23-01-04

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

Civil Appeal No. 33 of 2003
(Grand Court Cause No. 515 of 2002)

IN THE MATTER OF ANDREW BOLTON (AN ATTORNEY)

And

IN THE MATTER OF HUNTER AND HUNTER (A LAW FIRM)

BEFORE: The Rt. Honourable Mr. Justice E. Zacca, President.
The Honourable Mr. Justice I. D. Rowe, J. A.
The Honorable Mr. Justice M. Taylor, J. A.

Appearances: Mr. David Pannick Q.C. instructed by Hunter & Hunter for the Appellant and Mr. Samuel Bulgin, The Honourable Attorney–General, Ms. Vicky Ellis and Ms. Jackie Ziemniak , Crown Counsel as *Amicus Curiae*.

Heard: 26th November and 5th December, 2003.
Delivered: 23rd January 2004.

REASONS FOR JUDGMENT

ROWE, J. A.

1. On December 5, 2003 we gave oral reasons for allowing the appeal of Andrew Bolton, an Attorney, in the above styled matter and now provide our fuller reasons.

2. Although Hunter and Hunter, (A Firm), is referred to in the heading of the case, the appeal did not concern them and they did not take any part in the appeal as a law firm.

THE BACKGROUND.

3. The Attorney General participated robustly. For the background to this appeal we take the facts as set out in his Introductory Facts by the Attorney General. Cause 389 of 1999 in which the parties were Luis Roberto Demarco Almeida ("Mr. Demarco"), the plaintiff, and the defendants were: (1) CVC/OPPORTUNITY EQUITY PARTNERS, LTD; (2) CITIBANK N.A. and (3) INTERNATIONAL EQUITY INVESTMENTS, INC, ("CVC") was being heard by Kellock J. in the Grand Court and he had reserved judgment which he proposed to deliver on 24 June, 2002. There was a second matter, Cause 226 of 2002, which from the notes of the Court's proceedings on 24 June, 2002, was to be dealt with at the same time as Cause 389. About 20 minutes before the time scheduled for delivery of judgment, Mr. Andrew Bolton, ("Mr. Bolton"), a partner in the firm of Hunter and

Hunter ("HUNTERS") who acted as attorneys for CVC, handed a letter to Kellock J. in which it was suggested that the judge should consider recusing himself from the case.

4. The basis of the request for recusal was that HUNTERS had received communications from their clients wherein they expressed concern about the fact a Canadian law firm of Blake Cassels and Graydon in which Kellock J. was a partner had acted for a company called TIW and some of its major shareholders. TIW is a Canadian company and is involved in litigation with CVC in which it is alleged that TIW acted in league with Mr. Demarco in seeking to damage CVC. Kellock J. had ruled in those proceedings that CVC was not entitled to adduce evidence of a document which had become known as the "TIW Letter" and which document CVC had been relying upon to show the TIW/Demarco connection.

5. Mr. Bolton's letter was written *ex parte* Kellock J. refused to recuse himself. He read the letter into the record at the time of delivery of the judgment and stated that the complaints had absolutely no foundation. Kellock J. made these comments:

> "Firstly, I have shown the letter to the Chief Justice. Secondly, I am a retired partner of Blake Cassels as of January 31st two years ago. Third, I still don't know who or what TIW is. I haven't a clue. I have never heard of them before I came to Grand Cayman; Four, I have sat on no case in which TIW was a party.
>
> It is obvious that someone has mounted an investigation in order to mount this information. I would like to know who, I would like to

know when the investigation was mounted, I would like to know the purpose of the investigation, I would like to know what information was obtained and most importantly, I would like to know why this letter was written to me other than to attempt to derail the winding up petition."

6. Mr. Bolton was given the opportunity to reply. He said he would have to take instructions in relation to all but the last of the judge's concerns and his reply was that in keeping with the decision of the English Court in **Locabail,** when a matter such as was raised in the letter came to counsel's attention it was incumbent on him to bring the matter to the attention of the judge immediately. Mr. Bolton also said there were two matters before the Court and he was unsure in which matter the judge was proposing to deliver his judgment that afternoon. Mr. Bolton said that the information contained in the letter was in the public domain and that the detailed information had been received from his clients that morning. The Court adjourned with Mr. Bolton promising to provide responses to the questions from the Bench to the Chief Justice.

7. We must set out Mr. Bolton's letter dated 24 June, 2002 *in extenso*:

"Dear Judge,

Cause No. 389 and Cause No. 226 of 2002

As you know, one of the important documents that our clients sought to rely on at the recent trial in Cause 389 of 1999 was what has been described as the TIW Document.

You will also recall that our clients had serious concerns about the extent to which Mr. Demarco and TIW were in league together.

You ruled that our clients were not entitled to adduce in evidence the TIW Document.

Our clients have very recently provided us with information that your firm Blake, Cassels and Graydon LLP apparently has considerable links with the group of which TIW forms part. Specifically, our clients have discovered that your firm has acted in a transaction for the Administrative Agent for the credit facilities of Microcell Telecommunications, Inc., the main cellular operating vehicle in Canada for Telesystem Ltd. We also understand that your firm also lists among its Clients Caisse Depot and CIBC, both of which are major shareholders in TIW.

