in **Gouriet** and may need re-examination in any event in the light of **Miller 2**, the prorogation of Parliament case.[9]

[14] Whether the current proceedings should have been stayed to permit Mr Willock to bring proceedings for judicial review in the event that the Attorney-General refused her *fiat* is a matter which no longer arises in consequence of the discontinuance of the case. The possibility, however, existed. Whether this produces a difficulty in relation to the Speaker's proposed fresh judicial review application by virtue of the rule in **Henderson v Henderson**[10] will be a matter for the Court hearing his application to bring such proceedings.

[15] Considering all these points, in my judgment Mr. Willock did have at least an argument when he issued these proceedings that it was in the public interest that it be determined whether the three lawyers in issue were practising BVI law illegally. However, in the exercise of my discretion, the Court should not recognise Mr. Willock's public-spiritedness in bringing these proceedings so to make no order as to costs. Firstly, I do not accept that the current action is anything other than an ordinary private law claim, so that the issue does arise as to whether it required the Attorney-General's *fiat*. Secondly and as a wholly separate ground for the exercise of my discretion, assuming I should have regard to the public interest which Mr. Willock was defending, the simple fact is that by serving the notice of discontinuance he was abandoning his pursuit of the public interest. If he had fought and lost, then he could make the argument that he was acting in the public interest. Instead by folding the moment a potential difficulty was raised, he was likewise abandoning his pursuit of the public interest. Thirdly, in my judgment he acted unreasonably in

[9] R (on the application of Miller) v The Prime Minister [2019] UKSC 41, [2020] AC 373.
[10] (1843) 3 Hare 100.

abandoning the action at the first indication that there might be procedural difficulties. It caused very substantial costs to be incurred by the defendants to no public benefit whatsoever.

Robbing Peter to pay Paul

[16] The second head of argument put forward by Mr. Davies was that, since the Government of this Territory was paying Mr. Willock's legal costs and would pay any costs order made against him, it made little sense to be moving money from one Government pocket to another.

[17] Mrs. Vanterpool disputed that there was any such agreement between Mr. Willock and the BVI Government. She said that any agreement up to $100,000 would require the authorisation of the accounting officer for the House of Assembly, who was the clerk to the House of Assembly. Any agreement over $100,000 required the authorisation of the Financial Secretary. The Attorney-General's investigations, she said, showed that no such authorisations had been given.

[18] In consequence I gave a direction that Mr. Willock file an affidavit by close of business on 7th September explaining the funding arrangements for the action. In compliance with that direction, Mr. Willock swore and filed an affidavit. It is very short, a mere five paragraphs. The whole substance of the affidavit is this:

> "3. I make this affidavit to state whether the funding of the action is private or governmental in relation to this matter.
>
> 4. I hereby confirm that I instructed the lawyers at Silk Legal (BVI) Inc to pursue this administrative law action on the understanding that the Government of the Virgin Islands is covering the costs/fees of the matter.
>
> 5. I have not paid for the lawyers of Silk Legal (BVI) Inc, it is not my responsibility."

[19] I find various difficulties with these averments. Firstly, is Mr. Willock saying the "understanding" is legally binding or not? Secondly, with whom did he reach the

understanding? Presumably to have any efficaciousness, it needed to be an understanding with the BVI Government. An understanding simply with Silk Legal would have been pointless. Mrs. Vanterpool was asserting at the hearing on 2nd September that there had been no such agreement, because it would have had to have been approved by (depending on its size) the clerk of the House of Assembly or the Financial Secretary. Mr. Willock says nothing about whether such approval was given. (As speaker, he is presumably in a good position to know.) If no such approval was given, how could the understanding be legally enforceable? Thirdly, who was Silk Legal's client? Which human being agreed that the Government of this Territory would pay Silk Legal's legal fees? Lastly, Mr. Willock says nothing about the alleged liability on the part of the BVI Government to indemnify Mr. Willock against any costs order in favour of the defendants to the current action.

[20] The evidence I have at present as to the funding arrangements is unclear. It would not be fair to Mr. Willock to determine this aspect of his defence to the costs application by the defendants without giving him an opportunity to explain the position. I am therefore minded to direct that this matter be clarified.

