

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL DIVISION**



LACR0194/2016

**IN THE MATTER OF AN APPEAL UNDER SECTIONS 37(7) AND 38
OF THE LEGAL AID LAW, 2015
(taken administratively without a hearing “on the papers”)**

**REGINA
V
CANOVER WATSON**

REPRESENTATION: Amelia Fosuhene of Brady Law for the Applicant

**BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE
THE 16TH DAY OF JUNE, 2017**

Legal aid – appeal under the Legal Aid Law, 2015, (“the Law”) against refusal of grant for appointment of Queen’s Counsel – requirement that case need be complex within the meaning of section 24 – application of that principle.

JUDGMENT

1. The applicant Mr. Canover Watson is currently serving a sentence of imprisonment having been convicted on 4th February 2016 for offences of fraud, conspiracy to defraud and breach of trust.
2. On 12th October 2016, he was granted legal aid for representation to assist in his appeal against conviction and sentence. A limit of KYD15,000 was placed upon the certificate and a condition was imposed that the Legal Aid Fund be reimbursed from any assets available to the applicant once the legal proceedings are ended. His assets, of not

insignificant value, are currently the subject of restraint orders at the behest of the Crown, pending confiscation proceedings.

3. An application was made by him to extend the limit of KYD15,000 placed on the legal aid certificate and further to extend the certificate to allow for his representation on the appeal by Queen's Counsel.
4. The applicant had been represented at trial by Mr. Trevor Burke QC and by Mr. Ben Tonner (then a senior junior but now himself a Queen's Counsel) and by his further application he also sought funding to pursue a criticism of their conduct of his trial.
5. On 12 April 2017, his further application was refused by the Director of Legal Aid who issued her final certificate of refusal in these terms:

“Application for extension for Q.C. to (1) deal with appeal; (2) advise on criticism of previous Counsel and their conduct of case and (3) review Court papers with Counsel, is refused.”

6. On 9th May 2017 the Director refused an application for the reconsideration of her decision. This was a still further application which the Law, by section 37(7) requires to be made, before this appeal to a judge can be brought. The application having been reconsidered and refused by the Director, Mr. Watson now brings this appeal under sections 37(7) and 38 of the Law.
7. Mr. Watson's argument for the extension of the grant is presented by him in a letter dated 17 May 2017 and elaborated upon by Ms. Fosuhene on his behalf, in her note of appeal filed on 13 June 2017.



8. The primary ground of appeal relies upon section 7(2)(d) of the Cayman Islands Constitution Order 2009 which prescribes the right to legal aid where a person has insufficient means to pay for legal assistance and the interests of justice require that he or she is represented at public expense. While Mr. Watson has assets as mentioned above, in keeping with Section 45(4) of the Proceeds of Crime Law (2016 Revision), they are not available to him to fund his defence or appeal pending resolution of the Crown's claim. He therefore stands to be treated as a person of "insufficient means" and so qualifies for assistance under the Law in keeping with its objectives as declared by section 3. In this regard it is relevant to note that Mr. Watson had funded his legal representation for his trial from his own resources.
9. Mr. Watson being now of insufficient means, the requirements of the interests of justice are said by Ms. Fosuhene to be manifest from the complexity of the case. This is a most relevant consideration as identified by section 24 of the Legal Aid Law, 2015 which reads as follows:

"24.(1) The Director may procure, by contract, legal aid services on behalf of assisted persons in certain criminal cases which he determines, in accordance with subsection (2), to be complex legal aid cases.

