IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. POCL 8 of 2014

IN THE MATTER OF AN APPEAL ON REFUSAL OF LEGAL AID

IN THE MATTER OF KELVIN LEACH and others

<u>IN CHAMBERS</u>

Appearances: Mr. Colm Flanagan of Nelson & Company for Kelvin Leach

Before: Hon. Justice Richard Williams

Heard: 18 September 2017

Circulation of draft: 27 September 2017

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RULING

Procedural Background

1. This Ex Parte Appeal came before me in Chambers.

2. I have received written and oral submissions in relation to Kelvin Leach's ("KL's") application for Legal Aid in respect of his Appeal against the Judgment of Quin J., dated 25 May 2017. That Judgment relates to KL's application to discharge or vary an Ex Parte Restraint Order made against him and two other

Co-Defendant Companies he is related to which froze his and the Co–Defendant Companies' assets in the Cayman Islands.

3. Although the Written Submissions on the appeal have not yet been drafted, I note that the decision of Quin J., involved:

   (i) complex issues of statutory construction;

   (ii) the standard and nature of the evidence required in support of an application for restraint order sought pursuant to international treaty obligations;

   (iii) procedural requirements; and

   (iv) the duties incumbent upon the Crown when seeking an ex parte order of this nature.

I am therefore satisfied that the Appeal will deal with substantive and complex issues which are of public interest and importance and, in the absence of any previous decision from the Court of Appeal on such issues, a Court of Appeal ruling will likely be of great assistance to the Grand Court and litigants when dealing with similar matters in the future.

4. On 3 August 2017 the Acting Director of Legal Aid refused to grant a Certificate of Legal Aid stating that:

> *"Circumstances do not justify the expenditure of public funds."*

Pursuant to s.37 of the Legal Aid Law (2015 Revision) ('the Law") an application was made for the Director to reconsider that decision. On 11 August 2017 the Director of Legal Aid refused to grant Legal Aid stating that:

> *"The application does not justify the use of public funds. Further we take note that the applicant has assets with no encumbrances and further was able to fund the matter previously via a third party."*

I am therefore now dealing, as a Judge in Chambers, with an appeal of the Director's decision pursuant to s.38 of the Law.

5. In the Cayman Islands it is not permissible under the Proceeds of Crime Law (2017 Revision) ("POCL") to vary a restraint order to release funds to cover the legal representation for an application to discharge the restraint order. This was confirmed in ***Dio v RV5 Trust Limited v R.*** [2010 (1) CILR 339] where Quin J. found that the Court had no jurisdiction to permit the release of funds, since the restraint order prohibits the use of funds restrained to cover legal expenses incurred in relation to the offences of which the restraint order was made.

6. In England and Wales provision can be made from restrained funds for reasonable legal expenses in connection with proceedings seeking a restraint order or the registration of an external order. This exception to the general prohibition about the release of restrained funds appears to have been put in place so that the burden

for meeting the costs in matters where the State is assisting a foreign authority is not placed on the Legal Aid budget. This is not the position in the Cayman Islands.

7. In ***Dio v RV5 Trust Limited v R*** the applicants did not qualify for Legal Aid on the basis of the significant assets in their names, and also that, unlike in England and Wales, there was no provision for them to obtain other public funding, which meant that they would not have legal representation at the trial. Quin J. expressed a firm view that this state of affairs would be in breach of their rights under the European Convention of Human Rights ("ECHR"). He stated at paragraph 13 that:

> *"This court recognises that this is a matter for the Legislative Assembly and the Attorney General to consider. However, it is this court's opinion that the question of public funding for legal representation in cases of this nature should be considered as a matter of some urgency. If the current position is not addressed it will almost inevitably result in breaches of the ECHR, with the consequential increase in costs which the resolution of such concerns generates at the expense of the public purse. The ultimate result will be delay and added expense in the administration of justice, with the attendant risks of miscarriages of justice."*

Arguably, in such circumstances, Article 6 (Right to a Fair Trial) of Part 1, Bill of Rights, Freedoms and Responsibilities, of the Cayman Islands Constitution Order 2009 ("the BOR") could now be engaged.

