COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

JUDICIAL REVIEW

Case # - 00025/2010

In The Matter of Order 53, Rule 3 of the Supreme Court Act, (1978);
And In The Matter of Articles 28 and 117 of the Constitution of The Bahamas;
And In The Matter of an application for redress pursuant to Art. 28 Of the Constitution;
And In the Matter of an application for judicial review by Cheryl Grant-Bethel.

BETWEEN

CHERYL GRANT BETHELL

Applicant

AND

THE ATTORNEY-GENERAL OF THE COMMONWEALTH OF THE BAHAMAS
The Hon. John K.F. Delaney, Esq., QC

Third Respondent

Appearances: Mr. Wayne Munroe and Mr. Maurice Glinton for the Applicant.
Mr. Brian Simms for the Third Respondent.

Hearing date: 12th August, 8th October, 2nd and 10th December 2010; 4th 5th and 6TH January 2011.

RULING

Isaacs, Sr. J:

On 5 January 2010, pursuant to a summons filed on 2010 I heard the submissions of Counsel on whether John K. F. Delaney Q.C., the Third Respondent (hereinafter referred to as ***"JD")*** ought to be required to continue in these proceedings as such. I promised then to put my reasons in writing; and I do so now.

For the sake of brevity I do not intend to rehearse the history of this matter in any great detail. Suffice it to say that the Applicant has applied for judicial review of a decision of the Judicial and Legal Services Commission (hereinafter referred to as ***"the JLSC")*** made on 11 May 2010 whereby the JLSC purported to appoint her to the position of Deputy Law Reform Commissioner (hereinafter referred to as ***"the DLRC");*** and the proceedings of the JLSC pertaining to the Applicant's application for the post of Director of Public Prosecutions (hereinafter referred to as ***"the DPP").***

The Applicant is the Deputy Director of Public Prosecutions in the Office of the Attorney-General having been appointed to that position on 1 August 2001. I use the present tense in respect of the Applicant's designation because the Court has issued an injunction which precludes the Respondents, including JD, from interfering with the Applicant in the execution of her duties as such; and until it is determined otherwise, that is her substantive post.

JD was appointed to the office of Attorney-General on 23RD November 2009. The Attorney-General's functions are set out in Article 78 of the Constitution of the Commonwealth of The Bahamas. They are there generally expressed but other provisions of the Constitution and statute law speak more cogently to his functions, e.g., Article 72 requires him to be a member of the Cabinet where as such member he is allocated a portfolio pursuant to Article 77. One of the areas of responsibility that falls within his portfolio is the operation of the Office of the Attorney-General and the staff who work there.

In these proceedings the Attorney-General is a party in a representative capacity, that is to say, he is stepping up to the plate on behalf of the JLSC who has no corporeal capacity to be sued. He is sometimes named as a party in proceedings pursuant to the Crown Proceedings Act. JD is being made a party to these proceedings because the Applicant alleges he is a public officer whose actions which caused her damage went beyond his duties and powers as Attorney-General; and he was motivated by personal malice against her – targeted or untargeted.

In Turnquest v Parliamentary Registrar, No. 365 of1982; [1982] BHS J. No. 31 (Quicklaw reference) the Supreme Court constituted with three Justices of the Court considered a submission made by the defendant in that case that there was no proper defendant before the Court. The Court decided:

> **"25 The submissions of Counsel for the defendant under this principal head were:**

1. that the defendant is not a judicial entity who may be sued; and

2. that if he is such an entity, he is not the person to be sued.

> 26 In our view, the first submission is founded on a misconception. That misconception being that Counsel does not recognise that a public officer may at any given time occupy any one of three positions. He may be a public officer acting as such in which event any cause of action arising out of his conduct must, by virtue of the provisions of section 12 of the Crown Proceedings Act, Chapter 85, be brought against the Attorney General. He may be a public officer acting in his personal capacity. In that event, any cause of action arising out of his conduct must be brought against him personally in his own name. He may, however, also be a public officer performing a statutory duty as an agent of Parliament. In that event, although it is not altogether clear to us in what name he may be sued, we are not in doubt that he can be sued. That third position we consider was recognised both by the trial Judge and by the Court of Appeal in the D'Arcy Ryan cases, No. 1 and No. 5 of 1980. As we understand Counsel for the defendant, that third position is not recognised by her. Counsel recognises only the first two positions. We do not accept that there are only the two positions recognised by Counsel. We recognise also the third position."

I referred to Turnquest with approval in the Addendum to my decision in the Airport and Allied Workers Union, et. al. v Harding, et. al., Civil Action No. 000033 of 2007.