(2) In determining whether a matter is a complex legal aid case the Director shall take into account whether the case satisfies at least three of the following criteria –

(a) the commission of the offence to which the case relates is likely to give rise to national publicity and widespread public concern;

(b) a successful defence to the charges requires highly specialist knowledge;



- (c) *the elements of the offence are of a technical nature and a successful defence requires an attorney-at-law with the relevant technical legal knowledge;*
 - (d) *the elements of the offence involve an international dimension;*
 - (e) *a successful defence against the charges requires a combination of legal, accountant, investigative and other expert skills;*
 - (f) *the charges are based on allegations of terrorism;*
 - (g) *the offence attracts a sentence exceeding ten years;*
 - (h) *the offence is of a violent or sexual nature involving multiple victims; or*
 - (i) *the offence involves complex financial or legal transactions or records.*
- (3) *The fees and costs attached to the proceedings in complex legal aid cases shall be paid in accordance with the terms of the legal aid contract negotiated between the listed attorney and the Court Administrator and granted under this section.*
- (4) *The Director, with the approval of the Court Administrator, may, on receiving a written request from the attorney-at-law assigned under the contract indicating the reasons, allow for an upward adjustment in the agreed fees and costs if, during the conduct of the criminal or civil proceedings, there is a material change of circumstances which is likely to prejudice the quality of the legal aid representation and which makes it unreasonable to enforce the terms of the original legal aid contract.*
- (5) *An attorney-at-law in a complex legal aid case shall, at such intervals as may be specified in the contract, provide the Director with such written evidence as the Director may reasonably require in order to permit the Director to ensure that the estimates of time and costs under the legal aid contract are being met.*



10. Ms. Fosuhene relies, in particular, upon subsections 24(2)(a), (c), (d), (e) and (i) and argues as follows:

“In this instance the applicable subsections are a, c, d, e and i. This case obtained widespread publicity on the Cayman Islands and made front page news on island for the duration of the trial. Whilst there is no need for specialist knowledge, there was a need for technical knowledge relating to the specific charges. Moreover, there was an international dimension which arose in this case, in particular the emails and correspondence of Jeffrey Webb; whilst he was not on trial, he was inextricably linked to Mr. Watson by the prosecution over and over again. Importantly he entered guilty pleas to offences of dishonesty after being extradited from Switzerland to the USA. The guilty pleas came during the course of the Watson preparation for trial and trial. This was also a case in which an accountant should have been instructed moreover, in light of the late and piecemeal disclosure there is argument that a third attorney should have been on hand to deal with the disclosure which came at the end of the trial. Finally the case involved a number of complex transactions both financial and legal as well as significant records which were disclosed very late in the trial process. It goes without saying, this case fell into more than 3 categories of complexity to warrant the appointment of Queens Counsel.

An additional factor in considering the appointment of a QC is the question of whether there is a novel issue of fact or law which might arise in the case. There is likely to be a novel legal argument with regards to the definitions applied during the course of the trial by the judge in some of the charges. It is arguable that the judge did not adequately understand the nature of the role of Mr. Watson in various appointments and therefore mis-interpreted or mis-understood the use of the legislation. Before any party can come to the determination of whether or not Mr. Watson was guilty of Counts 3, 4 and 6 it would be important to understand fully the charges he faced and further understand the legal argument made by Mr. Burke QC as well as the judge’s interpretation of those charges and the relevant legislation. The ruling which is attached hereto shows that the Learned Judge struggled with the argument. He could find no authority thought the work which could help him resolve the argument he faced. (sic) However that may have been because no other jurisdiction interpreted the law in the way the learned judge did. In any event it will be imperative that the relevant Queens Counsel have some knowledge of Criminal law as well as Public Law and the definitions which govern the appointment of public officers. The argument at first instance was determined in favour of the prosecution. However, there are a number of factors which will fall to be considered afresh by the appeal court. Such an argument is one which would have never come before the



Cayman Islands Court of Appeal in this context and warrants the expertise of suitably qualified Queens Counsel.

In addition, there is likely to be significant criticism made about the way in which the original defence was conducted. As it was Mr. Burke QC who conducted the defence for Mr. Watson, it is only fair and proper that Mr. Watson should benefit from counsel of equal standing, if he is to make such criticism and it is submitted that he should be on an equal footing to do so.

