



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

CAUSE NO. G79 OF 2022

BETWEEN: CANOVER NORBERT WATSON

Appellant

AND THE DIRECTOR OF LEGAL AID

Respondent

Appearances: Ms. Amelia Fosuhene of Brady Attorneys at Law for the Appellant
Dr. Jevon Alcock, Deputy Solicitor General, for the Respondent

Before: Hon. Justice Richard Williams

Hearing: 26 May 2022

Draft Judgment

Circulated: 31 May 2022

Judgment: 7 June 2022

HEADNOTE

Legal Aid Act (2015 Revision) - Legal Aid Regulations (2016) - Appeal against the decision of the Director of Legal Aid pursuant to s.38 of the Legal Aid Act with respect to a refusal to grant legal aid for criminal proceedings following her reconsideration of an application - Whether a pending loan application made by a third party on an applicant's behalf can be considered as being a resource of an applicant for legal aid - requirement for an applicant to provide sufficient disclosure to the Director to enable a determination about his resources to be made - Whether a failure by an applicant to comply with a request for disclosure made by the Director is a reason for refusing to grant legal aid.

JUDGMENT

The Parties, the Application and the Procedural Background

1. The Appellant is Canover Watson. The Respondent is the Director of Legal Aid ("the Director").
This appeal is brought pursuant to s.38 of the Legal Aid Act (2015 Revision) ("the Act") and



concerns the Director's decision, recorded in a Legal Aid Certificate of Refusal dated 20 January 2022,¹ to refuse to grant a legal aid certificate for the Applicant for his representation in criminal proceedings.

2. In the criminal proceedings, the Appellant faces a number of serious charges contained in 6 counts in the Indictment No. 79/19, 80/19 and 89/19.² He is to be tried as number one on the indictment with his Co-Accused who only faces 4 counts. At the criminal trial, the Crown will be represented by Leading Counsel and two Junior Counsel. The Co-Accused, who does not have the benefit of legal aid, will be represented by Leading Counsel and Junior Counsel. The Appellant states that he requires similar representation and that he does not have the financial means to fund his representation. It is rightly agreed by the parties that the case falls under the definition of complex proceedings.³
3. This appeal was brought by way of an Originating Summons dated 6 April 2022. The Appellant pleads in the Originating Summons that what is sought is *"the hearing of an application by the Plaintiff Canover Norbert Watson that the Legal Aid Director erred in refusing legal aid to the Plaintiff for the representation in his forthcoming trial"*. Although the proceedings would have been better brought by a Summons, the Respondent takes no issue with this procedural irregularity.
4. The Appellant filed Grounds of Appeal dated 28 February 2022. The pleaded Grounds of Appeal comprise two grounds and they are:

*"(i) The legal aid Director was wrong to determine that Canover Watson was financially unable⁴ (sic.) to secure legal services from his own resources; and
(ii) The legal aid Director was wrong to consider that the pending loan could or should have been applied to cover the trial outstanding debts."*

¹ This was, as required by section 37(7) of the Act, following the seeking and obtaining of reconsideration by the Director after the Director's initial refusal on 17 December 2021.

² The counts are: Secret commissions, entering an arrangement, transferring criminal property x 2 and false accounting x 2.

³ Section 24 Legal Act (2015 Revision).

⁴ A typographical error as it should be "able" not "unable".



The Hearing

5. The Appeal hearing was scheduled for 23 May 2022. Due to the Appellant's non-compliance with the Court's directions made on 13 April 2022, the 23 May 2022 hearing became a Case Management hearing. I heard the Appeal on 26 May 2022. At that hearing, I received oral submissions from Counsel on behalf of the Appellant and Counsel on behalf of the Director. I have considered all of the material contained in the filed Bundles. At the end of the hearing, I reserved my decision and this is the reserved Judgment containing the same.

Background

6. To put the appeal into context, it is necessary to review the chronology relating to the Appellant's legal aid application, the Court's case management, and the manner in which financial disclosure was requested by the Respondent and provided by the Appellant.

7. On 30 November 2021, the Appellant's Legal Aid Application form was submitted online along with a Statement of Means form (with a pay stub) in which he stated that his income was CI\$105,000. He recorded in the Statement of Means form that he had monthly outgoings of \$2,100 for rent and \$1,000 for utilities and he commented under the 'other relevant information' heading:

"I am in the process of a loan application to fund the case. I am currently represented by a QC and Junior. The bank are (sic.) in the process of doing the credit checks to process the loan. The Current case has this far been funded by my daughter and family but they have run out ready funds and are applying for funds to assist me...."

The Appellant's Counsel said that he had not intended to rely upon legal aid to fund his representation and that is why he and his fiancée had been trying to raise funds by applying for the loan.⁵ Counsel stated that he only changed his mind and decided to apply for legal aid after he believed that the Judge who was case managing the criminal proceedings had recommended to him that he do so at a hearing held in November 2021.

⁵ The First Caribbean Bank Loan Application form signed on 25 November 2021.



8. The Director states that the supporting financial material accompanying the filing was insufficient to enable a proper review of the application. On 2 December 2021, the Legal Aid Officer wrote to the Appellant indicating that the application form had not been completed in accordance with the intake checklist and that as a consequence it could not be considered by the Director. Attached to the reply, the Officer sent a Notice headed "Incomplete Legal Aid Application or Request for Further Information" highlighting what the Appellant needed to provide. On 8 December 2021, the Appellant provided a copy of his driver's license, three months' pay slips, a brief list of his monthly expenses and the figure for his fiancée's monthly salary. The Officer replied the same day providing the Appellant with a revised checklist of financial information to be provided. The Officer also noted the disclosed expense of \$2,000 per month contribution made to the father as well as the \$1,000 per month miscellaneous expenses and requested a breakdown of same. On 10 December 2021, the Appellant provided a list of his updated monthly expenses and he stated that his father was paid in cash, with \$800 of the mentioned \$2,000 going towards the cost of the father's helper. He asked whether a signed letter from both of these persons would suffice. On 14 December 2021, the Appellant's attorney wrote to the Legal Aid Officer asking whether the application could be dealt with as "*a matter of urgency*".
9. On 17 December 2021, the Legal Aid Officer on behalf of the Director issued the Legal Aid Certificate of Refusal. The certificate stated:
- "Legal Aid - Refused*
Further to the application filed 30th November 2021 and with additional documents being filed on 8th and 10th December 2021, upon review of the circumstances, financial disclosure made by the Applicant and resources available to him, legal aid is refused at the applicant has the ability to make his own private arrangement with counsel (or Lead Counsel).
Circumstances do not justify the expenditure of public funds."
10. On 28 December 2021, a request was made in an email from the Appellant for an urgent reconsideration of his unsuccessful legal aid application because the criminal trial was due to