[21] I will hear counsel on the handing down of this judgment, but I am minded to order that by 4pm on Tuesday 14th September 2021 Mr. Willock and a person with knowledge of the facts from Silk Legal (BVI) Inc each make, swear and file an affidavit on the e-Portal as follows:

(a) Mr. Willock shall give evidence as follows, namely:

(i) whether the understanding mentioned in paragraph 4 of his affidavit of 7th September 2021 was reached orally or in writing;

(ii) if in writing, he shall (subject to any claim as to professional legal privilege) exhibit the relevant documents to his affidavit;

(iii) if he makes any claim to legal professional privilege, he shall state the date of the relevant document or documents and which human beings signed the documents and on whose behalf the relevant document or documents were sent and received;

(iv) if the said understanding was oral, when, where and between which human beings the understanding was reached, whether the communication was face to face or by telephone or by some other (and if so, what) electronic means, and (subject to any issue as to legal professional privilege) what the gist of the conversation was; and,

(v) whether the Government of the Territory of the Virgin Islands or an emanation thereof (and if so what emanation thereof) agreed

(1) to pay the legal costs of Silk Legal (BVI) Inc, and/or

(2) any liability incurred by him to the defendants or any or some of them (and if so, which) in the current litigation; and

(b) the person from Silk Legal (BVI) Inc shall give evidence as follows, namely:

(i) who the client of Silk Legal (BVI) Inc is in the current action;

(ii) whether the Government of the Territory of the Virgin Islands (or an emanation thereof) agreed to pay the legal fees of Silk Legal (BVI) Inc and if not, which natural or legal person (if anyone) has agreed to pay the legal fees of Silk Legal (BVI) Inc;

(iii) whether the agreement to pay the legal fees of Silk Legal (BVI) Inc (if there was one) was oral or in writing;

(iv) if in writing, the deponent shall (subject to any issue of legal professional privilege) exhibit the relevant documents to his or her affidavit;

(v) if the deponent makes any claim to legal professional privilege, he or she shall state the date of the relevant document or documents and which human beings signed the documents and on whose behalf the relevant document or documents were sent;

(vi) if oral, when, where and between which human beings the agreement was reached, whether the communication was face to face or by telephone or by some other (and if so, what) electronic

means, and (subject to any issue of legal professional privilege) what the gist of the conversation was; and,

(vii) whether the Government of the Territory of the Virgin Islands or an emanation thereof (and if so what emanation thereof) agreed to pay

(1) the legal costs of Silk Legal (BVI) Inc, and/or

(2) any liability incurred by Mr. Willock to the defendants or any or some of them (and if so, which) in the current litigation.

[22] Once this further information is filed, I shall consider whether I can reach a determination of costs or whether I should invite further submissions.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Dep. Registrar

EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM No: BVIHCV 2021/0210

BETWEEN:

HONOURABLE JULIAN WILLOCK

Claimant

and

(1) THE RIGHT HONOURABLE SIR GARY HICKINBOTTOM AS COMMISSIONER OF THE COMMISSION OF INQUIRY
(2) BILAL RAWAT
(3) ANDREW KING
(4) RHEA HARRIKISSOON
(5) ATTORNEY GENERAL

Defendants

Appearances:

Mr. Daniel Fligelstone Davies of Silk Legal (BVI) Inc for the Claimant
Mr. Andrew Sutcliffe QC, with him Mr. Oliver Clifton and Ms. Yegâne Güley of Walkers (BVI) for the First to Fourth Defendants
Mrs. Fiona Forbes-Vanterpool of the Attorney-General's Chambers for the Fifth Defendant

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2021 September 28, 30

FURTHER JUDGMENT ON COSTS

[1] **JACK, J [Ag.]:** I have previously given two judgments in this matter, the first on 27th August 2021, which raised certain procedural difficulties which might face Mr. Willock in pursuing his claim, and the second on 13th September 2021 dealing with some aspects of the costs of the case following Mr. Willock's decision to discontinue the action.

[2] On costs, Mr. Davies, who appeared for Mr. Willock, raised at the earlier hearing two issues which meant, he submitted, that costs should not be ordered against Mr. Willock. The first was that the action was an administrative action and that it was in the public interest that it be brought. In my judgment of 13th September, I rejected that argument. I held that the current claim is not an administrative action, but that even if it was, Mr. Willock had acted unreasonably and would be liable for costs pursuant to CPR 56.13(6). The second was that since the BVI Government was paying Mr. Willock's legal costs and would pay any costs order made against him, the Court should not make an order moving money from one Government pocket to another.

The retainer of Silk Legal

[3] The factual background to this second issue seemed unclear. I gave directions that it be clarified, so that I could determine this remaining issue. Pursuant to that order, both Mr. Rowe, the senior partner of Silk Legal (BVI) Inc, and Mr. Willock made affidavits. Mr. Rowe's affidavit said:

> "3. The Client of Silk Legal (BVI) Inc is the Speaker of the House of Assembly, in his official capacity, as per a contract signed by myself on behalf of Silk Legal (BVI) Inc and the Premier/Minister of Finance Honourable Andrew Fahie on behalf of the Government of the Virgin Islands, on the 28th of May 2021. Legal privilege is asserted over this document."

[4] Mr. Willock's affidavit said:

> "4. A contract was signed on May 28th, 2021 between Silk Legal (BVI) Inc... and the Premier/Minister of Finance, Honourable Andrew Fahie..., wherein I along with the other members of the House of Assembly (except the Attorney General) were to be represented by lawyers from Silk Legal (BVI) Inc, in matters relating to the Commission of Inquiry... Legal privilege is asserted over this agreement.
>
> 5. I as Speaker continue to act in my official capacity and I have had conversations with some members from both sides of the aisle. I have written to the Minister of Finance requesting supplementary funds to be placed in the House of Assembly vote, authorized for legal fees.

> 6. In addition, I have asked the Clerk, the accounting officer for the House of Assembly to make the formal request to the Ministry of Finance, in keeping with [the] practice and procedure of the Financial Management Act. It is crystal clear that the Government of the Virgin Islands will be undertaking any costs associated with my official duties as the Speaker. As these are matter concern [*sic*] the House of Assembly privilege is asserted over these documents, in keeping with Chapter 137 Legislative Council (Immunities and Powers) Act along with the practice of the House of Commons and Parliamentary Procedure set out in Erskine May.
>
> 7. In the Contract, I am authorized to instruct the lawyers of Silk Legal. In the Retainer I am also authorised to approve of fees. In said Contract the Government of the Virgin Islands is responsible for the payment of fees of Silk Legal and it has in fact been billed for same."

[5] He went on to say that payment of Silk Legal's fees had from time to time been authorised by the Clerk of the House of Assembly. He does not say what the total amount of fees paid has been.

[6] There seems to be no basis on which legal professional privilege could properly be claimed in respect of the contract of retainer. The point is, however, academic. On 31st May 2021 the contract was deposited with the Registrar of the High Court and is publicly available. A copy has been provided to me. Any privilege in the document has been lost.

[7] The contract begins:

> "1. Silk Legal (BVI) Inc thanks you, Mr. Julian Willock, Speaker of the House of Assembly, on behalf of the Government of the Virgin Islands, for your instructions...
> 2. The Client is Mr. Julian Willock, Speaker of the House of Assembly, Virgin Islands acting on behalf of the Government of the Virgin Islands."

[8] This is very different to the picture presented by Mr. Rowe and Mr. Willock. If Mr. Willock is acting on behalf of the BVI Government, then the client is the BVI Government. Mr. Willock is an agent acting on behalf of an undisclosed principal.

The contract was never signed by Mr. Willock. The only signatories were Mr. Rowe and Mr. Fahie. This reflects what in my judgment is the true position, namely that the Government of the Virgin Islands was the client.

[9] The contract continues:

> "3. ...Silk Legal (BVI) Inc will take instructions from all Members of the House of Assembly as arranged and directed by the Client *save and except* the Honourable Attorney General...
> 4. Silk Legal (BVI) Inc will keep the Client properly informed of the conduct of any instructions from the said Members of the House of Assembly and it will do so in a timely manner and in writing...
> 7. ...Silk Legal (BVI) Inc was solicited for and it intends to provide the following services:
>
> i) Provide the Client with independent written opinions on correspondence sent to the COI on/concerning all Members of the House of Assembly *save and except* the Honourable Attorney General;
> ii) Advise all Members of the House of Assembly *save and except* the Honourable Attorney General on any correspondence or requests originating from the COI's office in their official capacity as a House of Assembly Member;
> iii) Advise on any other legal matters that the Members or the House of Assembly *save and except* the Honourable Attorney General may request through the Client directly relating to the COI in their official capacity); and
> iv) If any aspect of the COI work reaches a court of law as it related to the aforesaid members in their official capacity, Silk Legal (BVI) Inc will assist Attorney General with legal representation in forms that the Honourable Attorney General approves and considers necessary."

[10] There are issues about the way this contract has been drafted. In particular, at least on one reading of it, the Speaker is acting as the agent of the executive. In a Westminster system of government, the legislature has two main functions: the passing of legislation and the holding of the executive to account. In order to carry out this second function, it is essential that the Speaker is neutral. If the Speaker is party-partisan, members of the opposition are likely to be hindered in carrying out their key constitutional rôle of investigating and, if necessary, criticising the

actions of the Government. Mrs. Forbes-Vanterpool, who appeared for the Attorney-General, explained, however, that the reference to Mr. Willock acting "on behalf of the Government of the Virgin Islands" was not intended to be a reference to the executive, but rather to the Government as a whole, in other words the Territory consisting of all three branches of the State. The contract had been seen and approved by the Attorney-General when it was made.

[11] On that basis, there would be no unlawfulness of the type put by **Chitty on Contracts** into the category of "objects injurious to good government... in the field of domestic... affairs."[1] See **Egerton v Brownlow**[2] and **Amalgamated Society of Railway Servants v Osborne**.[3] The Court is obliged to take points on public policy of its own motion, but here neither Mrs. Forbes-Vanterpool nor Mr. Sutcliffe QC wished to make any submissions on this, so I shall not determine the point.

[12] Another problem is that an important part of the retainer is that Silk Legal was to advise all members of the House of Assembly (apart from the Attorney-General). Indeed Mr. Willock confirms that he has "had conversations with some members from both sides of the aisle." That potentially gives rise to a conflict of interest in Silk Legal agreeing to act on this basis. Members of the opposition are very likely to have views and interests differing from those of member supporting the Government. Again, Mrs. Forbes-Vanterpool and Mr. Sutcliffe QC did not wish to pursue this argument.

Does the retainer cover the current litigation?

[13] What the defendants' counsel did submit was that the retainer does not cover the current litigation. The first three sub-clauses of clause 7 concern the giving of advice. Clause 7(iv) only covers litigation "[i]f any aspect of the COI work reaches a court of law as it related to the aforesaid members in their official capacity..." The current action has no connection with members of the House of Assembly at all; it is an action to prevent the three COI lawyers from continuing to act.

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[1] 33rd Ed (2019) at para 16-008.
[2] (1853) 4 HL Cas 1 at p 161 *per* Lord Lyndhurst.
[3] [1910] AC 87 at p 90.

[14] Moreover, Silk Legal's work was to be by assisting the Attorney-General with legal representation, but only "in forms that the Honourable Attorney General approves and considers necessary." In the current case, the Attorney-General does not approve Silk Legal's actions. Clause 7(iv) of the retainer of 28th May does not in my judgment cover Silk Legal's work in the current action.

[15] Mr. Davies sought to meet this objection by saying that the contract of retainer had been varied by the Speaker authorising the bringing of the current action. There is no evidence of this, beyond the fact that Silk Legal have in fact brought the current claim. In particular, there is no evidence that Mr. Fahie, or anyone else able to vary the contract, approved any variation on behalf of the Government. The variation is not in writing and has never been (and would never have been) approved by the Attorney-General. In my judgment the retainer of 28th May 2021 does not cover the bringing of the current action.

[16] Further, there is no express term whereby the Government of the Virgin Islands agreed to indemnify Mr. Willock against adverse costs orders. Now it is true that an agent generally has a right to indemnification from his principal. However, the agent must be acting within the scope of his authority to have standing to claim an indemnity. Here, there is nothing in the retainer which gives Mr. Willock a power to bring the current proceedings. Accordingly, any right to an indemnity falls away.

Mr. Willock's liability for costs

[17] Even if there were an indemnity, on the facts of this case that would not in my judgment affect the claimant's liability for costs. The costs of the first to fourth defendants are being met out of funds provided to the COI. There is no reason why the COI should be out of pocket for having to defend Mr. Willock's claim. As to the costs of the Attorney-General, she seeks those costs. I see nothing unreasonable in her so doing. She no doubt has a limited budget. There is no reason why her budget should be whittled down defending claims conducted unreasonably.

[18] Mr. Davies argued that it was relevant to costs that Mr. Willock was acting in his capacity as Speaker of the House of Assembly. It was part of the circumstances of the case: see CPR 64.6(5) and (6). In some cases that may be so, however, in the current case I have held that Mr. Willock acted unreasonably in issuing the proceedings and then discontinuing them at the first indication that there might be procedural problems with the case. Weighing all the factors in CPR 64.6, in my judgment there is nothing to cause me to diverge from the general rule in CPR 64.6(1) that costs follow the event.

[19] Accordingly, I shall order that Mr. Willock pay the defendants' costs.

The assessment of costs

[20] Mr. Davies submitted that any costs awarded should be prescribed costs rather than assessed costs, with a notional value of $50,000. The relevant rules are these:

> "65.3 Costs of proceedings under these Rules are to be quantified as follows –
>
> (a) where rule 65.4 applies... [It is common ground that this rule does not apply]; and
>
> (b) in all other cases if, having regard to rule 64.6, the court orders a party to pay all or any part of the costs of another party – in one of the following ways –
>
> (i) costs determined in accordance with rule 65.5 ('prescribed costs');
>
> (ii) costs in accordance with a budget approved by the court under rule 65.8 ('budgeted costs'); or
>
> (iii) (if neither prescribed not budgeted costs are applicable), by assessment in accordance with rules 65.11 and 65.12.
>
> 65.5(1) The general rule is that where rule 65.4 does not apply and a party is entitled to the costs of any proceedings, those costs must be determined in accordance with Appendices B and C to this Part and paragraphs (2) to (4) of this rule.
>
> (2) The 'value' of the claim, whether or not the claim is one for a specified or unspecified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant –

> (a) by the amount agreed or ordered to be paid; or if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the party entitled to, and the party liable to, such costs or, if not agreed, a sum stipulated by the court as the value of the claim; or
> (b) if the claim is not for a monetary sum it is to be treated as a claim for $50,000 unless the court makes an order under Rule 65.6(1)(a)."

No order has been made under CPR 65.6(1)(a).

[21] Mr. Sutcliffe QC submitted that CPR 65.5(2) had no application. That submission is in my judgment borne out by authority. Although it was not cited to me, Ventose J in **Orin Roberts v Financial and Regulatory Commission** held:[4]

> "[I]t is necessary to focus on the chapeau of CPR 65.5(2) which states that '[t]he "value" of the claim, whether or not the claim is one for a specified or unspecified sum, coupled with a claim for other remedies is to be decided in the case of the claimant or defendant.' The important point is that CPR 65.5(2) does not apply in all cases where the value of the claim is to be determined but applies only where the claim is: (1) for a specified sum; or (2) for an unspecified sum; and in both cases where it is (3) coupled with a claim for other remedies. The words 'coupled with a claim for other remedies' is the deciding limitation on the scope of CPR 65.5(2). If the claim, whether for a specified or unspecified sum, is not coupled with a claim for other remedies, CPR 65.5(2) does not apply."

[22] In the current case, there is no claim for a specified or unspecified sum, so CPR 65.5(2) does not apply. It follows that there is no value of the claim on which the prescribed costs regime can bite. Accordingly, in my judgment CPR 65.3(b)(iii) applies. The defendants are entitled to assessed costs.

[23] The Attorney-General had as long ago as 2nd September 2021 served her schedule of costs claimed in the sum of $6,084.00. The only point taken by Mr. Davies on the assessment was that the Attorney-General was billing in units of 15 minutes. That, he submitted, was too long and did not properly reflect the actual time devoted to a particular item. A similar submission was rejected by Leon J in

[4] [2019] ECSCJ No 338, Claim No SKBHCV 2016/0019 (determined 14th October 2019).

Olive Group Capital Ltd v Gavin Mark Mayhew.[5] Accordingly, I shall assess the costs of the Attorney-General at $6,084.00.

[24] The costs schedule of the other defendants was only served on the morning of the hearing claiming $115,348.50, which was a substantial increase over the earlier schedule served on their behalves. Mr. Davies reasonably asked for time to deal with the schedule. I therefore directed that he should serve points of dispute by close of business on 5th October with a reply by 8th October. All parties were content that I should assess costs on paper without a further hearing.

Recusal

[25] I should mention one further matter. In an article published on 15th September 2021, Virgin Islands News Online ("VINO") said it:

> "has also understood there are some questions as to whether UK national Mr. Jack should have taken up the case since he is believed to be friends with Col Commissioner Gary R. Hickinbottom and Governor John J. Rankin. The case was originally assigned to Justice Gerhard Wallbank; however, it was reportedly 'wrestled' away from him by Justice Jack."

[5] [2016] ECSCJ No 88, BVIHC (COM) 2015/0115 (determined 29th April 2016) at paras [120] to [125].

[26] Mr. Davies made no application that I should recuse myself. Since no such application has been made, I do not need to deal with it. I should, however, put on record that I barely know either Sir Gary Hickinbottom or his Excellency the Governor. They are not friends of mine. As to the allegation of "wrestling" the case from Wallbank J, the position is that the case was indeed originally assigned to that judge. His judicial assistant is, however, Mr. Willock's sister. The judge therefore felt it was inappropriate for him to deal with the case.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Dep Registrar

Approved
aj

Approved 4th May 2022

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NO. BVIHCV 2021/210

BETWEEN:

Honourable Julian Willock

Claimant

and

(1) The Right Honourable Sir Gary Hickinbottom
As Commissioner of the Commission of Inquiry
(2) Bilal Rawat
(3) Andrew King
(4) Rhea Harrikissoon
(5) Attorney General

Defendants

ORDER

BEFORE: **The Honourable Justice Adrian Jack**

DATED: **4 May 2022**

ENTERED: **May 2022**

UPON THE CLAIM dated 17 August 2021 by the Claimant, seeking declarations against the Defendants (the "**Claim**"), without first having sought the permission of the Fifth Defendant

AND UPON THE AMENDED APPLICATION dated 26 August 2021 by the Claimant, seeking orders prohibiting the Second Defendant to Fourth Defendants from acting as a barrister and solicitors respectively in the Commission of Inquiry until the Claim is determined (the **"Application"**)

AND UPON the Judgment of Court dated 27 August 2021 herein

AND UPON the Claimant serving a notice of discontinuance on the Defendants on 1 September 2021 and filing the same herein

AND UPON the Order dated 2 September 2021, the Judgment of the Court dated 8 September 2021 in relation to costs, the Order dated 13 September 2021, the Order dated 28 September 2021, and upon the Court directing that the costs of the First to the Fourth Defendants be assessed on paper

AND UPON the First to the Fourth Defendants filing a schedule of costs dated 28 September 2021, the Claimant filing Points of Dispute dated 8 October 2021, and the First to Fourth Defendants filing a Response dated 26 October 2021.

AND UPON the Court assessing the First to the Fourth Defendants' costs on the papers and handing down judgment thereon on 11 November 2021

AND UPON the matter coming on for on 4 May 2022 to settle the terms of the order dated 11 November 2021 among other things

AND UPON HEARING Mr Lewis Hunte QC for the Claimant, and Mr Andrew Sutcliffe QC for the First to Fourth Defendants –

IT IS HEREBY ORDERED THAT:

1. The Claimant do pay the First to Fourth Defendants' costs ordered to be paid by order of 11th November 2022 in the amount of $98,676.51 within 28 days, by 4pm on 1 June 2021.

2. The Claimant do pay the First to Fourth Defendants' costs of and occasioned by the assessment process in the amount of $7,500 within 28 days, by 4pm on 1 June 2021.

3. There be no order as to costs of the hearing on 4 May 2022.

BY ORDER OF THE COURT

REGISTRAR

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS

CLAIM NO. BVIHCV 2021/210

BETWEEN:

Honourable Julian Willock

~~**Speaker of the House of Assembly**~~

Claimant

and

(1) The Right Honourable Sir Gary Hickinbottom

As Commissioner of the Commission of Inquiry

(2) Bilal Rawat
(3) Andrew King
(4) Rhea Harrikissoon
(5) Attorney General

Defendants

ORDER

Walkers
171 Main Street

Road Town
Tortola
British Virgin Islands
Ref: OC/CF/B12921

Legal Practitioners for the First to Fourth Defendants

APPENDIX VI

SILK LEGAL

Richard G. Rowe & Daniel Fligelstone Davies

25 May 2022

Honourable Mr. Vincent Wheatley
Chairperson
Ad Hoc Committee
House of Assembly
Government of the Virgin Islands
Road Town, Tortola
British Virgin Islands

Dear Honourable Wheatley:

Speaker's Costs

This letter is to confirm that, we at Silk Legal (BVI) Inc were instructed verbally and on multiple occasions by the then Premier and Minister for Finance, the Honourable Mr. Andrew A. Fahie to file for an injunction against the COI lawyers, who were acting in criminal breach of the Legal Professions Act 2015. In fact we received numerous phone calls directly from the then Premier, directing that the matter be filed without delay. It should be borne in mind that the Premier signed the contract under which we acted.