In the normal way we would have taken considerable time to investigate these matters, and write to you asking for your comments on them but the recent news that you are giving judgment this afternoon at 2.30 p.m. renders, we believe, it imperative that this matter is at the very least drawn to your Lordship's attention so that your Lordship can consider whether it is right for your Lordship to continue to act in any Court proceedings involving our clients. In particular, we do not know what knowledge your Lordship has about the involvement of your firm in matters concerning TIW or what " conflict" searches your Lordship undertook before agreeing to act as judge in Case No. 389 of 1999 or Case No. 226 of 2002.

Your Lordship, no doubt, understand the concerns of our clients.

In these difficult circumstances, we hasten to send this letter to your Lordship so that your Lordship can consider the position before giving any judgment in this matter.

In view of the sensitivity of the matter we have not copied this letter to any other party.

Yours sincerely,

Andrew Bolton"

8. Mr. Bolton did not furnish to the Chief Justice any responses to the questions posed by Kellock J. on June 24, 2002.

THE COURSE OF PROCEEDINGS

9. On July 10, 2002, the Grand Court sitting *en banc* issued a NOTICE OF MOTION in Cause 515 of 2002, in The Matter of Andrew Bolton (an Attorney) and Hunter and Hunter (a Law Firm). The Notice of Motion was in these terms:

> "**TAKE NOTICE** that you are required to appear before the Grand court sitting *en banc* on Friday the 12th day of July 2002 at 2.00 p.m. to determine whether or not you should be held in Contempt of Court.
>
> The particulars of the possible Contempt of Court are that on June 24, 2002, Hunter and Hunter, by Andrew Bolton wrote a private letter which was addressed to and delivered to Mr. Justice Kellock without informing the opposing party which letter may be construed upon inquiring, was written for the purpose of interfering with the course of justice by influencing the decision or the exercise of the proper judicial functions of Mr. Justice Kellock in matters currently or likely to be before him wherein clients of Hunter and Hunter, Mr. Daniel Dantas or companies or entities in which he had an interest were parties.
>
> **AND FURTHER TAKE NOTICE** that at the hearing the Court will also inquire into the circumstances surrounding the retaining of The Security Centre and in particular Mr. Neville Smith, an employee of The Security Centre, for the purpose of investigating Mr. Justice Kellock. In particular, the Court will inquire into the retainer of The Security Centre, when and for what purpose it was retained, what instructions were given to Hunter and Hunter and The Security Centre, what investigations have been conducted, what information has been obtained, what reports have been given

by or to the Security Centre or Neville Smith or Hunter and any other matters that the Court thinks appropriate relating to the investisgation conducted by The Security Centre.

AND FURTHER TAKE NOTICE that if the Court should conclude that the investigation conducted by The Security Centre or Mr. Neville Smith was conducted on the instructions of or with the knowledge of Andrew Bolton or Hunter and Hunter, then the Court will consider whether or not Mr. Bolton or Hunter should be held in Contempt of the Court for the same reasons as stated above.

AND FURTHER TAKE NOTICE that at the hearing, the Court will refer to the letter of Andrew Bolton dated June 24th, the Transcript of the proceedings before Mr. Justice Kellock dated June 24th, 2002, the evidence of Mr. Neville Smith and other current and former employees and officers of The Security Centre, all documents which they will be required to produce pursuant to subpoena issued by this Court together with the evidence of Mrs. Lillian Curbello-Bush.

AND FURTHER TAKE NOTICE that this Notice of Motion is issued by the Court of its own motion pursuant to the Court's inherent jurisdiction to protect its ability to do justice, to control its own procedures and to inquire into and punish for Contempt of Court and pursuant to Order 52 r. 5.

AND FURTHER TAKE NOTICE that it is estimated that this hearing will require half a day.

AND FURTHER TAKE NOTICE that if Hunter or Andrew Bolton fail to appear before the Grand Court at the time and place specified above the Court may impose penal sanctions against them".

10. Following the Notice of Motion the Grand Court issued a *subpoena* to Nigel Clifford the Senior Partner of HUNTERS to attend the en banc sitting of the Court on July 12, 2002 and to produce (a) all

documents or notes or any other records of the firm in whatsoever form, relating directly or indirectly to the circumstances surrounding the retaining of the Security Centre, and in particular Mr. Neville Smith , an employee of The Security Centre for the purpose of investigating the Honourable Mr. Justice Kellock; and (b) to the retainer of The Security Centre, when and for what purpose it was retained, what instructions were given Hunter and Hunter and The Security Centre, what investigations have been conducted, what information has been obtained, what reports have been given by or to The Security Centre or Neville Smith or Hunter and Hunter.

11. A Non-communication Order dated 10 July, 2002 was issued by the Grand Court directed to Andrew Bolton, The Security Centre, Neville Smith and Hunter and Hunter. It contained a penal notice. The pertinent provisions of the Order are, that without the leave of the Court:

> "(a) Andrew Bolton and Hunter and Hunter are prohibited from discussing matters relating to this cause with Daniel Dantas or any companies he has an interest in, or with the Security Centre, Neville Smith or any employee of the said entities;
> (b) Neville Smith is prohibited from discussing matters relating to this Cause with Andrew Bolton, Hunter and Hunter, The Security Centre, Daniel Dantas, or any companies he has an interest in, or with any employees of the said entities".

12. Andrew Bolton swore to an affidavit on 11 July 2002. Nigel Clifford of HUNTERS to whom the *Subpoena Duces Tecum* was addressed swore to an affidavit on July 11, 2002, in which he swore that he found no documents or notes or other records of the firm in whatever

form relating directly or indirectly to the matters referred to in the writ of *subpoena*.

13. There was a hearing of the Grand Court sitting *en banc* on Friday July 12, 2002 presided over by Smellie, CJ, Sanderson, J, Kellock J, and Graham J. The respondents were represented by Mr. Andrew Jones, QC. The Attorney General was in attendance at the invitation of the Court as amicus curiae. Mr. Charles Quin and Mr. Simon Dixon appeared for Mr. Neville Smith. An affidavit had been sworn by Mr. Smith which was shown to Mr. Jones during the course of the proceedings.

14. At the outset of the proceedings the Chief Justice stated that, "The Court issued a Notice of Motion for an inquiry into possible contempt of court directed to Hunter and Hunter and to Andrew Bolton. The Court ruled that the proceedings would be held in public".

15. Towards the end of the proceedings on July 12, 2002, in answer to a question from Mr. Jones on behalf of Mr. Bolton, the Chief Justice said:

> "Your client should understand that, as we have said before, and we emphasize now, no formal charge for contempt has been leveled against him, certainly not as yet. He has chosen to file evidence and we will be perfectly content if, in respect of what he has now heard, coming from the testimony of Mr. Myles, you were to choose to file a further affidavit explaining his position'.

We pause here to note that the first paragraph of the Notice of Motion cited Mr. Bolton for contempt of Court and gave particulars of the

contempt that it was alleged that he had committed. The Notice of Motion then went on in the following paragraph to state that the Court would carry out inquiries into other matters and if evidence was uncovered to make further citations for contempt the Court would do so. It seems to us that at this point of the proceedings, the Court cannot have been referring to the *fons et origo* of the contempt proceedings, that is to say, the letter of June 24, 2002. That was plainly the subject of a specific charge of contempt which Mr. Bolton was required by Notice of Motion to answer.

16. A press release was issued by the Court to explain what had transpired in the 12 July, 2002 proceedings.

17. On 18 July, 2002, Andrew Bolton filed his Second Affidavit. The matter next came before the Court on June 2, 2003, as previously constituted, except that Mr. Justice Graham was not a member. The Chief Justice announced that wide ranging inquiries in more than one geographical jurisdiction had been taking place and they were not complete. Mr. Jones asserted that the type of inquiries that it appeared were being conducted were not appropriate under a Notice of Motion and the matter was adjourned.

18. Smellie CJ, Sanderson J and Kellock J sat *en banc* on September 1, 2003 to continue the hearing of the matter. The Chief Justice announced that there was an inquiry which had two aspects (a) the letter written by Mr. Bolton of 24 June 2002 and (b) the investigations that had been carried out by Mr. Neville Smith and others regarding

Kellock J. He stated that the Royal Cayman Islands Police had conducted an investigation and prepared a report that the Court had considered. In pertinent part he said:

> "The Court has concluded that there is not sufficient evidence available to justify a citation for contempt being issued with respect to the second area of inquiry. – The Court has considered, however, that it is obliged to direct a citation for contempt against Mr. Bolton. The Court has concluded that Mr. Bolton has a case to meet but it does not endeavour to determine whether a contempt has been committed. That will be for determination in the contempt hearing.
>
> The Court directs that a citation of contempt of court be issued against Mr. Bolton for an attempt improperly to influence the conduct of proceedings before the Court by way of private communication with the judge. The Court expressly makes no comment on the merits of the case or on the state of the evidence available. The Court simply observes that there is a case for Mr. Bolton to meet.
>
> The Court has three specific areas that it feels obliged, however, to advise Mr. Bolton of in order that he might properly deal with this citation. They are: (1) The fact that the communication was made privately without notice to the other parties; (2) The nature of the concerns forming the basis of the communication. Could those concerns properly justify a communication suggesting the recusal of the judge in any event?' (3) The timing of the communication on June 24th last year 15 minutes before judgment was to be delivered when Mr. Bolton apparently knew of Justice Kellock's association with Blake Cassels (the law firm) some days before the communication was made i. e. on June 20th of last year and had in fact appeared before Justice Kellock on June 21st last year.
>
> This matter has been referred to the Attorney General for prosecution and his office will within 14 days serve notice of the formal charge upon Mr. Bolton".

19. The Chief Justice advised Mr. Jones that Cause 515 of 2002 was at an end. To the other attorneys, Mr. Quin and Mr. Allen, the Chief Justice confirmed that the involvement of their clients in Cause 515/02 was at an end.

20. Mr. Anthony Trace Q.C. who was leading counsel in Cause 389 of 2002 and who had been consulted by Mr. Bolton prior to the issuance of the letter of June 24, 2002 was advised by the Court by letter of the outcome of the proceedings on September 1, 2003. We need say no more about the letter of 1 September 2003 to Mr. Trace as it played no significant part in the appeal proceedings.

AN APPEAL IS LAUNCHED.

21. Notice and Grounds of Appeal were filed on September 10, 2003.On September 12, 2003 the Chief Justice, in response to a memorandum from the Registrar, said, *inter alia:*

> "Your memorandum of 10th September 2003 refers. Section 20(4) of the Court of Appeal Law speaks of "the reasons for the judgment appealed against. There us no 'judgment' understood in those terms".

