

BARBADOS

[Unreported]

**IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION**

No. 1206 of 2016

BETWEEN:

**PAUL LEWIS
(per power of attorney Thelma Gill-Barnett)**

CLAIMANT

AND

**THE ATTORNEY GENERAL OF BARBADOS
THE CHIEF IMMIGRATION OFFICER**

DEFENDANTS

**Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High
Court**

**Dates of Hearing: 2017 December 12
2018 March 9**

Appearances:

**Mr. Chester L. Sue in association with Mr. Philip Gaskin, Attorneys-at-Law
for the Claimant**

**Ms. Deirdre Gay-Mckenna Attorney-at-Law of the Attorney General's
Chambers for the Defendants**

DECISION

Introduction

[1] This is an Application for Court Orders during or after the course of Court Proceedings brought by the First Defendant for an order striking out the First Defendant, the Attorney General, as a party to these proceedings.

[2] The Application, together with Affidavit in Support, was filed April 25th 2017.

[3] The Grounds of the Application are iterated as follows:

- “1. The Claimant’s Statement of Case discloses no reasonable grounds and/or cause of action for bringing the claim against the First Defendant;
2. There has been a failure to comply with a rule particularly Part 56; and
3. The First Defendant is not a proper party to these proceedings.”

The Substantive Application

[4] The substantive action in this matter is an application brought by way of Fixed Date Claim Form on September 7th 2016 against both Defendants as representatives of the Crown in right of Government of Barbados, pursuant to the provisions of the **Crown Proceedings Act (CPA), Cap. 197** and **Sections 4 and 5 of the Administrative Justice Act (AJA), Cap. 109B of the Laws of Barbados**. The said Fixed Date Claim Form was accompanied by an Affidavit of the same date.

[5] The relief sought, *inter alia*, is against the Chief Immigration Officer, as a result of that functionary’s refusal to allow the Claimant to enter Barbados on the 17th of August 2013, as being an unreasonable or irregular exercise of

discretion, a breach of the principles of natural justice, and as based on an absence of evidence on which a finding or assumption of fact could reasonably be based.

- [6] Counsel from the office of the Attorney General, has entered an appearance for both Defendants, as is the norm in these matters.

The Applicant's Arguments (First Defendant)

- [7] The rationale of this Application to strike out the Attorney General as a party to these proceedings, is outlined at paragraphs 3 to 6 of the Affidavit in Support of Deirdre Gay-Mckenna, Attorney-at-Law, as follows:

“3. I verily believe that the First Defendant is not a proper party to these proceedings insofar as no allegations of the First Defendant exercising, purporting to exercise or failing to exercise any power or duty conferred or imposed by any enactment have been made nor has any relief been sought against the First Defendant.

4. The Claimant's Statement of Case discloses no reasonable grounds and/or cause of action for bringing a claim against the First Defendant.

5. That an application for judicial review is one for relief against an administrative act or omission and none of the grounds as mentioned in section 4 of the Administration of Justice Act, Cap. 109B on which the Claimant is seeking relief are in respect of actions allegedly committed by the First Defendant.

6. Pursuant to the Judicial Review (Application) Rules, 1983, and Supreme Court (Civil Procedure) Rules, 1983, the Claimant need only have served and given notice of his application for Judicial Review to the First Defendant. There was therefore no need to make the First Defendant a party to these proceedings.”

- [8] Summarized, the Applicant's submissions are:

“1. There are no allegations of any act or omission by the Attorney General for which an application for judicial review can be made; nor is any relief being sought against him; stated differently, no cause of action has been shown against the Attorney General;

2. The Chief Immigration Officer is the functionary involved in the decision making who is alleged to have acted unreasonably or irregularly, inter alia, not the Attorney General;
3. All that was required was that the Attorney General be given notice of the application for judicial review of the alleged acts or omissions by the Second Defendant, the Chief Immigration Officer and served with copies of the documents filed;
4. Civil proceedings under section 14 of the Crown Proceedings Act pursuant to which the Attorney General must be made a respondent, differ from proceedings for judicial review. Stated differently, judicial review proceedings are not civil proceedings against the Crown within the scope of the Crown Proceedings Act.”

[9] The following authorities were used in support of the above arguments:

I.D.M. Direct Marketing Corporation v The Attorney General and Commissioner of Police SC Suit (unreported) No. 1188 of 1996 where **Moore J.** (as he then was) adopted the approach of **King J. in Scotland District Association Inc. v The Attorney General et al, No. 938 of 1996** and **Williams CJ** in **C. O. Williams Construction Ltd. v Donald G. Blackman et al Suit No. 1033 of 1988**; **Steve Straughn v Judicial and Legal Services Commission and the Attorney General SC (unreported) Suit No. 1640 of 2014**; **Steve Ian Straughn v The Chief Personnel Officer (unreported) No. 712 of 2013.**

The Claimant’s Response

[10] Also summarized, the Claimant’s submissions in response are as follows:

- “1. That it is a long established practice to join the Attorney General as a Defendant to any suit involving the government; the action does not have to be personally against the Attorney General, the pleadings do not have to specifically

refer to acts or omissions of the Attorney General. It is sufficient if the pleadings refer to an authority, department or officer of the government.

2. That in making this application, the Crown is raising trivial and vexatious technicalities (since ultimately the Crown is responsible for the actions of the Immigration Department) and dishonouring the imperatives of the Overriding Objective of the CPR 2008, in particular Rule 1.1 (2) (d) of “ensuring that it [the case] is dealt with expeditiously and fairly”.

3. No harm or prejudice is suffered by the Attorney General being a party as has always been the case.”

[11] Counsel relied on the authority of **C.O. Williams Construction Ltd. v Blackman et al (1992) 41 WIR 31** and **Judy Lloyd v Attorney General, CA No. 9 of 1998** where **Williams CJ** observed:

“As to the naming of the Attorney General as Defendant I can see no prejudice as likely to result from adopting this procedure which is in keeping with the approach of **Wooding CJ** and **Hyatali JA** in **Hochoy v National Union of Government Employees (1964) 7 WIR 181.**”

[12] Counsel submitted that the authorities relied on by the Applicant are decisions of an inferior court, which said decisions are contrary to the approach of the Court of Appeal, which has accepted the Attorney General as a party, even if only nominal, in matters not falling under the **CPA**.

Issue

[13] Whether the First Defendant, the Attorney General is the proper party to these proceedings, and whether he should be struck out as a party.

[14] This touches collaterally on the wider issue of proper parties, generally, in judicial review proceedings (see the recent decision of this Court in **#1519**

and #1520 of 2016 Delangis et al and Richardson v The Director of Public Prosecutions), 16th February 2018 (unreported).

Discussion

[15] Since the coming into force of the **AJA** in 1983, a recurring procedural issue has been whether the Attorney General is a proper party, in many of the judicial review actions heard. The two most common arguments advanced in support thereof are firstly, that judicial review matters are not civil proceedings; and secondly, that there has been no administrative act committed or the omission of such by the Attorney-General.

The Argument that Judicial Review Matters are not Civil Proceedings

[16] **Section 2** of the **CPA, Cap. 197** (the statutory provision for civil proceedings by and against the Crown modelled after the **Crown Proceedings Act, 1947** of the United Kingdom now repealed) provides as follows:

“(1) “civil proceedings” includes proceedings in the Supreme Court or a magistrate’s court sitting in the exercise of his civil jurisdiction for the recovery of fines or penalties but shall not include proceedings in Barbados corresponding on the Crown side of the Queen’s Bench Division in the United Kingdom.”

[17] The interpretation of this provision, which it is assumed informed the decision in **I.D.M Marketing Corporation v Attorney-General of Barbados (supra)**, is that expressed by **Cornelius J.** at **paragraph 47** of her Ladyship’s decision in **Leacock v The Attorney-General, the Police**

Service Commissioner and the Commissioner of Police Suit No 2251 of

2007 where she states as follows:

“Proceedings on the Crown side of the Queen’s Bench Division refer to proceedings in the Administrative Court: Atkins Court Proceedings (Volume 13) para. 514.”

[18] The Act provides further at **section 2(3)** as follows:

“Any reference in Part IV or V to civil proceedings by or against the Crown or to civil proceedings to which the Crown is a party shall be construed as including a reference to civil proceedings to which the Attorney-General or any Government department, or any officer of the Crown as such, is a party but the Crown shall not for the purposes of Part IV or V be deemed to be a party to any proceedings by reason only that they are brought by the Attorney-General upon the relation of some other person.”

[19] **Section 14** provides:

- “(1) Civil proceedings by the Crown may be instituted by the Attorney-General.
- (2) Civil proceedings against the Crown shall be instituted against the Attorney-General.
- (3) No proceedings instituted in accordance with this Part by or against the Attorney General shall abate or be affected by any change in the person holding the office of Attorney General.”

[20] The argument that judicial review proceedings are not civil proceedings as defined by the **CPA** (as determined in **I.D.M. Marketing Corporation v Attorney General of Barbados (supra)**) has been addressed in this jurisdiction, by the **Supreme Court (Civil Procedure) Rules (CPR) 2008** which came into force on October 1st 2009.

[21] See also the decision of the Court of Appeal of the Eastern Caribbean, in **Fredericks v Comptroller of Customs and the Attorney General (unreported) Civil Appeal No. 037 of 2008, per George-Creque, JA**; the

Privy Council in **Bahamas Hotel Maintenance & Allied Workers Union Bahamas Catering and Allied Workers Union et al [2011] UKPC 4; Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Ltd. [1992] LRC (Const) 720.** Note also **Cornelius J's** review of the Commonwealth Caribbean Jurisprudence, as well as, the position of the Barbadian Courts in **Leacock v The Attorney-General, the Police Service Commission and the Commissioner of Police (supra).**

[22] **Part 2 Rule 2.2** of the **CPR** speaks to the application of the Rules as follows:

“2.2 (1) Subject to sub-rule (3), these Rules apply to all civil proceedings in the Supreme Court.

(2) In these Rules “civil proceedings” include Judicial Review.”

[23] Unfortunately however, this manner of addressing the issue is questionable, as it begs the question as to whether a statutory instrument (secondary legislation) can amend a statutory provision (an Act of Parliament: primary legislation): see **Lord Scott of Foscote** at para [19] in **Beverley Levy v Ken Sales v Marketing Ltd [2008] UK PC 6.** It is noted also for further consideration that in **Shazar Distributors Inc. v Attorney General et al Civil Suit No. 414 of 2006 Kentish J.** took the position that the substantive law can be overthrown by procedural rules and practice. This is an issue that should appropriately be ruled on by our apex court[s].

[24] It has not however, resolved the continuing issue of whether the Attorney General should be named as a party where the act or omission is not his specifically.

The Authorities

[25] **Hochoy v NUGE [1964] 7 W.I.R. 174**, a decision of the Court of Appeal of Trinidad and Tobago, is the authority most often used to support the submission that the Attorney General is the proper party in any action against the State. However, there is a narrower interpretation of this decision, namely, that it is only authority for the proposition that as a matter of protocol (“the ordinary civilities” in the words of **Wooding CJ**, ‘in keeping with the dignity of the State’ as used by **Hyatali, JA**) the Attorney General should be named as defendant whenever the validity of any act of state done by the Governor General is being called into question: see **Wooding CJ** at **page 181**. See also the Court of Appeal of Barbados in **Civil Appeal No. 6 of 89 C. O. Williams v Blackman et al (supra)**.

[26] This approach/ruling was clearly a response to the argument advanced in this case that, as the Queen’s representative in Trinidad and Tobago at that time, the Governor General was immune from suit, and that the Court had no jurisdiction over him.

[27] This was the ruling, despite the fact, as commonly argued by counsel for the office of the Attorney General, that the act or omission complained of, was not that of the Attorney General, but that of the Governor General performing an act of State, or an act of the Government. The act complained of, was that of The Governor General acting on the advice of the Public Service Commission.

[28] This narrower interpretation, one can only surmise, explains the repeated attempts in this jurisdiction to exclude the Attorney General as a party to judicial review proceedings, it being evident also, that **Hochoy v NUGE (supra)** has nothing to do with an interpretation of the **CPA**.

[29] This was the approach taken in the case of **Leacock v The Attorney General, et al (supra)**. In that case, my Learned sister **Cornelius J.** opined that although **Hochoy** did not pertain to the **CPA**, the decision was nonetheless important as an authority on the issue of joining or not joining the Attorney General as a party in judicial review proceedings. In that case, while not conceding that it was the proper practice to join the Attorney General in every judicial review action against the State, **Cornelius J.** did nonetheless find that the Attorney General, for the purposes of that case, had been properly added as a party, since she found that the Commissioner of Police is answerable to

the Governor General, and on the authority of **Hochoy**, the Attorney General was properly named as a party in the aforementioned proceeding.

[30] In **Shazar Distributors Inc. v Attorney General et al (supra)**, by preliminary submission, counsel for the Crown sought to have the Attorney General struck out as a party to the application. In refusing to do so, **Kentish J.** observed that “it is the well-established practice in these Courts to join the Attorney General as a party to applications for judicial review.” Her Ladyship referred in support thereof, *inter alia*, to **Williams CJ** in **C. O. Williams v Blackman et al (supra)** where he too refused such an application, and in the process, adopted the observations of **Wooding CJ** in **Hochoy** in his finding that the Attorney General was the proper party to represent the Cabinet of Barbados, which was being sued. **Kentish J.** declined to follow **I.D.M. Marketing Corporation v The Attorney General (supra)**, and adopted the approach of **Hochoy** approved by **Williams CJ** in the **C.O. Williams’** case, and the well-established practice above-mentioned. Significantly, in my opinion, Her Ladyship made the following further observation/finding:

“[10] Moreover, no prejudice can result as the Attorney General would be called upon, in any event, to represent the Comptroller of Customs.”

[31] Similarly, in **Mount Six Mens Company Limited v Chief Town Planner et al Suit No. 274 of 1999 (unreported)**, an application was made before **Chenery J. (Ag)**, to strike out the Attorney General. The

applicants/respondents argued that there was no administrative act or omission on the part of the Attorney General within the meaning of the **AJA**, that the proceedings were not civil proceedings within the meaning of the **CPA** and that **section 18(2)** of the **CPA** could not be invoked to justify making the Attorney General a respondent.

[32] Counsel for the respondents/applicants argued that the acquisition of land in Barbados is done in the name of the Crown under statutory power, that the applicant is seeking a declaratory judgment against the Crown, that the Governor General is the representative of the Crown, and, in the circumstances, the Attorney General is a proper party.

[33] The Court (**Chenery J (Ag.)**) found that in this matter the applicant was seeking a declaratory judgment against the Crown and (on the basis of **Dyson v Attorney General and Hochoy v NUGE (supra)**) it seemed proper to the Court that the Attorney General should be a party to the proceedings as representative of the Crown (see paragraphs 25 and 26). On this reasoning the Court refused to strike out the Attorney General.

[34] In **Steve Straughn v The Judicial and Legal Service and the Attorney General, No. 1640 of 2014 Worrell J.** in his Reasons for Decision, rejected the arguments of the Claimant that the Attorney General had been properly joined. He accepted the arguments of counsel for the Attorney General (the

Judicial and Legal Service Commission had been separately represented) that no power or duty had been conferred on the Attorney General under the respective statutory enactments referred to in the pleadings, and therefore there was no act or omission that he could have exercised or could have failed to exercise. His Lordship followed the ruling of **Moore J.** (as he then was) in **I.D.M. Direct Marketing Corporation v The Attorney General et al** (**supra**), that these were not civil proceedings against the Crown within the scope of the Crown Proceedings Act and concluded that, in consequence, there was no justification for making the Attorney General a party to these proceedings.

[35] In **I.D.M. Direct Marketing Corporation v Attorney General of Barbados, Moore J.**, in deciding that the Attorney General was not a proper party to the proceedings, went on to observe that:

“...in order to determine whether the Attorney General is a proper party to these proceedings one must examine the act or omission he exercised or failed to exercise in pursuance of any power or duty conferred on him by the Constitution or by any enactment.”

[36] And later:

“... there is no allegation or contention that the Attorney General exercised or failed to exercise any power or duty conferred on him by that provision.”

[37] In **Steve Ian Straughn v The Chief Personnel Officer No. 712 of 2013, Cornelius J.** ruled that it was not desirable at that point in the proceedings to

join the Attorney General as a party, as the Claimant had not shown that adding the Attorney General would aid the Court in the resolution of the matter, and had accordingly failed to justify why the Attorney General should be joined. Her view was that it must be determined before naming the Attorney General, whether there was a cause of action for which the Court should exercise its discretion in the Attorney General's favour. It was as a result of this analysis that her Ladyship determined that the Claimant had not shown that adding the Attorney General would have aided the Court in its resolution of this matter. Her Ladyship accordingly refused the application so to do, but allowed the Claimant to amend his application to add the Judicial and Legal Service Commission as a party necessary to assist the Court in resolving all the matters in dispute in the proceedings before her.

[38] **In Glinton v Cash et al BS 1985 SC 2, Adams J.** of the Supreme Court of the Bahamas stated:

“I am of the view that as a matter of courtesy, applicants ought in proceedings against the Crown to name the Attorney General as defendant and refrain from joining the Governor General as a respondent, the proprieties and civilities make such a course eminently desirable.”

[39] **In Dr. Vaughn A. Lewis v The Attorney General of St. Lucia et al suit No 854 of 1997, Farara J.** in addressing the issue of whether the Attorney General was the proper party, ruled that “the normal civilities of life dictate

that the Attorney General should be named as a party instead of the Governor General.”

[40] In **Ex Parte Belize Telecommunications Limited v R et al, BZ 2002 SC 2, Conteh CJ** of the Belize Supreme Court, while distinguishing that country’s position from that of Barbados, which he noted has an Administrative Justice Act, took the following position on this issue:

“To be sure, here in Belize, nearly always the practice has been to cite the Attorney General in such proceedings. But the Attorney General per se, for the purposes of these proceedings is not a necessary or proper respondent always to any and every judicial review application. In public law, almost always, the wrong of which an applicant for judicial review seeks redress before the court would have been committed by a functionary of the State or other authority exercising public or statutory powers and not necessarily the Attorney General himself. It is therefore, I think, just, fair and proper that the responsible officer or authority be cited as a respondent. But the Attorney General, absent his own involvement in the decision or action against which judicial review is being sought, may not necessarily be a respondent.”

Conclusion and Disposal

[41] Under **section 72(1) of the Barbados Constitution**, the “Attorney-General shall be assigned the functions of principal legal adviser to the Government.” This, potentially, places the Attorney General in the arena whenever legal action is taken against the Crown, be it civil proceedings or judicial review proceedings.

[42] The **CPR**, clearly intend that the Attorney General should (at the very least) have notice of every judicial review matter filed. **Rule 56.4** provides as follows:

“(1) The applicant must serve a certified copy of the application on every person who is a respondent not later than 14 days before the date fixed for hearing.

(2) A copy of the application must be served on the Attorney General within 7 days of its filing.

(3) The applicant must file at the at the Registry not later than 3 days before the date fixed for hearing an affidavit of service which

(a) states the date and place of service of each respondent served;

(b) the date on which the Attorney General was served; and

(c) if any respondent has not been served, states the fact and the reason for it.”

[43] The same obtains with the **Judicial Review (Application) Rules 1983** which provide at **Rule 1.(3)**:

“The applicant must give notice of the application to the Attorney-General not later than the day before the application is made, and must at the same time furnish the Attorney-General with copies of the statement and every affidavit in support.”

[44] The approach of the Barbadian Courts has in the majority of cases indicated a common view, irrespective of the provisions of the **CPA** and irrespective of whose administrative act or omission it has been, that the Attorney General is a proper party in judicial review proceedings. See **C.O. Williams Construction Ltd. v Blackman; Judy Lloyd v The Attorney General et al No. 979 of 1999 (unreported); Alfred Sparman v Gilbert Greaves et al No. 529 of 2003 (unreported); Rupert Barker v The Attorney General et al No. 1033 of 1997; Shaazar Distributors Inc. v The Attorney General et**

al; Mount Six Men’s Company Limited v Chief Town Planner et al (unreported) High Court Suit No. 274 of 1999.

[45] But there are also authorities which take the other approach: see para [99] of **Leacock** where **Cornelius J.** lists the local cases which either struck out or refused to join the Attorney General.

[46] I agree with **Cornelius J** in her review of the authorities in **Leacock v Attorney General (supra)** that “it cannot be definitively stated that there appears to have developed a practice in Barbados for applicants of judicial review to join the Attorney General as party to an application whether or not the judicial review application in question concerns an administrative act or omission of his own or one over which he has control or whether it is an administrative act or omission of the Governor General or the Cabinet in the exercise of its executive power.” [see paragraph 100]:

[47] My qualification, however would be, that my observation against the background of matters over which I have had the privilege to preside, is that counsel (when referred to **Hochoy v NUGE**) will invariably consent to the withdrawal of the Governor-General as a party to the proceedings. There has not been, to my knowledge, any naming of the Cabinet of Barbados as a party in an action since the ruling in **C.O. Williams Construction Ltd. v Blackman et al (supra)**.

[48] **Cornelius J.**, however points out at paragraph [52] in the Leacock’s decision, as follows:

“[52] As a result of the dicta of Wooding CJ in Hochoy, in claims challenging the validity of acts said to have been done by the Governor-General or under the exercise of executive power usually name the Attorney-General as party. The Governor-General has, however, been himself named as party in some public law matters without any apparent difficulty: see for example, **Thompson v Judicial and Legal Services Commission and Governor-General of the Commonwealth of the Bahamas (unreported) Bahamas Supreme Court, No. PUB 0004 of 2005, Decisions of June 6, 2005**; and **Cabey v the Governor et al (unreported) High Court of Montserrat Suit No. MNIHCV 4 of 2003, Decision of October 21, 2004.**”

Disposal

[49] From my review of the authorities, it is clear to me that Judicial Review does not fall within the category of case in which the Attorney General is required to be joined as a party. In the premises, the Claimant is well advised to amend his Claim to delete the reference to the **CPA**.

[50] Nevertheless, it has been held in several cases that, for various reasons (courtesy, civility etc.) the Attorney General will be allowed to remain a party.

[51] It is therefore not possible to state as a general rule applicable to every case that the Attorney General is or is not a proper party.

[52] Essentially it is therefore a matter for the discretion of the Court based on the circumstances of the particular case.

[53] In the exercise of its authority/powers under **Part 56** of the **CPR** (Judicial Review) the Court is exercising a discretion, and in so doing pays attention to

the particular circumstances of the case at bar, and to the imperatives of the Overriding Objective, in determining proper parties and/or who has a sufficient interest to be heard.

[54] As expressed by **Conteh CJ. (supra)**, it is also my view that it is not every case that the Attorney General needs to be a respondent. In this case, he already is, and unlike the cases of **Worrell J.** and **Cornelius J.** (above-mentioned) there is no separate representation of the parties to this action; as noted above, the office of the Attorney General represents both defendants in this action.

[55] In these circumstances there is, in the opinion of this Court, no prejudice or injustice to the Attorney General in being a party to this action.

[56] In the exercise of my discretion therefore, I dismiss this application to strike out the Attorney General as a party to these proceedings.

[57] No order is made as to costs.

[58] This matter should be set down for case management without further delay.

MARGARET A. REIFER
Judge of the High Court