The relief sought against JD is found at numbers 7, 10 and 11 of the "Relief Sought" in the Applicant's Statement. They are as follows:

> ***"7. A Declaration that the Third Respondent's acts as they relate to the Applicant's discharge of her post amount to malfeasance in public office or alternatively to misfeasance in public office for which he is personally liable." and***

"10. Exemplary and Aggravated Damages as against the Second and Third Respondents.

11. Damages as against the Respondents."

As to the grounds on which the Applicant relies for the relief sought against JD, that is to be found at number 12 of the "Grounds and reasons therefore on which relief is sought" contained in the Statement. It provides:

"12. The Third respondent was put on notice of the Applicant's position by the Applicant orally and in writing and by letter for Munroe & Associates, Counsel and Attorney for the Applicant by letter dated the 7th day of July, 2010 but notwithstanding such notice took steps by directing or approving steps designed or intended to unlawfully interfere with the Applicant in her post of Deputy Director of Public Prosecutions."

Mr. Simms, on behalf of JD, submitted that the Applicant has not properly pleaded her case against JD, and even is she had, there is no evidence to support the claim; and the Applicant's claim against JD raises tortuous issues without any public law elements for which judicial review proceedings is not appropriate. He has put another position that any action against JD in his personal capacity should be brought by a separate action or at the very least the claim in this action should be stayed to await the outcome of the case against the JLSC.

Mr. Munroe submitted in response that an unconditional appearance was entered on behalf of JD in these proceedings on 7 September 2010 and it is much too late in the day for JD to be seeking what effectively amounts to a discharge of the

leave granted by the Court on 12 August 2010. He submitted further that the justice and convenience of joinder of the judicial review proceedings and the proceedings in tort weigh more heavily in the scales against severance of these proceedings. There is no gainsaying the attractiveness of Mr. Munroe's arguments. The benefit of a conjoined hearing is to obviate the need for a second court proceeding; and the judicial time saved thereby.

I have distilled to their essence the submissions made by Counsel but it is necessary to set out in some detail the bases for their submissions. I begin with a passing mention of Mr. Simms' contention that no cause of action has been made out on the Applicant's pleadings. For the sake of these proceedings, the pleadings would be what is contained in her Statement: CO Williams Construction Ltd v Blackman and Another [1994] 4 LRC 216 per Lord Bridge at p.223.

I have also considered the note to Order 53 rule 1 at page 833 of the ***"White Book"*** 1979 where it is said:

"A party will not be allowed to rely upon or seek any relief at the hearing except the grounds and relief set out in the statement."

to support my view of what I should have regard to at this stage.

I pay no regard to the Applicant's affidavit on the strike out application under Order18, rule 19 as I do not consider it appropriate to do so: CO Williams supra. Thus, it is only the Statement to which I would have paid regard in determining

whether any cause of action had been made out against JD. Mr. Simms relied heavily on the authority of Three Rivers District Council v Bank of England [2001] 2 All ER 513; and I propose to refer to it in the course of my ruling. However, on the view I take later in this decision it is not necessary for me to determine this point.

It will be necessary to address Mr. Munroe's submission as to the timing of this application since he contends JD ought not to be allowed to make it due to the lateness of its appearance. Order 18 rule 19 enables a party to bring an application at any stage of the proceedings to strike out another party's pleadings. It states, inter alia:

> ***"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —***
>
> ***(a) it discloses no reasonable cause of action or defence, as the case may be; or***
>
> ***(b) it is scandalous, frivolous or vexatious; or***
>
> ***(c) it may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***(d) it is otherwise an abuse of the process of the court, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.***
>
> ***(2) No evidence shall be admissible on an application under paragraph (1) (a).***
>
> ***(3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."***

So on the face of it, JD may bring this application at even – what Mr. Munroe says late - stage of the proceedings pursuant to Order 18 rule 19. I note that JD has entered an unconditional appearance; and the Court is cognizant that there is an extant injunction against JD imposed by me in this matter but I hold the view that if there has been an improper joinder of a judicial review proceeding to a tort action simpliciter or that there is no cause of action disclosed against JD he should not be precluded from raising the objection and being relieved of the burden of participating any further in the case. Indeed in Three Rivers Lord Hope of Craighead observed at page 242:

> ***"6) Whether the claim should be summarily struck out***
>
> ***94 For the reasons which I have just given, I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?***
>
> ***95 I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is***

contradicted by all the documents or other material on which it is based."

It must be noted that Order 53 sets out its own procedure for the conduct of proceedings relating to the reliefs sought thereunder; although it does refer at times to those orders related to an action begun by a writ. On the issue of whether JD should be joined in this action, some importance attaches to the relief one may claim under judicial review proceedings. Order 53 rules 1 and 2 are set out below:

"1. (1) An application for —
(a) an order of mandamus, prohibition or certiorari;
or
(b) an injunction under section 18 of the Act
restraining a person from acting in any office in
which he is not entitled to act,
shall be made by way of an application for judicial review
in accordance with the provisions of this Order.
(2) An application for a declaration or an injunction
(not being an injunction mentioned in paragraph (1) (b)
may be made by way of an application for judicial review,
and on such an application the Court may grant the
declaration or injunction claimed if it considers that,
having regard to —
(a) the nature of the matters in respect of which
relief may be granted by way of an order or
mandamus, prohibition or certiorari;
(b) the nature of the persons and bodies against
whom relief may be granted by way of such an
order; and
(c) all the circumstances of the case,
it would be just and convenient for the declaration or
injunction to be granted on an application for judicial
review.
2. On an application for judicial review any relief
mentioned in rule 1(1) or (2) may be claimed as an
alternative or in addition to any other relief so mentioned if

it arises out of or relates to or is connected with the same matter."

I consider rule 2 refers back to rule 1 and does not in any way extend the ambit of reliefs beyond those mentioned in rule 1. This does not mean a claim for damages cannot be made on a judicial review application since rule 7 of Order 53 states:

"7. (1) On an application for judicial review the Court may, subject to paragraph (2) award damages to the applicant if —
(a) he has included in the statement in support of his application for leave under rule 3 a claim for damages arising from any matter to which the application relates; and
(b) the Court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages.
(2) Order 18, rule 12, shall apply to a statement relating to a claim for damages as it applies to a pleading."

It seems to me that a claim for damages under rule 7 must arise from the decision taken by the JLSC inasmuch as the Statement only impugns that body's decision and proceedings. Thus whatever, claim the Applicant may have against JD in his personal capacity would sound in the law of tort. This is so because judicial review is available to those who are aggrieved by the acts or omissions of public officers or bodies. I am fortified in my conclusion by the decision of Lord Wilberforce in Davy v Spelthorne Borough Council [1984] AC 262 at pages 277 – 278 where he explained:

"...this claim, treated as it must be as a claim for damages for negligence, could not, in my opinion, be pursued by way of judicial review under R.S.C., Ord. 53.

This proposition can be established in two steps. First, the right to award damages conferred by Ord. 53, r. 7 is by its terms linked to an application for judicial review. Unless judicial review would lie, damages cannot be given. Secondly, an action for judicial review in respect of alleged negligence is not "appropriate" within the meaning of Ord. 53, r. 1. I quote the words of Lord Scarman:

"The application for judicial review was introduced by rule of court in 1977. The new R.S.C., Ord. 53 is a procedural reform of great importance in the field of public law, but it does not - indeed, cannot - either extend or diminish the substantive law. Its function is limited to ensuring 'ubi jus, ibi remedium.' The new procedure is more flexible than that which it supersedes. An applicant for relief will no longer be defeated merely because he has chosen to apply for the wrong remedy. Not only has the court a complete discretion to select and grant the appropriate remedy: but it now may grant remedies which were not previously available. Rule 1(2) enables the court to grant a declaration or injunction instead of, or in addition to, a prerogative order, where to do so would be just and convenient. This is a procedural innovation of great consequence: but it neither extends nor diminishes the substantive law. For the two remedies (borrowed from the private law) are put in harness with the prerogative remedies. They may be granted only in circumstances in which one or other of the prerogative orders can issue. I so interpret R.S.C., Ord. 53, r. 1(2) because to do otherwise would be to condemn the rule as ultra vires": Reg. v. Inland Revenue Commissioners, Ex parte National Federation of Self-Employed and Small Businesses Ltd. *[1982] A.C. 617, 647-648 and similarly* per *Lord Diplock, at p. 639.*

So, since no prerogative writ, or order, in relation to the present claim could be sought, since, consequently, no declaration or injunction could be asked for, no right to judicial review exists under rule 1, and no consequential claim for damages can be made under rule 7."

I set out the headnote in Davy:

"An agreement was made between the plaintiff and his local planning authority that he would not appeal against an enforcement notice in respect of his premises; the time for appealing subsequently expired. He later claimed that the negligent advice of the authority's officers had induced him to

agree not to appeal, and brought proceedings against the authority. He sought damages, as well as an injunction ordering non-implementation of the notice and an order that the notice be set aside. The later two claims were ordered to be struck out, on the basis that they raised questions of public law which could only be raised by way of judicial review. However, an order to strike out the claim for damages was refused, and the authority appealed against that refusal: Held (i) the claim for damages was not barred under Town and Country Planning Act 1971 s 243 (repealed). That section, as amended, provided that the validity of an enforcement notice could not, except by way of an appeal under the 1971 Act Pt V (repealed), be questioned on any of the grounds on which such an appeal could be brought. The authority's negligent advice was not one of those grounds; s 243 (repealed) thus did not apply. (ii) The claim for damages was an ordinary action in tort, alleging infringement of the plaintiff's common law rights. It did not seek to impugn the enforcement order, but was based on the fact that the plaintiff had lost his chance to impugn it. Before a proceeding at common law could be an abuse of process, it had to be shown that the claim in question could and should have been brought by way of judicial review. Judicial review would not have been appropriate for dealing with the plaintiff's claim, which was for damages for negligence; it made no difference that the defendant was a public authority. Accordingly, that claim would not be struck out."

In R v Secretary of State for the Home Department ex parte Vafi, a young woman from the Ivory Coast was allowed to enter England on a temporary basis but be available to be removed following receipt of the appropriate notice because when she arrived in the country the immigration officer refused her leave to enter. Miss Vafi resisted strenuously all attempts to deport her even going so far as to employ the stratagem of removing her clothing in the mistaken belief that would forestall her removal.

Judicial review was sought by Miss Vafi but not resolved because ***"[o]wing to the grant of leave and the injunction, the matters complained of became academic".*** On an application by the Home Department for a reconsideration of the grant of leave to move for judicial review Harrison, J discharged the leave and he refused the application to amend the Form 86A.The learned judge decided that the matter originally complained of had become academic and the new complaints sought to be raised on the proposed amendment ***"were essentially private law complaints which were made with a view to establishing private law remedies against the Home Department or persons acting on its behalf".*** In the course of this exercise the judge examined the merits of the complaints. He concluded that on the facts they were not justified. I have refrained from straying outside the Statement in this case

Miss Vafi appealed to the Court of Appeal. Hobhouse, LJ speaking for the Panel, agreed with the judge's decision. He found, inter alia:

> ***"The only complaints that can be pursued are the allegations which relate to the manner in which the removal directions were carried out; if there is anything in them, they are capable of being the subject of civil law remedies."***

I have noted the judgment of Lord Lowry in Jones v Swansea City Council [1990] 3 All ER 737 where a plaintiff had alleged misfeasance by a public officer, a council which had taken a decision adverse to her interests. She alleged the council was actuated by malice. I think it was accepted that one was but her claim against the council failed as she did not prove most of the council when

voting against her ***had "done so with the object of damaging her."*** It is instructive that the plaintiff could show an attitude of hostility toward her and her husband in earlier utterances by the leader of the council. It is also instructive she pursued a writ action and did not sue the leader in his personal capacity.

As I indicated, the Applicant's grievance against JD sounds in tort and to my mind judicial review is an inappropriate vehicle to use to seek relief against him. Order 53 proceedings are intended to facilitate speedy resolutions to matters involving issues which are oftentimes of interest to the general public and, notwithstanding Mr. Munroe's view that there is little dispute of fact in these proceedings so the time required for resolution of the matter would not be greatly enlarged by the joinder, I do not share his optimism should the case against JD be allowed to continue in lockstep with the judicial review.

In any event, I am unable to accept Mr. Munroe's submission on the balance of convenience, viz, the justice and convenience of a conjoint hearing argues cogently for JD's application to be dismissed. What then is to become of the claims against JD? I do not think striking out is the answer just because I have found judicial review is not a proper vehicle for those claims. The Applicant may very well be able to demonstrate once all of the evidence is disclosed, actions or behaviour on the part of JD which in a tort action gives rise to an actionable wrong for which she can be awarded damages. What evidentiary difficulties she may face is not a matter for this Court at this stage.

The scope of the conflict has been already been marked out and, as the Court can order severance of the action against JD, I do so; andI order the proceedings in relation to JD to continue as if they had been begun by writ pursuant to Order 53 rule 9(5). I consider that this inures to the justice of this case, if not the convenience of the parties.

In the circumstances I am constrained to accede to JD's application and he is relieved from being a party to these proceedings.

It is not necessary on the view I have taken above to consider whether or not any cause of action had been disclosed on the Applicant's case. Hence, I do not. .

The costs of this application are JD's. Such costs are to be taxed if not otherwise agreed.

Dated this 11th day of January, 2011.

Isaacs, Sr. J.