In that same letter the Chief Justice disclosed that the Attorney General had on 9 September 2003 advised the Grand Court that the Notice of Motion envisaged by the Court in its decision of 1 September 2003 should be issued by the Grand Court itself.

22. On 15 September, 2003 the Clerk of Courts provided Mr. Bolton with a copy of a memorandum dated June 24th 2002 from Kellock J to the Chief Justice and an undated memorandum, (entitled Re Hunter and Hunter) from Kellock J to the Chief Justice. The appellant has said that he was unaware of these memoranda prior to September 15, 2003. Between 24 June 2002 and July 10, 2002, when the Grand Court issued its Notice of Motion there was no recorded activity in relation to the June 24 letter. The memorandum from Kellock J dated 28 June, 2002 to the Chief Justice must therefore be set out. In that memorandum Kellock J wrote:

> "Herewith Barrie & Lowe on contempt – I have marked the relevant pages.
>
> Page 429 - pp D 1st sentence
> Page 430 - re Dyce Sombre
> Page 431 - Chester Corp – statement of Whitmore Richards J.
> Page 439 - The court must show it has a long arm
>
> If Bolton thought that I was disqualified he should have brought a motion.
>
> The private letter (even if it was properly based) was improper.
>
> Bolton's clear intent was to intimidate me – ie: to induce me to act so as to avoid embarrassment by recusing myself from sitting on any CVC matter. Instead of making his case in open court or chambers (as he knew full well he had no case to make in open court or chambers) Bolton sought to intimidate.
>
> Imagine the mail judges would get from litigants or counsel if this were permitted.
>
> If a litigant does not have a strong enough case to make openly

(which is the only way to make it) private letters to judges have to be contempt – an attempt to interfere in the administration of justice.

Bolton's only defence (and one which he will surely make, is that he wished to save me embarrassment That is appealing on its face but is prohibited see **Re Dyce & Sombre.** See also 9(1) Hals. 7th pp 434

It seems to me that the question is not has there been contempt, but what sanctions should be imposed."

THE GROUNDS OF APPEAL

23. Although, in the interest of judicial time, Mr. Pannick kept his main submissions in a narrow compass, he asked the Court to consider the whole range of his skeleton submissions, if necessary, and these covered all the grounds of appeal. We therefore set out in some detail the main grounds of appeal filed by Mr. Bolton. Ground 1 alleged, and gave particulars to contend, that the court erred in law in concluding in its 1 September 2003 decision that there was a case for Andrew Bolton to answer in contempt. Special reference was made to the decision of the English Court of Appeal in **Locabail v Bayfield Properties** [2000] Q.B. 451. Ground 2 alleged that in the circumstances in which the citation of contempt was made on 1 September 2003, Mr. Bolton could not receive a fair trial and therefore the citation was made in breach of natural justice. Grounds 3 and 4 complained of the manner in which the Court disposed of the inquiry involving the investigation of Kellock J.

24. The fifth ground of appeal alleged that the Grand Court had no jurisdiction or alternatively ought not to have exercised any jurisdiction to commence proceedings for contempt of court of their own motion unless (a) the contempt of court is clear, i.e., it is plain and obvious that the defendant has committed a contempt of court; (b) it affects pending proceedings; (c) there is an urgent and imperative need to act in order to protect the administration of justice and (d) the circumstances are such that no other procedure can be employed to protect the administration of justice.

25. Ground 6 alleged that the Grand Court misunderstood the nature of their jurisdiction and wrongly issued the Notice of Motion notwithstanding that (a) there was no clear contempt of court. To the contrary the judges issued a Notice of Motion for an enquiry into a possible contempt of court which, in their view, required to be investigated; (b) because there was no clear contempt of court, there could have been no urgency about the need to punish Mr. Bolton or any other partner of HUNTERS; (c) it was inappropriate for the Judges of the Grand Court to adopt the role of investigating possible contempt of court or crimes relating to the administration of justice as that function, belonged to the Commissioner of Police; (d) it was unnecessary and inappropriate for the Judges of the Grand Court to adopt the role of prosecutor by acting on their own motion when the case did not fall within the criteria set out in ground five, (supra). The Judges erred, it was alleged, in not referring the matter to the Attorney General who could have referred the matter to the Commissioner of Police for action.

26. In Ground 7, Mr. Bolton complained that the Grand Court had no power to direct the Attorney General to commence contempt proceedings against him. Count 8 alleged that if a reference was to be made by the Court it should be directed to the Commissioner of Police to make his independent investigation. Count 9 alleged that the Grand Court had no jurisdiction, or alternatively ought not to have exercised jurisdiction to issue the Notice of Motion of July 10, 2002. Count 10 alleged numerous breaches of the rules of natural justice in the issuance of the Notice of Motion.

27. The relief sought was that (a) the Notice of Motion be struck out; (b) the Judgment and order of the Grand Court sitting *en banc* on 1 September 2003 be set aside in its entirety, (c) that any proceedings that may, prior to the hearing of the appeal, have been instituted by the Attorney General pursuant thereto be struck out and (d) that there be an order for costs.

CAUSE 599 OF 2003

28. An Originating Notice of Motion was issued by the Clerk of the Grand Court by Order of the Chief Justice on September 15, 2003, citing Andrew Bolton, an Attorney, for contempt of Court pursuant to Order 52 r.5 of the Grand Court Rules. The particulars of contempt wrongly stated the date of Mr. Bolton's letter as, "24th June 2003".

This Notice of Motion stated that:

> "The writing and delivery of that letter constituted a contempt of court in that :
>
> 1. You wrote to the learned judge during the course of proceedings without informing your opposing counsel;
> 2. That letter was delivered to the learned judge approximately 15 minutes before he was due to deliver a judgment on June 24, 2002 (which you specifically referred to in your letter) when much of the information upon which you relied had been known to you since June 20th 2002.
> 3. The basis for raising your concerns with the judge was groundless as the company TIW was not a party to the action being heard by the learned judge.
> 4. Moreover, even the purported basis upon which your concerns were raised, by any objective view, could have given no proper cause for concern. This is apart from the fact that the learned judge is no longer a partner of the firm of Blake Cassels".

29. This Motion we were advised was brought at the Court's own motion on the advice of the Attorney General. It was stayed pending the hearing of this appeal.

THE MOTION IN LIMINE

30. The Attorney General argued *in limine* that this Court had no jurisdiction to hear the appeal. His first point was that this Court could not grant the relief requested by Mr. Bolton to strike out the Notice of Motion. The basis of his submission was that as this Court

has no original jurisdiction in civil cases, it had no power to strike out the Notice of Motion of July 10, 2002 as no application to strike out had been made in the court below and no decision or precise judgment had been rendered by the court below on that issue. We did not think that the power to grant a particular relief went to the jurisdiction of the Court to enter upon the appeal but rather that the threshold issue must be whether the Court can enter upon the appeal and not whether any specific relief can be granted on the hearing of the appeal.

31. The second limb of the *point in limine* was that there was no judgment in Cause 389 of 2002 from which an appeal could be taken. He submitted that the proceedings of 1 September 2003 produced no judgment or order or decision in contemplation of Order 42 of the Grand Court Rules. There must, he said, as a prerequisite to an appeal, be a judgment, order or decision and he pointed to the memorandum of the Chief Justice which stated that there was no judgment as such in Cause 515 of 2002. His further submission was that "despite the wording of the Notice of Motion issued by the Grand Court on 10th July, 2002" what actually took place on 12th July and 1st September 2003, was an inquiry. We were referred to **Allen v. Byfield No. 2**, [1964] 7 W.I.R. 69, a judgment of the Court of Appeal of Jamaica. That was a case in which during the hearing of an action the Court ordered the production of documents over an assertion that the documents were privileged. It was an interlocutory ruling on the admissibility of evidence. No formal order was prepared in relation to that ruling and the Court of Appeal held that the appellant was unable to show that an interlocutory order had been made in the court below.

The point in **Lake v Lake** [1955] P.D. 336, was that the appellant was not appealing from the formal order of the Court that had been drawn up but from a statement in the reasons given by the trial judge. Where there is a formal order drawn up in conformity with the prevailing rules of Court and filed in the appeal, that is the judgment or order from which the appeal must be taken and not from individual issues decided by the trial court in the course of giving reasons for judgment. In **Moncris Investments Ltd. v. Lans Efford Francis et al**, (a judgment of the Court of Appeal of Jamaica) (unreported SCCA 50/92), the Court applied **Allen v. Byfield** and held that there was no right of appeal from a ruling of the trial judge in refusing to permit parol evidence to contradict a written agreement. We do not obtain any assistance from these cases although they were stoutly relied on by the Attorney General.

32. This was a case in which the parties were brought before the Court in discreet proceedings in Cause 515 of 2002 in which Andrew Bolton was cited for contempt of court. Those proceedings were finally terminated and the court made a determination at the end of the proceedings. There was nothing interlocutory about these discreet proceedings and there was nothing comparable to rulings on the admissibility of evidence in the **Allen v. Byfield** line of cases relied upon by the Attorney General.

33. Mr. Pannick submitted that on 1 September 2003, the Grand Court took two decisions in relation to Mr. Bolton, to wit, a decision that he should be cited for contempt of court and a direction to the Attorney

General to institute contempt proceedings against Mr. Bolton within 14 days. Both these decisions he said were explicit in the ruling of the Chief Justice on 1 September 2003. The language of the reference to the Attorney General could not, he submitted, be interpreted as a request to the Attorney General to exercise his independent prosecutorial discretion and decide whether or not a charge of contempt should be brought against Mr. Bolton. He said that if this Court found that final decisions were in fact made by the Grand Court on 1 September, 2003, the only issue remaining on the point *in limine* was whether the Court should refuse to hear the appeal because no judgment or order of the Grand Court was filed with the Notice of Appeal.

34. Order 59 r. 5(1)(a) of The Supreme Court Practice 1997 is applicable to this jurisdiction and it is provided therein that in setting down an appeal a copy of the judgment or order appealed from should be filed. The Attorney General admitted that circumstances could exist in which an appeal could proceed without the formal order or judgment but he strongly contended that this was not such a case.

35. We reserved our decision on the point *in limine* and heard the appeal. On December 5, 2003 in the course of our oral reasons for judgment we said that the point *in limine* failed, citing Section 26 of the Court of Appeal Law which provides that:

> "The provisions of this Law conferring a right of appeal in civil causes and matters shall be construed liberally in favour of such right and in case any provision of this Law

> shall have been inadvertently, or from ignorance or necessity omitted to be observed, the Court may, if the justice of the case so requires, with or without terms, admit the appellant to impeach the judgment or proceeding appealed from despite the omission".

Order 59 r.5 of the English Court of Appeal Rules is applicable to this jurisdiction by virtue of section 35 of the Court of Appeal Law. Consequently if this Court is of opinion that a provision of the English Rules could not, as a matter of necessity, be complied with, this Court can act pursuant to Section 26. We said in the oral judgment that the appellant had requested a copy of the judgment or order of the 1 September 2003 and that the Chief Justice had replied stating that "there is no judgment understood in those terms". The appellant could not therefore comply with Order 59 r. 5 (1)(a) which requires the appellant to lodge a copy of the judgment or order appealed from.

36. We agree with the submissions of Mr. Pannick that on 1 September 2003 the Grand Court made decisions that Mr. Bolton should be cited for contempt and gave directions to the Attorney General to institute proceedings against him. In our opinion these were final decisions which terminated Cause 515 of 2002 and were appealable as of right by Mr. Bolton.

In our view, as a matter of necessity, the judgment or order could not have been included in the notice of appeal filed by the appellant and for these reasons we stated in our oral judgment that the point *in limine* failed.

THE GROUNDS OF APPEAL DISCUSSED.

37. The appeal was scheduled to be heard in one day. The point *in limine* was argued at some length and appellant's counsel announced that he would argue two main points and so to speak, leave the other grounds of appeal on file. Mr. Pannick submitted that the Grand Court had no power on 1 September, 2003 to decide to bring contempt proceedings against Mr. Bolton or to direct the Attorney General to institute proceedings. The most, he said, that the Grand Court could lawfully have done was to invite the Attorney General to decide whether he should bring proceedings. In his submission the Court has jurisdiction to act in an emergency basis, on its own motion, to commit for contempt of court, but on the facts of this case no conceivable emergency existed 14 months after the letter was written to Kellock J in June 2002. Mr. Pannick relied on the decisions of the English Court of Appeal in **Balogh v. St. Albans Crown Court**, [1975] QB 73 and the very recent decision of this Court in **WX v YX** [2002] CILR 514 in support of his propositions.

38. **Balogh** was a case in which a solicitor's clerk wishing to enliven the proceedings of the St. Alban's Crown Court devised a plan to introduce laughing gas into the courtroom. He was discovered by the police after he had stolen and placed a cylinder of laughing gas in the ventilation system of the Court but before he could set if off. **Balogh** admitted his acts to the police and he was taken before the senior judge presiding at that Crown Court. He was summarily sentenced to 6 months imprisonment for contempt of court pursuant to the

provisions of R.S.C.Ord. 52 r.1. On appeal it was argued that a judge of the Crown Court had jurisdiction to punish for contempt that was committed in the face of the court and that as Melford Stephenson J. had no personal knowledge of what happened he had no jurisdiction to commit Mr. Balogh for contempt. Lord Denning considered the competing arguments of counsel as to the ambit of R.S.C. Ord. 5 r 5 as it impinges upon the power of a superior court to commit for contempt on its own motion and at p. 83 of the Report he said:

> "In what circumstances can the High Court make an order "of its own motion"? In the ordinary way the High Court does not act of its own motion. An application for contempt is usually made by motion either by the Attorney General or by the party aggrieved: see Reg. v. Gray [1900] 2 QB 36; **Attorney General v. Times Newspapers Ltd.** [1973] QB 710, 737 in this court by me as corrected in the House of Lords [1974] AC 273 at 294 by Lord Reid, at p. 310 by Lord Diplock and at p. 3243 by Lord Cross of Chelsea: and such a motion can, in an urgent case, be made *ex parte* : see **Warwick Corporation v. Russell** [1964] 1 W.L.R. 613. All the cases cited in the notes to Ord. 52 r. 5. are of motions by some one *ex parte.* None of them tells us when the High Court can make an order of its own motion. All I find in the books is that the court can act upon its own motion when the contempt is committed "in the face of the court". Wilmot CJ in his celebrated opinion in Rex v. Almoh (1765) Wilm. 243, 254 said: 'Tis is a necessary incident to every court to fine and imprison for a contempt to the court acted in the face of the court'. Blackstone in his Commentaries, 16th ed. (1825) Book IV, p. 286, said: "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned at the discretion of the judges'.

39. Lord Denning got no formulation from his predecessors that he could quote which capsuled the propositions upon which the court was asked to pronounce and at p. 84 of the Report he said;

> "But I find nothing that tells us what is meant by "committed in the face of the court". It has never been defined. Its' meaning is, I think, to be ascertained from the practice of the judges over the centuries. It was never confined to conduct which a judge saw with his own eyes. It covered all contempt for which a judge of his own motion could punish a man on the spot. So 'contempt in the face of the court' is the same thing as 'contempt which the court can punish of its own motion'. It really means 'contempt in the cognizance of the court".

At p. 85 of the Report Lord Denning said:

> "As I have said, a judge should act of his own motion only when it is urgent and imperative to act immediately. In all other cases he should not take it upon himself to move. He should leave it to the Attorney General or to the party aggrieved to make a motion in accordance with the rules in R.S.C. Ord. 52. The reason is so that he should not appear to be prosecutor and judge: for that is a role which does not become him well".

40. The bench as presently constituted had the opportunity to consider whether committal for contempt could properly be ordered by the court in exercise of the power of the court to punish contempt of its own motion outside the rules, an inherent jurisdiction provided by Ord. 52 r. 5. In answering this question, Taylor JA said:

> "We have no doubt that the court has authority, in an exceptional case, to punish summarily, of its own motion, failure in timely compliance with an order of the present sort made in civil proceedings, *i.e.* an order requiring that

a party provide evidence on affidavit within a stated time. It has, however, long been recognized that the inherent authority to proceed summarily of the court's own motion is to be exercised most sparingly, and only where, after weighing all relevant factors, the court properly concludes that such action is essential, in the public interest, in order to preserve respect for its authority and that of its orders, or otherwise to ensure the due administration of justice.

The reluctance of the courts to exercise the inherent jurisdiction lies not so much in the procedure adopted being summary, for it may, are here, be exercised in circumstances in which there is no urgency requiring curtailment of fundamental rights such as those to notice, representation by counsel and the opportunity to make full answer and defence. It lies, rather, in the fact that the procedure renders the court the complainant and prosecutor as well as judge, and the process although criminal in nature, takes on an inquisitorial character, with little or nothing of the presumption of innocence. It is necessary that the court has already formed the view that the alleged offender is guilty of contemptuous behaviour before the procedure can be invoked or there would be no basis for requiring that cause be shown why imprisonment should not be imposed.

While the power is a broad and necessary one, and the court cannot be required in all cases to defer to the decision of the parties or of the Attorney General whether contempt proceedings should be brought, it is only when there is pressing necessity for such drastic action that the court will be justified in assuming what must, under our system, be an anomalous and unavoidably uncomfortable role- that is to say, the role of complainant, accuser and prosecutor, as well as judge, in the matter before it".

41. The views expressed above as to the role of the Attorney General are consonant with those of Lord Reid in **Attorney General v.**

Times Newspaper [1974] AC 273. This case concerned the drug "thalidomide' and a publication in the Times Newspapers of the plight of the thalidomide children which was considered to be in contempt of court. One issue was whether the private party ought to have instituted action or that the decision lay with the Attorney General. In giving his judgment, Lord Reid said at p. 293:

> "I agree with your Lordships that the Attorney General has a right to bring before the court any matter which he thinks may amount to contempt of court and which he concludes in the public interest should be brought before the court. The party aggrieved has the right to bring before the court any matter which he alleges amounts to contempt but he has no duty to do so. So if the party aggrieved failed to take action either because of expense or because he thought it better not to do so, very serious contempt might escape punishment if the Attorney General had no right to act. But the Attorney General is not obliged to bring before the court every prima facie case of contempt reported to him. It is entirely for him to judge whether it is in the public interest that he should act".

42. The Attorney General did not dissent from the propositions of law as adumbrated in **Balogh** and **WX v YX,** as set out above. What he did was to call the Court's attention to the case of **In re Lonrho Plc et al**, [1990] 2 AC 154 and to the procedure that was followed in that case. **Lonrho** was locked in a bitter take over dispute with the Al Fayed brothers over the House of Fraser which owned, *inter alia*, Harrods of London. While the legal dispute was on its way to the House of Lords, **Lonrho,** through the Observer newspaper, published and provided to members of the Appellate Committee of

the House of Lords who were assigned to hear the appeal adverse comments on the Al Fayed brothers. On April 10, 1989, The Appellate Committee of the House of Lords raised the following questions; (a) whether the sending of documents received by the Lords of Appeal was designed to influence them in their approach to the appeal and whether it might constitute a contempt of the House of Lords; (b) whether the partially successful publication of the special edition of "The Observer" did not of itself constitute a contempt of the House. On April 13, 1989, the House of Lords ordered that the Appellate Committee, to which was referred the consolidated appeals, should consider whether the circumstances in which a special edition of "The Observer" was published constituted a contempt. At the request of the Appellate Committee, the Attorney General nominated counsel to assist the Appellate Committee as *amicus curiae* who was to act in the role of prosecutor and the Appellate Committee announced that the amicus was to "make available a formal statement on the usual lines". **Lonrho** was cited for contempt.

43. There were legal challenges to the procedure adopted for the citation of **Lonrho**. The House held that an alleged contempt which related to proceedings before the House of Lords in its judicial capacity was determinable by the House alone and that it was not for the Attorney General to decide whether cognizance should be taken of such possible contempt or not. The House held that there was no authority vested in the Divisional Court of the Queen's Bench Division or any other court to deal with matters

over which the House had jurisdiction.

44. We did not find this case particularly helpful. As a chamber of the British Parliament, the House of Lords has special privileges to punish contempt of its proceedings. The processes by which the House might choose to do so are not applicable to the ordinary courts that are not part of Parliament. In our view the **Lonrho** case is not authority that could empower the Grand Court to investigate reports so as to be able at a future time to determine whether or not there is prima facie evidence against a "suspect" to place him on trial for contempt.