We were also urged by Withers to file for an injunction and we had conversations as to how this could be done.

The Honourable Speaker also indicated that he received a telephone call from the Deputy Speaker, the Honourable Neville A. Smith, that the then Premier had instructed him to ask the then Speaker to instruct Silk Legal (BVI) Inc to file for this injunction.

The issue of permission from the Attorney General, was not raised until after the application for the injunction was filed. The issue with respect to permission was raised in an irregular judgment. When we say irregularly, we mean that the law requires that parties be given an opportunity to be heard before a judgment is given. No such opportunity was afforded to the Speaker before this judgment was handed down.

30 DeCastro Street, Road Town, Tortola, British Virgin Islands
(284) 340 9569
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SILK LEGAL
Richard G. Rowe & Daniel Fligelstone Davies

We then instructed the Speaker to obtain the necessary permission from the Attorney General. Unfortunately, as far as we are aware the Attorney General did not respond. We then recommended to the Speaker that the best course of action was to withdraw the matter in light of the judges request for permission. The Speaker then instructed us to withdraw.

Yours sincerely

Daniel R. Fligelstone Davies
signing for himself and on behalf of:

Richard G. Rowe

cc. Honourable Julian Fraser
Honourable Mark Vanterpool
Mr. Julian Willock

30 DeCastro Street, Road Town, Tortola, British Virgin Islands
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Dissent from the Report

In accordance with Standing Orders 83 (4) c, I exercise my option to dissent from the Report as follows:

While in fairness to the Committee, *myself included*, I find that the Resolution in offering three options, has failed to offer one that represented the actual, or close to the actual facts, I do not find that the position of the Committee accurately spoke to the situation at hand.

Excerpts from the Resolution

AND WHEREAS having acted in his official capacity as Speaker there are three (3) possible considerations that could be determined by the House of Assembly, namely;

a) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is deemed warranted and with merit and as a result the payment of costs would be approved by the House of Assembly;

b) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is deemed warranted and with merit but the payment of costs should not be approved by the House of Assembly; and

c) There was no expressed permission by the House of Assembly but the Honourable Speaker acted in his official capacity and in good faith relying on the assumption of permission being at least implied and consistent with his duty, and the action is not deemed warranted and is without merit and as a result there should be no consideration of the matter by the House of Assembly.

First there is the issue of Consent, which I shall address.

The Speaker was indeed given consent by Members to proceed with the Application to Object. So let's be clear about what this Application to Object is: It is a request to the Courts to have the 3 lawyers who everyone including the Attorney General agreed was practicing in the territory illegally, to discontinue until they were called to the Bar.

The Attorney General had already stated there would be no objection to them being granted status provided they followed the procedures.

My understanding is that they did apply. However, pending approval of their Application they were about to resume practice after a recess, while at the same time the Application for Objection hearing was postponed, which means the lawyers would be practicing once again illegally since their applications were not yet approved.

This being the case, in his vigilance, the Speaker proceeded to use a legal maneuver and filed an Injunction. And this is where this matter became ticklish. Here is where the question of consent of Members came in. Remember the purpose of the injunction was to save the Application. And that the Application had consent of Members. I think that had the Speaker knowingly allowed the Application to become obsolete he would have been rightfully criticized for being derelict in his duties.

To me the issue of Consent of Members for the Injunction is purely semantics. I look at it this way, "approving someone's participation in a Conference overseas, and when they arrive they found out that the Conference required a registration fee, and because they didn't call to seek

approval to pay that fee, you refuse to reimburse them"... would you really have preferred for the candidate to have returned home and not attend the Conference? I don't think so.

Second, there is the issue of who should Pay Cost....

On this all I'll say is that my competences doesn't lead me into overruling a Court's Decision.

LOpp. Julian Fraser RA