commence on 12 January 2022. Following receipt of this request, the Director wrote to the Appellant's attorney:

- (i). Importantly, stating that the Appellant had not provided proper disclosure (including supporting documents) concerning his financial assets owned in the Cayman Islands and other jurisdictions, and about his other sources of income and adding that this lack of disclosure needed to be addressed by him;
- (ii). Asking whether there may be a local leading counsel available and for details of any leading counsel that has been approached and who has agreed to work at the legal aid rate;
- (iii). Asking for an estimate for the breakdown of costs; and
- (iv). Asking for a breakdown of the preparation work that has already been completed.

11. On 30 December 2021, the Appellant's attorney, attempting to address the queries raised, sent a more detailed email to the Director. She highlighted that: (i) this case would likely "*give rise to national publicity and widespread public concern*"; (ii) a successful defence to the charges required highly specialist knowledge; (iii) the elements of the offences were of a technical nature and that an attorney with the relevant technical legal knowledge was required; (iv) the elements of the offence involved an international dimension; and (v) the offence involves complex financial or legal transactions or records. She stated that the Appellant had no other assets in any other jurisdiction and that anything he had owned had been sold "*some time ago*". She added that he had no other funds apart from those set those out in the present communication and in his application. She highlighted that he had received a one-off bonus of \$15,000 and that it had been paid directly to his fiancée to enable her to obtain additional funding via a loan to assist him with his legal fees. The attorney stated that there was no suitable counsel based in the Cayman Islands and she highlighted the level of work that would be required to be undertaken on the case by the Appellant's legal team.



12. On 11 January 2022, the Appellant provided evidence by email from his fiancée's employer to verify her income.⁶ Shortly after that email was sent, on the same day, the Legal Aid Officer wrote back seeking further financial information and indicated that the Director had noted that "*the disposable income of the household*" appeared to be above the threshold for the consideration of legal aid "*in the normal course*". The following information was required by the Director to be provided by 14 January 2022:

- (i). A copy of the loan application submitted to try to secure a loan for legal fees and a report on the status of that loan application;
- (ii). Supporting documents relating to (a) the Appellant's salary and the salary of any adult contributing to the household; (b) the bonus received in 2021 and evidence of the deposit/transfer of that to another person; (c) the amount of funds frozen in various accounts; and (d) the monthly expenses of the household;
- (iii). Confirmation in detail about how the transfer of the \$15,000 bonus was to assist with the obtaining of further funds;
- (iv). An affidavit from the Appellant with a declaration providing detail about (a) any property owned solely/jointly or in which he has beneficial interest in this jurisdiction or outside this jurisdiction, and (b) any property sold within the last 24 months; and
- (v). Clarity as to how the collateral of the father's property (which has a \$1 million valuation) will be used and about whether "*consent can be provided for a first charge be placed on the property in favor of the Legal Aid Fund/Government if legal aid is granted*".

13. On 14 January 2022, the Appellant replied to the 11 January 2022 communication received from the Legal Aid Officer as follows:

- (i). In relation to the first request: The Appellant stated that the loan application had been submitted by his fiancée to assist him with his legal fees and that it was still being

⁶ Employer stated that her annual salary was USD\$98,050.

processed, with a decision pending. The Appellant stated that he asked her to provide him with a copy of the loan application but, as she was travelling, she did not have access to the documents at that time and she would provide them later that day;

(ii). In relation to the second request: The Appellant attached (a) three months of his pay stubs and his fiancée's salary letter; (b) an email confirming his CI\$15,000 bonus and confirmation of his employer transferring that bonus to his fiancée; and (c) a breakdown of the monthly expenses for his household. He confirmed that the frozen assets were signed over by him to the Crown in early 2020, and that he did not have any knowledge of the value of the assets realised or retained by the Crown.

(iii). In relation to the third request: The Appellant stated that the \$15,000 bonus served two purposes. The first purpose was to improve his fiancée's debt services ratio to assist with the approval of the loans. The second purpose was to assist his fiancée with the monthly repayment of the loan.

(iv). In relation to the fourth request: The Appellant indicated that he was willing to sign an affidavit or any other document to about property ownership and sales, but asked that, *"in the interests of time due to the urgent need of this response"*, the present email act as confirmation that he did not own property in or outside of the jurisdiction and that he has not sold a property within the last 24 months.

(v). In relation to the request concerning the collateral of his father's property: The Appellant indicated that his father wished to take legal advice before he was able to respond to the request.