45. The procedure adopted by the Grand Court has presented us with some difficulties. In the first place, if the Court did not have prima facie evidence of contempt of court, why was the court triggering its inherent power to order named individuals to show cause why he or they should not be committed to prison or to deprivation of property for contempt? The portions of the transcript of proceedings that were brought to our attention by the Attorney General stressed that the members of the Court were of an open mind and were carrying out an investigation to ascertain facts. At the very end of the day the Court disclaimed that it had come to a concluded view on the facts that it had ascertained in its investigation. However, the Court did act as a tribunal of fact, in that it determined that HUNTERS which had been cited in the action had no case to answer. Other entities were also absolved.

CONCLUSION

46. We have canvassed issues herein to which we did not make specific reference in our oral reasons for judgment. We now formally include in these reasons for judgment the oral reasons which were delivered in open court on December 5, 2003 when we said:

> "By Notice of Motion in Cause 515 of 2002 dated July 10, 2002, Andrew Bolton was cited to appear before the Grand Court sitting en banc on July 12, 2002 to determine whether or not he should be held in contempt of court for writing a private letter to Kellock J without informing the opposite party, which letter the citation said, " may be construed upon inquiring, was written for the purpose of interfering with the course of justice by influencing the decision or exercise of the proper judicial functions of Kellock J in matters currently or likely to be before him wherein clients of Hunter and Hunter, Mr. Daniel Dantas or companies or entities in which he had an interest were parties.
>
> The Notice of Motion included particulars relating to the retention of a Security Centre and the involvement of a Mr. Neville Smith and or Mr. Andrew Bolton and or Hunter and Hunter for investigations into the background and professional practice of Kellock J.
>
> The Notice of Motion was issued by the Grand Court on its own motion, pursuant to its inherent jurisdiction to protect its ability to do justice and to inquire into and punish for contempt of court and pursuant to Ord. 52 r. 5.
>
> At the *en banc* hearing it was held that the inquiry should be in public (rather than in private) and the Court stated that : 'We emphasize, as the Notice of Motion also says,

that the proceedings at the present stage is to be in the form of an inquiry. The Court has formed no view as to the guilt or innocence of anyone. The presumption of innocence stands unless and until it is to be properly displaced upon inquiry. Moreover, as is intimated from the Notice of Motion, should there be, upon inquiry, further reason to pursue charges of contempt, further particularization, perhaps in the form of further Notice of Motion, may be considered appropriate.

The Chief Justice was, in our view, saying at that stage, that the proceedings on the Notice of Motion would have in issue the question of Mr. Bolton's innocence or guilt of contempt of court.

The proceedings on the Grand Court's inquiry were terminated on September 1, 2003 when the Grand Court: 'directed that a citation for contempt of court be issued against Mr. Bolton for an attempt improperly to influence the conduct of proceedings before the Court by way of private communication with the Judge' and then the Court said, 'This matter is referred to the Attorney General for prosecution and his office will within 14 days serve notice of the formal charges upon Mr. Bolton'.

On September 15, 2003, an Originating Notice of Motion was issued by the Court of its own motion pursuant to Ord. 52 r. 5 requiring Mr. Bolton to show cause why he should not be punished for contempt for the exact matter in which Mr. Bolton had been cited for contempt in Cause 515 of 2002.

In our view, it is apparent that the Grand Court made a decision on September 1, 2003 that brought to an end the proceedings in Cause 515 of 2002 to determine "whether or not Mr. Bolton should be held in contempt of Court" in that proceeding. Mr. Bolton had replied in that proceeding by filing affidavits and by explaining his conduct. He had been cited for contempt in Cause 515 of 2002 and he was entitled to a decision in those

proceedings as to whether or not the alleged contempt had been established.

In our view, the decision of September 1, 2003 plainly did not find that the contempt alleged had been established. Mr. Bolton was entitled, in the circumstances, to be acquitted of the charges.

We are of the view that the Grand Court fell into error when it decided that a further inquiry into the matter of contempt which it had embarked upon and had concluded should be embarked upon by a second tribunal at the instance of the Attorney General or by the Court of its own motion.

We accordingly allow the appeal and direct that the decision of the grand Court sitting *en banc* on September 1, 2003 should be set aside in its entirety and that no further proceedings be taken against Mr. Bolton in regard to the matters complained of in the Notice of Motion in Cause 515 of 2002".

47. The Constitution of the Cayman Islands confers upon the Attorney General the primary right to present and to terminate criminal prosecutions in his sole independent discretion. As Lord Reid said in **Attorney General v. Times Newspaper**, (supra), the Attorney General is not bound to prosecute every criminal contempt of court as in these matters he is the repository of the public interest and his decision whether or not to prosecute is final.

48. This case has turned entirely on the procedure that was adopted by the Grand Court. Nothing that is said in this judgment must be construed as an approval of the conduct of Mr. Bolton which was so overwhelmingly disapproved by the Grand Court. Insofar as the

Court had jurisdiction to act urgently of its own motion in regard to the letter of June 24, 2002, that jurisdiction was exhausted on September 1, 2003 when the Court concluded the proceedings it had brought for the purpose as Cause 515 of 2002, having made no finding of contempt against Mr. Bolton or any party named.

49. Mr. Nigel Clifford, the senior partner of HUNTERS, raised with Court the matter of costs on December 5, 2003 when we announced our judgment. We said then that the matter was reserved. We do not expect to hear anything more about it.

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ZACCA P.

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ROWE, J.A.

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TAYLOR, JA