Mr. Watson also faces confiscation proceedings brought by the Crown pursuant to S.15(3) of the Proceeds of Crime Law (2014) as a result the court issued an order restraining Mr. Watson's assets pending the outcome of the appeal. Counsel is not in a position to offer any assurances or any contribution towards the legal aid fund from Mr. Watson. The value of the sums restrained are in excess of half a million dollars. Neither the court nor counsel can accept any monies which might have been obtained as a result of the proceeds of crime. Therefore it is not possible for the court to agree to a contribution. However, it is within the court's power to attach conditions to the contribution it wishes Mr. Watson to make. Accordingly the court can impose a condition which would allow Mr. Watson to contribute to the final legal aid bill should he be acquitted."

11. I accept the contention that the case meets the statutory requirements of complexity on the bases identified by Ms. Fosuhene. But like the Director, I immediately reject the proposition that funding should be made available to pursue the applicant's criticism of his former lawyers' conduct of the case. Apart from the mere assertion in the paragraph quoted above that this should be allowed, no basis for it is explained. The only ground made out for a grant for the appeal is the complexity of the case within the meaning of that term ascribed by section 24(2) of the Law. As a corollary of this, I accept that the novel or difficult questions of law are a contributory factor of complexity; in particular in this regard, the criteria identified in subsections 24(2) (b), (c) and (i).
12. However, the classification of the case as complex does not necessarily mean that the applicant's request for open-ended additional funding and the appointment of



Queens Counsel must be met. Section 24(2) simply authorizes the Director to procure legal aid services by contract for complex cases leaving the issue of the seniority or expertise of the lawyer to the evaluative judgment of the Director.

13. Moreover, as shown above, even in a case suitable for assistance as a complex case, section 24(1) contemplates a particular course – that of the Director procuring by contract the legal services needed for the proper presentation of the case or appeal. That this is the primary approach contemplated by the Law is further shown by the distinction it draws between a standard legal aid case (as defined in section 2 to mean a case which is not a complex legal aid case) and a case such as the present which meets the criteria of a complex case set out in section 24. For the standard legal aid case, the Law contemplates that the assigned attorney-at-law will be remunerated at the current hourly legal aid rates and that the remuneration shall not exceed twenty thousand dollars (\$20,000) unless the Director approves such a bill having obtained the prior written approval of the Court Administrator and the Clerk of Court for doing so. See respectively sections 23(1) and 8(1) of the Law.
14. The variable cap of twenty thousand dollars imposed by section 8(1) is not however, limited to the standard legal aid case. It applies as section 8(1) prescribes, to “*any one legal aid matter*” and so also to any complex case as well.
15. All of the foregoing leads me to the conclusion that in recognizing this case as a complex case, special directions should be given for its treatment as such.
16. It is appropriate first of all, that I should note my acceptance of the argument for the appointment of Queen’s Counsel. Secondly, rather than making an open ended grant of a certificate for the engagement of two counsel (one a Queen’s Counsel) for the



representation of the appeal, I conclude that I should refer the matter back to the Director for treatment in keeping with section 24 of the Law.

17. The process will thus involve the negotiation of a reasonable sum, having regard to the complexity of the case, to be engaged by contract entered into with Ms. Fosuhene as the instructing attorney on behalf of herself and the Queen's Counsel to be engaged. In the course of those negotiations, the Director will of course have regard to the cap imposed by section 8(1) but, with the prior written approval of the Court Administrator and Clerk of Court, may well also have regard to the legal aid fees allowed in prior complex cases, including the fact that under section 23(1) of the Law, the rates have been increased from \$135 to \$160 per hour. The preference for local leading counsel expressed in section 21(3) of the Law, should also be observed.
18. For the foregoing reasons, I grant the appeal with directions that the matter be referred to the Director to be dealt with in keeping with section 24(1) of the Law as a complex case but excluding any grant to allow the proposed investigation of the conduct of the trial by Mr. Watson's former counsel.
19. The earlier conditions for recovery of costs on behalf of the Legal Aid Fund in the event the assets of the applicant are ultimately released to him, remain in effect. It appears from section 45 of the Proceeds of Crime Law (2016 Revision) that reimbursement of the Legal Aid Fund from the restrained assets, could well become permissible.


Hon. Anthony Smellie
Chief Justice



June 20, 2017