14. In an email sent on 18 January 2022, the Appellant's attorney informed the Legal Aid Officer that his client's father had refused to provide his property as collateral. On the same day, the Director replied seeking a yes or no answer to each of the following questions:



- (i). Was the Appellant's father's property going to be used as collateral to the bank loan (to secure legal fees)?
 - (ii). Has the Appellant's father refused to place a consensual charge over the property to secure legal aid costs?
 - (iii). While in the process of applying for legal aid in December 2021 did the Appellant receive \$15,000 bonus and provide those funds to another person to secure/advance a bank loan for his legal fees?
 - (iv). Is the \$15,000 still available to be paid to Legal Aid as a lump sum payment to offset costs?
 - (v). Is the loan application to the bank still pending?
 - (vi). Is the loan application made in sole or joint names?
 - (vii). Will the balance of the requested documents be provided to Legal Aid on 18 January 2022?
15. After the Legal Aid Officer's email had been sent, the Appellant sent emails with attached copies of (i) the assignment of lease;⁷ (ii) his fiancée's loan application with CIBC; and (iii) a rent receipt for the property he was living in.
16. On 19 January 2022, the criminal proceedings came on before Ramsay-Hale J. The Learned Judge refused the Co-Accused's application to sever the trial, and she refused Ms. Fosuhene's application to come off the record for the Appellant. The proceedings were adjourned to a mention hearing on 9 February 2022, with a new trial date set to commence on 25 July 2022.
17. On 19 January 2022, a meeting was held between the Appellant's Counsel and the Director regarding his requested reconsideration of his legal aid application. At that meeting Counsel was informed that, upon reconsideration, the Appellant's legal aid application was refused. The Legal Aid Certificate of Refusal was dated 20 January 2022 with an effective date of 19 January 2022.

⁷ Mr. Watson wrongly called this a copy of the lease agreement in his email.



The reasons for refusal were given on two pages attached to the Certificate. The Director determined that the Appellant *"was in a position to make his own arrangements to service his legal fees"*. Reference was made by her to his fiancée making private arrangements for the settlement of the fees via a pending private loan application made prior to filing for legal aid and that, after the legal aid application had been made, he provided his fiancée with a lump sum of \$15,000 to facilitate the advancement of the loan application and to assist her with monthly payments of the loan. The Director highlighted that the Appellant's *"household disposal"* was over \$45,000 per annum and he was therefore over the threshold considered for legal aid in the normal course. The Director further highlighted that whilst substantial collateral had been offered to secure the loan application, a similar guarantee was not made in relation to the application. The Director stated that:

"It was unreasonable to consider that public funding should be advanced...when a loan application is pending, and seems likely to be approved."

She also felt that it was unreasonable to provide such funding when there had been insufficient financial disclosure and/or inconsistent disclosure given in a piecemeal fashion. Although the Director accepted that the instruction of Leading Counsel was necessary, as the case threshold for a complex matter had been met, she stated that:

"The application fails as there are resources available to the Applicant to make his own private arrangements and/or the grant would have only been possible with significant contributions attached, and because the Applicant place his fiancée in a position to make the loan application and the same is in her name, the Director cannot make contribution terms against her and no satisfactory terms have been put forward to secure the costs involved."

She added:

"...it seems likely that the arrangements to settling funds owed to both counsel are being arranged and that there will be significant funds left over to cover either all or a substantial portion of the future legal costs of the trial."



It would therefore be reckless with this information to provide public funds to the Applicant, particularly when the disposable income is over the legal aid threshold, he has real/potential access to funding and it is clear even at this stage the amount of the confiscated funds, debts to lead and junior counsel and supporting expenses claimed on application have not been provided.”

18. The Listing Officer listed the appeal hearing for 13 April 2022. It was evident that the parties would not be ready for the appeal hearing and I informed them that the hearing would be used for case management with the provision of structured directions.
19. At the Case Management hearing held on 13 April 2022, I directed the Respondent to file any evidence by or on 11 May 2022 and the Appellant to file any affidavit evidence in reply by or on 18 May 2022. The Respondent filed and served her affidavit sworn on 6 May 2022 on 9 May 2022. On 18 May 2022, the Appellant filed and served a document headed ‘Response to the Affidavit by the Director of Legal Aid’ which did not conform to the requirements set out in the GCR Preamble paragraph 12 and GCR O.41. This having been brought to the Appellant’s attention, an affidavit in proper form was eventually sworn on 23 May 2022 and filed on the day before the effective Appeal hearing.
20. At the 13 April 2022 case management hearing, Counsel for the Appellant indicated that when the criminal proceeding came on for a Case Management hearing in January 2022, Crown Counsel informed the Court and the Respondent that the Crown may be willing to agree to the release of funds restrained under the Proceeds of Crime legislation to pay his legal expenses in the criminal matter. I was told that applications were being made to Carter J (Actg) concerning those funds. With that in mind, I stated that the Appellant was to diligently pursue that hearing before Carter J (Actg) or receive confirmation from the Court Administration about the status of the funds and that should all be done before the appeal hearing. It does not appear that this was done, but in the end this became a non-issue. At the April hearing it was not made clear to me that the funds were not



restrained, but were in fact subject to confiscation orders. In such circumstances I am not clear why Crown Counsel would have felt it appropriate to give such an indication concerning confiscated funds. It seems that the DPP do not consent to any confiscated funds being released to meet the Appellant's legal fees. I am satisfied the confiscated funds cannot not be regarded as a resource, or even a possible resource, of the Appellant to be used to pay for his legal representation.

21. Another of the issues that had been raised (one of the reasons given by the Director for refusing legal aid) was the Respondent's finding that the Appellant had failed to provide adequate financial disclosure to support his legal aid application. With that in mind, at the Case Management hearing held on 13 April 2022, I also directed the Respondent, by or on 20 April 2022, to provide the Appellant with details of the information and supporting evidence that she felt was still lacking. I directed that the Appellant respond to any requests made by 27 April 2022.
22. The purpose of the above direction was (i) for the Respondent to have an opportunity to set out in a single request document what outstanding information she says was required to be provided to enable it to make an informed decision about the Appellant's financial resources; (ii) to inform the Appellant about the financial information he needed to provide and to afford him with a further opportunity to provide the same, with the hope that it would lead to an informed reconsideration of his legal aid application being undertaken by the Director; (iii) to enable the Court to decide whether the Director had been correct in refusing legal aid due to what she stated was a lack of proper financial disclosure and/or whether the Director now had sufficient information to consider the application; and (iv) for the Court to have sufficient financial information about the Appellant's financial position if it needed to determine whether the Appellant had insufficient means to meet the costs of his legal representation. With these considerations in mind, I now set out in detail the request made by the Respondent and then the belated reply given by the Appellant.



23. In compliance with that direction, Chambers sent a letter dated 19 April 2022 stating that the Director was of the view that the “general information” which had been provided was “inconsistent and incomplete”. It also highlighted a concern that the collateral which had been available to try to secure the bank loan, namely \$15,000 and the father’s land, had been refused to Legal Aid. The letter contained details of the information being requested and the reasons why, as follows:

- “(i) **Supporting evidence of all monthly household expenses claimed during this process.** *The Applicant initially only provided limited information on his application form and then subsequently provided a breakdown of those expenses. There has been no supporting documentary evidence provided which corroborates the claims made and/or some of the claims made are inconsistent with the information which is provided.*⁸
- (ii) **The updated Lease/Rental Agreement.** *The one provided is inconsistent with the disclosure made regarding monthly sums paid.⁹ His application states \$2,100.00 and the loan agreement form states the rental amount is \$18,000.00 (or \$1,500.00 per month).*¹⁰
- (iii) **Details of properties owned (solely/jointly or which he has a beneficial interest in)** *are required along with an estimate of the value of the loans with copies of deed(s) of title and any other relevant supporting documentary evidence. This is to include any properties held or owned by the Applicant in a company’s name, or, in which he has a beneficial interest (either situate in the Cayman Islands or outside of this jurisdiction).*¹¹
- (iv) **An affidavit of Means** *is required from Mr. Watson for the purpose of averring to: (1) any property he owns solely/jointly or in respect of which he may have an equitable or beneficial interest, such property may be situate either in this jurisdiction or outside of this jurisdiction; the (2) disclosure any property sold within the last 24 months.*¹²

⁸ “Page 5 of the Application Form and revised expenses on 8th and 10th December 2021.”

⁹ “The Lease Agreement says \$1,700.00 per month.”

¹⁰ “See page 5 of the application form, page of 1 of Assignment of Lease & page 2 of Loan application.”

¹¹ “See checklist of additional info requested on 2nd December 2021 and email dated 11th January 2022 now expanded for better clarity.”

¹² “This affidavit was requested in January 2022. Mr. Watson replied on 17th January 2022 providing information but an affidavit in support of the assertions made is required.”



- (v) **Outline and copies of invoice for legal fees.** *An outline of the professional fees paid to date and/or owed to Counsel (junior and Lead) with supporting receipts.¹³ this could take the form of a lawyer and own client bill of costs. His lawyers would have required to issue Mr Watson with an itemised Bill of costs and receipts as proof of payment.*
- (vi) **Copies of all/any credit card statements for the last 3 months.¹⁴**
- (vii) **Outgoings.** *The Applicant indicated that \$2,000.00 per month is given to his father in cash (\$800.00 towards Helper/Caretaker). The Director requires:- (a) copy of the Helper's work permit; (b) and a statement from the Helper with regard to monthly salary; and (c) a declaration from his Father with regard to the monthly contribution which he receives.¹⁵ ...The property of his father appears to generate rental income. The Director requests that the same valuation which was provided to the Bank (with regard to the loan application) ought to be provided to the Director together with evidence of all/any monthly rental income earned/generated by this property (which is owned by his father).*
- (viii) *The Applicant stated on 14th January 2022, that "The \$15K bonus serves two purposes: (1) improves (his fiancée's) debt service ratio to assist with approval of the loans; and (2) Assist (his fiancée) with the monthly repayment of the loan." As the loan was not approved, the \$15K should now be available to Mr. Watson and/or would have been returned to him to service any new loan or facilities. The Director requires Mr. Watson to provide a detailed elemental breakdown and supporting evidence on how the funds were dispersed. The Director seeks confirmation as to whether the \$15K is still available to be paid as a contribution to Legal Aid?¹⁶*
- (ix) **While certain bank accounts are frozen pending the disposition of the charges.** *There is no indication of the current value of these accounts. The Director seeks to ascertain the value of the accounts seized. This is required to be verified and the information is required to be provided to Legal Aid in the event that he is acquitted of the charges. These matters should be deposed to in the Affidavit of Means.*
- (x) *..., given the passage of time, and consequential developments, and given that Counsel's response to 18th January 2022, did issue while the loan application was*

¹³ "The request was made for this information from Counsel in a meeting but she was unable to give an exact amount at the time. It was simply stated that the loan, if received, would have to pay for a portion of the fees outstanding."

¹⁴ "Credit cards held in the Cayman Islands or outside this jurisdiction."

¹⁵ "This interacts with the breakdown of expenses filed 8th & 10th of December 2021."

¹⁶ "Email dated 14th January 2022"



still pending, now that the loan has been refused, Counsel is requested to respectfully revisit whether consensual charge can be placed on the property (for 5 years).¹⁷

24. The Appellant failed to properly comply with the Court's directions because he did not provide a reply to any of the requests made in the letter from the Attorney General's Chambers until 18 May 2022. This gave insufficient time for the Respondent to review the material, to give instructions to Counsel, to prepare properly for the appeal hearing, or to reconsider the legal aid application. The non-compliance with the directions given on 13 April 2022 resulted in the 23 May 2022 hearing date having to be vacated and commuted into a further case management hearing.
25. In the belated reply document, the Appellant sought to address the requests in the following fashion:
- (i). Concerning the request for supporting evidence of household expenses: The Appellant failed to address this in the reply. The brief schedule listing the purported outgoings previously provided¹⁸ is of little value without supporting evidence, especially as there were some potential discrepancies with the living expense figures provided in the First Caribbean Bank Loan Application Form. At the hearing, his Counsel indicated that she had been instructed that the documentation like utility bills were in his fiancée's name and that although the Appellant had asked her for it, she had failed to provide it to him. The reason for non-production is questionable,¹⁹ especially as his fiancée had applied for a substantial loan to meet his legal fees and provided an employment/salary letter from her employer. The apparently inconsistent approach from her concerning providing necessary material to enable her fiancée's legal aid application to be processed in an informed manner raises a concern about why this easy to obtain and unobtrusive disclosure is not being produced despite the number of requests made for it.

¹⁷ *"The father's residence was intended to be used as security/collateral for the loan."*

¹⁸ The schedule of his personal monthly expenses totaling CI\$7,200 is date stamped Jan 17 2022 and a briefer list of his personal monthly expenses again totaling CI\$7,200 is date stamped Dec 08 2021.

¹⁹ The Assignment of Lease document made on 28 March 2017 and received by the Legal Aid Office on 18 January 2022 is not sufficient - I have only been provided with the first page of that document.



(ii). Concerning the request for a copy of the lease agreement: The Appellant stated that the rent had increased from CI\$2,000 to \$2,300 in May 2022 and he highlighted the content in an extract in a text from the Landlord sent on 21 March 2022 to his fiancée. He also provided on an unsigned sheet of paper simply headed 'rent receipt' which named the owner as Judy Byrd-Ebanks and gave a date of January 2022 and noted that the rent received was CI\$2,000. He failed to provide a copy of the requested lease agreement. The reason he gave was that the lease was in his fiancée's name and that although he had asked her for it, she had failed to provide it to him. The lease agreement had been previously requested by the Respondent and, again the reasons given for the non-production are not attractive.

(iii). Concerning the request about properties owned and the requested affidavit of means: The Appellant did not provide a sworn or witnessed affidavit. He supplied a document headed "Affidavit of Means" dated 29 April 2022, containing an appropriate declaration as to truth, signed by him in which he said he did not own any property solely/jointly or in which he has a beneficial interests in our outside of this jurisdiction and that he had not sold any property within the last 24 months. Although not sworn, the Director has been informed about what his position is and the content of the document is a reiteration of what he had already told her prior to the refusal of the legal aid certificate in January 2022. If legal aid was granted to the Appellant partly based on this representation by him, and if it later turned that he had misrepresented the position there would be consequences for the Appellant.

(iv). Concerning the request about invoices for legal fees paid or owed: The Appellant appropriately exhibited a fees statement from Leading Counsel's Chambers which indicated that his legal fees totaled CI\$470,176 for the Watson/Moss and Watson/Blake cases. He stated that the total did not include a number of disbursements, costs of a Privy Council appeal, confiscation matters and an appeal to the Immigration Appeal Tribunal.



The Respondent failed to provide a fees statement or even give a breakdown of the fees paid/owed to Brady Attorneys. A failure to do so is not helpful to both the Director and to the Respondent, as the Director could take those financial commitments into account when considering the Appellant's and his household's disposable income.

- (v). Concerning the credit card request: The Appellant stated that he did not have any credit cards.
- (vi). Concerning the outgoings request: The Appellant provided a copy of the helper's work permit and he stated that his father pays the helper. The Appellant commented that his father is the sole owner of his property and, therefore, the father will not provide any details of rental income received for the property. That is regrettable as the rental figure is required to determine whether there is a necessity for the Respondent to deplete his resources by contributing \$2,000 of his income each month. That would be relevant to determining his ability to pay for legal aid and/or the level of any contribution he should pay were legal aid to be granted to him. If the father refuses to provide information about the level of any rent he receives, the Appellant is at risk of the Director concluding that, in the vacuum of information, the purported \$2,000/month payment is not shown to be a necessary outgoing and decide that she should not include the \$2,000 in her disposable income calculations.
- (vii). Concerning the request about the \$15,000 bonus: The Appellant indicated that the funds were used to pay for outstanding legal fees to previous Leading Counsel totaling CI\$21,083.78. The Appellant adequately dealt with that when he provided confirmation of the payment being made to Leading Counsel's Chambers in an online transfer from Butterfield Bank.
- (viii). Concerning the frozen bank accounts: The Appellant explained that these do not relate to the present case and that any acquittal in the present criminal proceedings will not

have an impact of the non-availability of those funds. He said that the total value of those funds and assets are CI\$418, 0129.99.

(ix). Concerning the possible charge being placed on his father's property: The Appellant stated that his father has refused to provide his property as collateral for legal aid. The father is entitled to take that position and the Respondent cannot require or expect the father to provide the collateral.

26. In an email received from Counsel for the Respondent on 25 May 2022, he said that due to the late provision of the Appellant's reply, the Director:

"feels that pressure is being exerted on her to make a decision within a very narrow time frame" and Counsel labelled it as being the *"pressure cooker effect"*.

He added that:

"The position of the Director is that the Court requires to make a ruling at the date the decision to refuse legal aid was made. The Director/Chambers will be asking the court to consider whether/if the decision made at the time of the refusal was within the proper exercise of her discretion, and reasonable. Chambers contends that the decision was reasonable. The Director has no issue with the matter being remitted to her for reconsideration. However, she instructs Chambers that she requires a direction from the Court at this stage. The Director has instructed Chambers that we may seek additional time from the Court in order for her to consider the matter, or, request His Lordship to make a determination on the Director's refusal decision. I deem it prudent to bring these developments to your attention this evening rather than doing so before His Lordship tomorrow morning."

27. In an email sent on the morning of the hearing by Counsel for the Respondent, he informed that the Legal Aid Officer and the Director had reviewed the recently submitted material and he added that:

"1. The Director instructs that "Mr Watson did not provide any supporting documents in relation to claim for utilities (water, light etc)."



2. The Director instructs that Mr Watson still has to provide a copy of the Rental Agreement. On 19th April 2022 Chambers wrote seeking a copy of the Lease Agreement

3. The Director instructs "that the rental contract received was an Assignment of lease which had \$1700 (+\$500 pets).... The receipt that was provided in relation to rent said \$2K"

4. The Director instructs that it is very "difficult to assess the disbursement of his monthly income because there is no bank account provided to cross reference the expenses being claimed".

Furthermore, the Director instructs, that she wishes to reiterate that even if the Director had been placed in a position and provided with all the documents by Mr. Watson, the budget for this matter would have to be approved by the Court Administrator (s.8) possibly a contract put in place regarding the fees (s.24). In this regard, the Director instructs that she would expect counsel to provide the Director with a breakdown of the estimated costs and would place that before the Court Administrator for directions or approval. Thereafter, once the Legal Aid Office knows the average costs to be incurred for this matter, it could then consider the contribution terms. The Director instructs Chambers that Mr Watson's counsel should provide a breakdown of what she anticipates the hours would be to deal with the trial.

Finally, Chambers is instructed to seek a ruling from his Lordship today on the refusal (reconsideration) at the date it was made namely that it was within the proper exercise of the Director's discretion to refuse the application. "

The Statutory Framework for Legal Aid

28. It is necessary to consider the relevant legislation and procedures concerning an application for legal aid for a party in criminal proceedings. Section 3 of the Legal Act (2015 Revision) ("the Act") provides:

"The purpose of this Law is to provide legal aid to persons in respect of civil and criminal matters where those persons are financially unable to secure legal services from their own resources." [My emphasis].



The Appellant submits that this means that one can only look at the resources of the person who is applying for legal aid. That may be right if one was looking at capital resources, but, as I will later expand on herein, it does not apply when one is looking at disposable income as there is a requirement while considering disposable income to have regard to that of the household of which the applicant is a member.

29. Regulation 5 in the Regulations deals with grants of legal aid in criminal matters and highlights the factors that the Director has to consider when determining whether the applicant has the means to retain an attorney, and it provides:

“5. (1) In determining in accordance with the Law whether the applicant who has been charged with an offence has the means to retain the services of an attorney-at-law, the Director shall have regard to -

- (a) the amount of the applicant’s disposable income;*
- (b) the applicant’s ability to obtain employment; and*
- (c) the likely cost of the proceedings.²⁰*

(2) In the event that -

- (a) an assisted person is charged with a Class A offence together with any other class of offence; and*
- (b) the court orders the offences to be tried together,*
the certificate shall authorise the assisted person to be represented in respect of all the offences.”

As stated in s.4.(1) of the Act, legal aid may be granted in criminal proceedings on indictment. It is clear from s.4(1) and Regulation 5(1) that, as it is public money that is being used for legal aid, there is a balance to be struck, on a case by case basis, between providing this means of access to legal representation against the limited funds available. This is an important and understandably often problematic task for the Director. To enable the Director to do that properly, a person applying for legal aid must ensure that he provides sufficient disclosure to enable her to determine what the disposable income is and what the likely cost of the proceedings will be. That is why there are

²⁰ My emphasis.



usually requests made (i) for information about the level of income and outgoings with supporting evidence, (ii) for details about the level of legal fees still owed by the applicant (that may form part of the disposable income calculation) and (iii) for a meaningful estimate of the legal costs for an applicant for the relevant proceedings. The likely costs of the proceedings are not only a relevant factor when considering the amount of public money that may be expended if a grant is made (with or without a contribution), but also to form a view about whether an applicant could realistically pay the fees from his own resources, including his disposable income. From the material before me, the parties both agree that a drain on the public funds in the region of CI\$190,000 is possible for the Appellant's legal fees. The Appellant has been charged with a Class A offence, so s.5(2) of the Act is applicable.

30. Section 15 of the Act concerns the method of application by someone seeking legal aid and it provides:

“(1) Any person who wishes to be granted legal aid shall apply in writing to the Director²¹.

(2) Every application for legal aid shall be in such form and accompanied by a statutory declaration verifying the facts stated in the application as may be prescribed.

(3)... ”

This has been done by the Appellant.

31. Regulation 4(4) of the Regulations provides:

“Every application for legal aid shall contain such information and shall be accompanied by -

(a) a statement of means and such documents as the Director may require for the purpose of verifying its contents; and

(b) such documents as may be required to enable the Director to determine –

²¹ Paragraph 4(1) in the Legal Aid Regulations, 2016 (“the Regulations”) provides that a person who desires legal aid in a criminal case may apply using the form issued by the Director.



- i. *the nature of the proceedings in relation to which legal aid is sought and the circumstances in which legal aid is required;*
- ii. *the question whether it is proper that a certificate should be granted; and*
- iii. *the disposable income of the applicant.”*

The Appellant did provide a Statement of Means form at the same time that he filed his application. He has filed a number of documents, but I agree with the Director that he has not been as diligent in this regard as one might expect, especially when he is saying that his application requires an urgent determination. The Appellant has presented quite a bit of the material in a piecemeal manner and, rather than being proactive to show that his resources are limited, he has had to be repeatedly prompted to supply relevant information. As outlined, there are still some gaps in the disclosure that Regulation 4(4) permits the Director to require and seek. Having regard to this background, it is understandable that the Director has taken a cautious and considered approach to the application, requiring sufficient financial material to enable her to make an informed decision.

32. Section 7(3) of the Act deals with what the Director must do after an application has been properly filed, and provides:

“...shall receive and consider every application for legal aid made under section 15 and, subject to the following provisions of this Law and any regulations, shall grant a certificate to an applicant in any proper case, with or without provision for payment of contributions by the applicant.”

It is evident that the Director has received and has considered the application. In January 2022, the Director felt unable to find that this was a proper case and issue a certificate due to her view that the loan, the confiscated funds and her findings about the Appellant’s disposable income meant that he could meet his legal expenses from his own resources. I do not agree with her conclusion reached on that premise. However, importantly, I feel that it was reasonable for her to be unable to find in January 2022 that it was a proper case for a grant due to her concerns about the gaps in the



requested material provided to her. I note that the Director has expressed a willingness to review the application further if this Court directs that be done, but she would still require the Appellant to provide the outstanding material. She has also stated that if legal aid were to be granted, as it is a complex case, she may procure, by contract, the legal aid services on behalf of the Appellant.²²

33. Section 16 of the Act sets out the powers that the Director has to make enquiries relating to an application and it provides:

“(1) Where an application for legal aid is made, the Director -

- (a) may refer to such government entity as he considers appropriate, any question connected with the eligibility of the applicant for legal aid or as to his liability to make any contribution towards legal aid;*
- (b) shall make such inquiries as to the means and condition of the applicant and as to the merits of his case;*
- (c) shall require the applicant to furnish such information and documents as the Director may require for the purpose of considering his application; and*
- (d) shall require the applicant to attend personally before the Director unless the Director considers this to be unnecessary or the circumstances of the applicant do not permit such attendance.”*

Therefore, the Director, as she has done in relation to the Appellant’s application, is able and is expected to carry out the type of inquiries that she has made in order for her to make an informed decision.

34. Section 17 of the Act deals with the grant of Legal Aid Certificates and the relevant part for the purpose of this appeal provides:

“(1) Subject to section 4, a legal aid certificate may be granted to an applicant by the Director if his disposable income is the prescribed amount or less.

(2) An applicant who -

- (a) is charged before a court with any Class A criminal offence;*
- (b)....*

²² Section 24 of the Act.

...shall, if he qualifies for the grant of a certificate under subsection (1), be entitled as of right to have a certificate granted to him by the Director.”

Having regard to the counts in the Indictment that the Appellant faces, he would be entitled to legal aid if his disposable income is the prescribed amount or less as the offences are Class A criminal offences.²³ The Court was informed that the Director regards the normal level for a grant of legal aid in criminal proceedings is \$20,000²⁴, but that the Director assesses the household disposable income threshold as \$40,000 when there are two relevant adults in the household. However, just because the assessed disposable income is above the “normal” threshold, that does not mean that legal aid cannot be granted, especially if considering whether an applicant has sufficient means to pay privately for the cost of legal representation in a lengthy, complex and expensive criminal proceedings.

35. Section 18 of the Act relates to disposable income and provides:

“The Cabinet shall, after consultation with the Chief Justice, by regulations prescribe the calculation of the disposable income of an assisted person and the assessment of the amount of any contribution which he may be required to pay under section 19 having regard to the amount so calculated.”

36. Section 19 of the Act, clearly in recognition of the limited public funds available, provides that there is a requirement for an Assisted Person to pay a contribution to those sums, and the relevant part of the section for this appeal provide:

*“(1) Subject to subsection (2), the Director, on granting a certificate, shall require an assisted person to pay to the Government a contribution towards the sums payable on his account under the authority of the certificate.
(2) If the Director requires an assisted person to pay a contribution, he shall either require him to pay the same forthwith or by way of such periodical*

²³ Section 2 of the Act.

²⁴ Regulation 15(4)(a) of the Regulations.



instalments as may be specified in the certificate granted to him.

(3)...

(4) Notwithstanding the provisions of this section, where in the circumstances of a particular case the Director is satisfied that it is appropriate in the interest of justice so to do, the Director may disregard the disposable income of an assisted person and not require him to make any contribution in accordance with this section but the Director shall provide written reasons to the Court Administrator for so doing.

(5) In making any arrangements under this section, the Director shall have regard to the principle that any debt that is to be paid from the assisted person's disposable income shall be paid by the assisted person within five years from when the debt arises."

37. Regulation 11 (5) of the Regulations provides in relation to contributions that:

"(5) In assessing the amount of contribution, if any, payable in respect of any proceedings, the Director shall have regard to the probable costs of the proceedings."

...

(8) In fixing the method by which any contribution shall be paid, the Director shall have regard to all the circumstances, including the probable length of time which any certificate granted as a result of the application will be in force, and may order the contribution to be paid in instalments or the whole or a part of it to be paid before a certificate is issued.

(9) After the Director has approved an application for a certificate he shall notify the applicant of -

- (a) the amount, if any, of his contribution as determined by him; and*
- (b) the terms upon which a certificate will be issued."*

38. The Schedule at Part 8 of the Regulations sets out how the calculation of a person's legal aid contribution shall be calculated referable to his disposable income. For the calculation, a person's disposable income is the aggregate annual gross income of the household of which he is a member less certain specified deductions in respect of the premises where that household lives. This Regulation is consistent with the approach of the Director, when also considering disposable income as a resource of the Applicant, that it is not limited to the applicant alone, but for the



household. If legal aid were to be granted to the Appellant in this case, from the information provided to date, one can conclude just from the Applicant's rough personal disposable income figure, let alone the disposable income figure for his household, that he would likely be required to make a significant contribution. Regrettably due to the remaining gaps in the requested financial disclosure made to the Director, she has understandably highlighted the problem she would face in trying to determine the appropriate contribution figure.

The Merits of the Appeal

39. The Director erred in the emphasis and reliance that she placed on the loan application as a reason for refusing the legal aid application. It is clear in the written reasons given on 20 January 2022 for the refusal of the grant that great importance was placed on the pending loan and that it was regarded as a resource of the Appellant. The Director cannot require a third party, even if it is a partner living in the same household, to apply for a loan to meet the legal expenses of an applicant. However, in a situation where a loan application for funding to pay for legal expenses has actually been approved by the lending institution, the position may arguably be different. In the matter before me, where the Director was told in the legal aid application process (to strengthen that application and for her to place reliance upon the loan when granting legal aid) that the loan had been applied for by his fiancée with the declared intention that any loan proceeds would then be provided to him for the purpose of meeting past and present legal expenses, then if the loan was granted then that would become a resource of the Applicant that should be considered by the Director when determining his ability to pay his legal fees. If the loan application was only pending when the legal aid application was being determined, as the Appellant says that it was in January 2022, then the Director could have considered making it a condition of any grant of legal aid that upon the loan being approved and the funds being made available to the Appellant, that a specific sum be paid from those funds to cover all or some of his legal aid grant.



40. If the Director is to reconsider the legal aid application, then the loan application has no relevance as the Appellant states that it has not been approved by the Bank. Although there is no proof provided by the Respondent to show that the loan application form was actually submitted to the Bank or anything from the Bank showing that the application was declined, the loan cannot be considered as a resource of the Appellant for the purpose of determining his ability to meet his legal expenses.
41. The Director erred in the emphasis and reliance that she placed on the confiscated funds as a reason for refusing the legal aid application. The confiscated funds cannot be released for this purpose, and even if they could, in any event they would not constitute a resource of the Appellant until it was known that their timely release was certain. Due to the confusing representations being made, in or around January 2022, by the Appellant and apparently by the Office of the DPP about the possibility of some of these funds being released to meet the Appellant's legal fees in the criminal proceedings, it is understandable that the Director reviewed the status of the funds. However, there was great uncertainty as to whether future those funds would ever be made available. The correct approach would have been for the Director, rather than regarding it as a reason for refusing legal aid on the basis that it constituted a resource available to the Appellant, to consider adding a condition to any grant that the application for release of the funds be diligently be pursued by the Appellant and that any funds that were released must be immediately applied to cover his legal aid expenses.
42. The Director did not err, in January 2022 when declining the grant, when she placed emphasis on reliance on the lack of disclosure provided by the Appellant. The Director, as the legislation empowers her to do, may make inquiries for sufficient disclosure from an applicant to enable her to properly consider that person's resources and ability to meet their own legal fees as well as the level of any contribution to be made. If an applicant fails to provide sufficient information without



a valid reason, then he has failed to make a proper application. An applicant who seeks legal aid funding from public resources is expected to recognise that he must diligently provide the relevant information to enable the Director to make an informed decision about a possible grant. An applicant should not have an expectation that legal aid will be granted if he fails to do that, even if on a broad brush approach to consideration of his resources, there might very well be merit in his application.

43. The Director has made reasonable inquiries, some of which are dated, that have still unreasonably not been adequately addressed by the Appellant. I have analysed that above at paragraphs 8-17 (pre-refusal of legal aid on 19 January 2022) and paragraphs 22-27 (post-refusal of legal aid on 19 January 2022). It is a basic requirement, especially if requested, to provide supporting documents to verify household outgoings and this has not been done by the Appellant. With rent being alleged to be a significant outgoing, providing a copy of the lease agreement is a basic requirement and its non-production is not acceptable. A further major outgoing is the monthly amount purportedly paid by the Appellant to maintain his father. Therefore, the failure to provide details about any rental income that the father receives from his property prevents the Director from being able to reach an informed conclusion about whether this is a reasonable/necessary expenditure by the Appellant and whether the monthly payment should be considered when calculating disposable income. It is reasonable to request a fee note containing a breakdown of legal fees paid or still outstanding to Brady Attorneys' because on the eligibility review, the Director may wish to consider the legal costs as being a possible deduction from an applicant's disposable income. It is not acceptable to fail to provide that information.

Conclusions and Observations

44. When looking at Ground 2 in the Grounds of Appeal, I am satisfied that the Director was wrong to consider that the pending loan was a reason for determining that the Appellant has sufficient



resources to pay for his legal representation aid and for refusing the grant of legal aid. I hold this view if the Director treated it as being a stand-alone reason or as cumulative part of a number of reasons for refusing the grant.

45. When looking at Ground 1 in the Grounds of Appeal, I am unable to determine whether the Director was wrong to consider that the Appellant was financially able to meet his expenses. This is because for her to make such a decision, the Appellant is under a duty to reply to her reasonable inquiries- which he has only partly done.
46. Due to the nature of the counts, this is a very complex criminal matter. The trial will be a lengthy one and the legal expenses, even at legal aid rate, will be considerable. With that in mind, taking a broad brush approach to the consideration of the Appellant's disposable income, it is likely that the he will require legal aid as he will not have sufficient resources. I therefore remit the legal aid application back to the Director for reconsideration. There has been some relevant financial disclosure given since the 19 January 2022 refusal decision and the Director should consider that.
47. If the Appellant provides the remaining disclosure highlighted by me, if that does not contain anything highly unexpected, now that the loan and the confiscated funds have been found to be an irrelevant consideration to any grant, I would expect the outcome of the reconsideration to be a grant of legal aid with a contribution. However, before that informed decision can be made, the Appellant would be expected to disclose the material set out in paragraph 43 above. He would be well advised to do that and to have the requested affidavit of means concerning property ownership which he signed but failed to have sworn, properly executed and also provided to the Director. If legal aid is granted, due to the amount involved, it may well require a contract to be put into place regarding the fees and the budget for that will have to be approved by the Court Administrator.

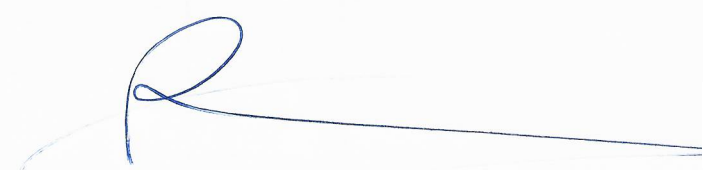


Therefore, I would expect the Respondent to act very promptly, especially as the criminal trial is fixed for a date in July 2022.

48. When considering disposable income, the Director may consider the income and outgoings of the Appellant's partner, who shares his household. However, it is not for that partner to pay for the Appellant's legal representation. When considering the Appellant's available resources and eligibility based on an ability to pay his fees, the Director may approach it on the basis that the partner in the household, especially on her high income level, could take on a greater responsibility for the household expenses thereby reducing his outgoings and increasing the level of his disposable income.
49. Another factor that the Director may consider is the Appellant (and his family's) recent high expenditure on criminal legal proceedings and the fact he was successful in parts of those proceedings but failed to get an award of costs. This has resulted in higher than usual outgoings and means that his means available to pay privately for the costs of legal representation has been greatly diminished. The Director may also take into consideration that, due to the Appellant's successful arguments made in the earlier stage of these criminal proceedings, the criminal charges are now brought by a voluntary bill of indictment.

Costs

50. Both parties have agreed that this is a matter where no costs order should be made.


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