8. There have been some changes in the legislation since Quin J.'s Ruling in ***Dios***. Section 45(4A) of the POCL (2017 Revision) provides an exemption enabling relevant Legal Aid payments to be made from restrained funds. However, this is only in cases where a person has been granted Legal Aid to deal with the underlying offence with which they have been charged in the Cayman Islands. In the case before me there is no underlying offence in the Cayman Islands with which KL has been charged and therefore the provisions are not applicable.

9. When I consider the human rights issues raised by Quin J., I also have in mind the concerns expressed by Smellie C.J. in his judgment in ***R v Canover Watson*** LACR0194/2016 which was handed down on 20 June 2017. In that case the Chief Justice was dealing with an appeal under the Law against the refusal of grant of Legal Aid for appointment of Queen's Counsel. Smellie C.J. made clear that the classification of the case as a complex one does not necessarily mean that an applicant's request for open ended additional funding and the appointment of Queen's Counsel must be met. In that case he referred the matter back to the Director of Legal Aid so that a reasonable sum could be negotiated, having regard to the complexity of the case for the engagement of Queen's Counsel. It is clear from that judgment that the Chief Justice was rightly conscious of the public concern that would arise when granting Legal Aid where the relevant individual or entity's assets are subject to restraint orders. I am cognisant of that concern when I make my determination on the current appeal.

10. Having reviewed KL's Application for Civil Legal Aid Form No.1 dated 21 July 2017 it appears that he is unemployed and that this is not a case in which a contribution would be required if Legal Aid was granted. Although KL received financial assistance from a third party or third parties in relation to the earlier legal fees in these restraint proceedings, the Court has been informed that that source no longer exists. Any of the assets with no encumbrances in which KL may have an interest brought into the Cayman Islands to place on his attorney's account to meet legal expenses would likely fall under the restraint order and be restrained and would therefore not be available.

11. Having carefully reviewed the Appeal, I am satisfied that it is appropriate to grant Legal Aid with conditions. The amount of legal aid under the certificate will be capped at CI$10,000, a figure which was deemed to be acceptable by Mr. Flanagan at the hearing before me and in correspondence from him following that hearing. I do not expect there to be any application for Legal Aid to be extended above that cap. The Legal Aid Certificate will cover two Counsel, Mr. Nicholas Dixey and Mr. Colm Flanagan. They have both been heavily involved in the case to date and this will result in no additional costs.

12. At the hearing I canvased whether there should be a potential security for the repayment of any Legal Aid funding provided should KL be successful on his Appeal before the Court of Appeal. Counsel rightly highlighted that, if a security

were to be provided by the Co-Defendant Companies from the monies currently restrained, this might be considered dealing with the property and a breach of the Restraint Order.

13. Mr. Flanagan stated in writing on 19 September 2017:

> *"Having taken instructions, if legal aid is granted, Mr. Leach and the co-defendant companies, are willing to accept that the release of any funds, if successful, be conditional upon the $10,000 being repaid to the legal aid fund. The way we see that working in practice is for this to be reflected in any order granted for legal aid. As counsel, with duties to the Court and the Legal Aid fund, if the restraint was released we would bring the direction to the attention of the Court of Appeal and ensure that in their order, the position that funds not be released until the monies have been repaid is reflected."*

14. I am satisfied that the agreed condition set out in paragraph 13 above should be added to the Certificate and the grant of Legal Aid is made subject to that condition.

15. I wish to make it very clear that, by this Ruling, I do not seek to set up a precedent in relation to the granting of Legal Aid in relation to restraint proceedings. I have made this decision based on the circumstances in this case, including the conditions I have imposed with KL's clear consent. However, of great importance in my decision to grant Legal Aid with conditions in this case is the fact that the

Appeal will deal with substantive and complex issues which are of public interest and importance and, in the absence of any previous decision from the Court of Appeal on such issues, a Court of Appeal ruling will likely be of great assistance to the Grand Court and parties when dealing with similar matters in the future. The Court if Appeal may set down principles of general application for the making and/or discharging of restraint orders in this jurisdiction.

GRAND COURT - CAYMAN ISLANDS -

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The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT