



[2022] JMFC FULL 06

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2019HCV05030

**CORAM: THE HONOURABLE MS. JUSTICE CAROL LAWRENCE-BESWICK
THE HONOURABLE MRS. JUSTICE ANDREA PETTIGREW-COLLINS
THE HONOURABLE MRS. JUSTICE SIMONE WOLFE-REECE**

**IN THE MATTER OF THE CONSTITUTION
OF JAMAICA**

AND

**IN THE MATTER OF AN APPLICATION
OF GEORGE NEIL** alleging violation of his rights
under SECTIONS 13(3)(e) and (h), of the
Constitution of Jamaica and seeking redress
pursuant to section 19 of the Constitution.

BETWEEN	GEORGE NEIL	CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	OFFICE OF UTILITIES REGULATION	2ND DEFENDANT
AND	SPECTRUM MANAGEMENT AUTHORITY	3RD DEFENDANT

IN THE FULL COURT

**Lord Anthony Gifford Q.C. and Danielle Archer instructed by The Law Practice of
Danielle Archer for the Claimant.**

Lisa White, Louis Jean Hacker and Matthew Gabbadon instructed by the Director of State Proceedings for the 1st and 3rd Defendants.

Danielle Gentles-Silvera and Shaun Wilkinson instructed by Livingston Alexander and Levy for the 2nd Defendant.

IN OPEN COURT

Heard: 20th, 21st, 22nd 23rd, 27th, 28th and 29th June and 28th October 2022.

Constitution of Jamaica – Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act- Sections 13(3)(e) and (h) – Whether the decisions of the Office of Utilities Regulation and the Spectrum Management Authority breached the Claimant’s right to freedom of association and right to equitable and humane treatment.

Crown Proceedings Act- Sections 2 and 13(2)- Whether constitutional claims are civil proceedings within the meaning of the Act - Attorney General being joined as a Defendant

Civil Procedure Rules – Rule 19 of the Civil Procedure Rules- addition of Minister as defendant after case closed.

Lawrence-Beswick J, Pettigrew-Collins J, Wolfe-Reece J

This is the judgment of the Court, to which each member has contributed a substantial portion.

[1] Mr. George Neil, the Claimant has filed a claim against the Defendants that his rights to freedom of association and equitable and humane treatment which are afforded to him by the Constitution of Jamaica were breached by the Defendants. He asserts that the decisions of the Office of Utilities Regulations (OUR) (2nd Defendant), the Spectrum Management Authority (SMA,) (3rd Defendant) and the then Minister of Science Energy and Technology were the catalyst and the bases of this claim. He sues the Attorney General by virtue of section 13(2) of the Crown Proceedings Act.

Background

[2] The Claimant was the Chairman of Index Communications Network Limited (Index) and Gotel Communications Limited, (Gotel) which both provided telecommunication services in Jamaica. These companies were granted telecommunication licences during the period 2001-2008. In 2012, Index merged with Newgen Technologies Company Limited to form Symbiote Investments Limited (Symbiote). At the time of the merger each company was the holder of a valid telecommunications licence.

[3] In March 2014 Symbiote applied to the OUR for the renewal and/or transfer of the telecommunications licences held by Index and Gotel to Symbiote. By way of a letter dated August 26, 2014 the then Minister advised Symbiote, that he would not grant those licences as the OUR had not recommended the grants. The letter explained further that:

“There were reports from the Commissioner of Police which revealed the non-existence of one of the shareholders of the company – Narysingh LLC; the existence of adverse traces; and inconsistencies and misleading information contained in the application submissions with respect to the stated directors, shareholders and financiers of Symbiote.”

[4] Two months later in October 2014, Symbiote made another application for carrier and service provider licences. Narysingh LLC remained listed as a shareholder in Symbiote and it was noted that the Claimant was no longer being associated with the Company.

[5] The OUR then requested the Jamaica Constabulary Force [JCF] to conduct background checks into the company. The checks did not reveal that any of the stated principals of the company were not fit and proper persons to hold a telecommunications licence. However, the OUR was unable to obtain independent verification in relation to the shareholders and directors of Narysingh LLC.

Consequently, the OUR recommended the grant of the telecommunications licences for which Symbiote had applied, and the Minister granted the licences.

- [6] In 2016 the SMA advised Symbiote that its licence had been granted on condition that “Mr. Enos George Neil, who was previously the subject of an adverse trace, shall not be a part of the company.” Shortly thereafter, the then Minister of National Security expressed some security concerns which he termed a matter of national security to the SMA and the OUR regarding an allegation that someone with adverse traces continued to participate in Symbiote. The OUR and SMA thereafter started some investigations into Symbiote.
- [7] In December 2016 the SMA and the OUR informed Symbiote of the information that had by then been received by the then Minister of National Security and they issued Notices of Investigation to Symbiote on the 6th and 7th December 2016 respectively. Symbiote then initiated judicial review proceedings before the Court challenging the decisions of the SMA and OUR to investigate. Symbiote was unsuccessful and no review was granted.
- [8] The OUR in October 2017 informed the then Minister of Science, Energy and Technology that Symbiote had knowingly failed to provide information that would have resulted in the refusal to grant the telecommunications licences that it had sought. Based on banking information obtained from the Office of the Contractor General which disclosed that the Claimant was a signatory to Symbiotes’ bank accounts, the OUR concluded that Symbiote had failed to declare that the Claimant was associated with it. The OUR therefore recommended to the Minister the revocation of Symbiote’s telecommunications licences. On April 10, 2018 the Minister informed Symbiote of the revocation of its telecommunications licences.

The Claim

- [9] The Claimant is aggrieved by the designation of the term “adverse trace” to him and the resultant circumstances based on the use of the moniker. He considers

that his constitutional rights have been thereby breached and has filed this claim seeking constitutional redress from the Court.

[10] On December 20, 2018 Mr. Neil commenced proceedings by way of a Fixed Date Claim Form which was subsequently converted to a Claim Form by order of the Court. The Claimant, Mr. George Neil, seeks the following orders: -

1. *A Declaration that the Defendants by their actions and statements between about 2014 and the present day, in stigmatizing the Claimant as a person who has an “adverse trace”, and/ or in penalizing him to his detriment because of the said stigma, and/or in recommending or requiring that licences be granted on condition that the Claimant may not take part in the licensee’s activities, have contravened and infringed the Claimant’s right to freedom of association, as guaranteed by section 13(3)(e) of the Charter.*
2. *A Declaration that the Defendants, who are public authorities, have by stigmatizing the Claimant as a person with an “adverse trace”, treated the Claimant inequitably and/ or inhumanely, in contravention of his right to equitable and humane treatment by any public authority in the exercise of their functions, as guaranteed by section 13(3)(h) of the Charter.*
3. *A Declaration that the Defendants’ actions in prohibiting his involvement with a licensee in the Telecommunications Industry treated the Claimant inequitably and inhumanely when those Defendants had induced him to surrender existing licences that were subsistence, [sic] as a pre-requisite to the grant of licences which they later revoked on the basis of the Claimant’s involvement.*
4. *An Order that the Minister of Science and Technology amend the terms of the spectrum licence granted to Symbiote Investment Limited by removing the condition attached to the said licence that the Claimant take no part in their activities.*
5. *Damages for loss of reputation and injury to his feelings and financial loss caused by the wrongful stigmatization.*

6. *Costs.*

7. *Such further or other relief as may be just.*

Issues:

1. Whether the use of the term “adverse trace” and the condition attached to the licence granted to Symbiote Investments Limited breached the Claimant’s right to freedom of association
2. Whether the assignment of the moniker “adverse trace” to the Claimant resulted in a breach of his right to equitable and humane treatment
3. Whether the actions of the Defendants are demonstrably justifiable in a free and democratic society
4. Whether the Claimant would be entitled to Constitutional Redress
5. Whether the Minister of Science, Energy & Technology should be added after the close of the case

Preliminary Point

Whether the Attorney General of Jamaica (1st Defendant) should be removed as a party to the Claim and be named as an interested party?

[11] At the commencement of the trial, Counsel Ms. White who appears for the 1st Defendant raised the issue and submitted that the Attorney General was not a proper party to the Claim. She contended that the Claimant in commencing this claim, proceeded pursuant to Section 13(2) of the Crown Proceedings Act, which provides that civil proceedings being pursued against the Crown should be instituted against the Attorney General.

[12] Ms. White argued that the claim before this Court is not Civil Proceedings, therefore the Attorney General should not be a named party but rather be designated as an interested party. She relied on **Kevin Simmonds v. The Minister of Labour and Social Security and Attorney General**¹ where the Full Court stated that Constitutional Claims are not Civil proceedings within the meaning of the Crown Proceedings Act. The Court however in keeping with the Civil Procedure Rules named the Attorney General as an interested party who is to be served in all Constitutional claims.

[13] Lord Anthony Gifford Q.C., on behalf of the Claimant disagreed and submitted that this matter, being a claim for constitutional redress, is a civil proceeding. It is not concerned with the revocation of a licence nor is it a judicial review, but rather, it is about excluding the Claimant from associating with Symbiote. His submission was that it was the Government of Jamaica, that is, the Cabinet, which had ordered the restriction on the claimant's rights. He too relied on the **Crown Proceedings Act**² and **Kevin Simmonds**³ to support the argument.

Law & Analysis

[14] The Crown Proceedings Act (CPA) provides that the proper party where the action is brought against the Crown or a servant of the Crown acting in the course of his/her duties is the Attorney General. Section 13(2) of the Act specifically states:

“Civil proceedings against the Crown shall be instituted against the Attorney General.”

¹ [2022] JMFC FULL 02

² 1st February 1959

³ Supra

[15] It is accepted that the Attorney General is the proper party in civil proceedings instituted or brought against the Crown. In the instant case to make a determination as to whether the Attorney General is a proper party the Court must consider whether Constitutional Claims are civil proceedings.

[16] Section 2 of the CPA states that;

“civil proceedings” does not include proceedings which in England would be taken on the Crown side of the Queen’s Bench Division; ”

The Queen’s Bench Division (QBD) is made up of five specialized courts that deal with specific areas of the law: The Administrative Court, the Admiralty Court, the Commercial Court, the Mercantile Court, and the Technology and Construction Court. Proceedings on the side of the QBD were the predecessors to an application for judicial review, that is applications for the ancient writs of mandamus, prohibition and certiorari.

[17] In **Kevin Simmonds v. The Minister of Labour and Social Security (etal)**⁴ Barnaby, J discussed this very issue. She examined the judgment of the **Minister of Foreign Affairs, Trade and Industry v. Vehicles and Supplies Limited and Another**⁵. There the statutory powers exercised by the Minister were being challenged, that is the parties were seeking to have judicial review of the Minister’s exercise of his statutory powers. It was concluded that such a challenge did not fall within the meaning of Civil Proceedings as defined by the CPA. Barnaby J stated as follows:

⁴ Supra

⁵ [1991] 1WLR 552

“I accept that the addition of the Attorney General as a party to Judicial review and Constitutional claims which are sui generis pursuant to the CPA is improper”

[18] The decision in **Scott Davidson v Scottish Ministers**⁶ alluded to by Ms White demonstrates the point that more likely than not, constitutional claims are not civil proceedings within the meaning of the CPA. The facts of that case are not relevant to the present claim but the reasoning is insightful with regard to the meaning of civil procedure in the United Kingdom (UK) and by extension in our jurisdiction. The UK CPA which bears similarity to our legislation was passed with a view to remedying three main defects in bringing claims against the Crown namely:

- a) the subject was at a disadvantage because of the particular procedure involved in cases where the Crown was a litigant;
- b) the Crown could not be sued in the county courts; and
- c) the Crown was not liable to be sued in tort.

The intendment was the same in our jurisdiction. The changes brought about by the passage of the Act meant that the subject was given a remedy as of right against the Crown both in tort and in contract, and the procedure governing litigation between subjects was now applied to litigation in civil proceedings by, as well as against the Crown. In other words, those changes affected what would be matters of private law.

[19] Section 10 of our CPA abolished certain mentioned civil proceedings by, or against the Crown and directed that all civil proceedings by or against the Crown be instituted and proceeded with in accordance with rules of court. Section 18(2) sets out proceedings that are to be considered civil proceedings against the Crown. Constitutional claims are not mentioned.

⁶ (2006) SCLR 249

- [20] Given that there was never an issue with bringing claims in the nature of public law claims against the Crown and hence no need to remedy what was not an issue, it is the considered view that constitutional claims were not included as civil proceedings in the reform process.
- [21] Paragraphs 78 and 79 of the judgment in the case of **Scott Davidson v Scottish Ministers**⁷ is worth quoting. Those paragraphs explain the purpose of the legislation passed in the UK.

*“78. In his speech in **M v Home Office** [1994] 1 AC 377 Lord Woolf reached essentially the same conclusion by a slightly different route. He drew attention, at p 412B-D, to the definition of “civil proceedings” in section 38(2): the term “does not include proceedings on the Crown side of the King’s Bench Division.” By excluding Crown side proceedings from the definition of civil proceedings, Parliament also excluded the prerogative order proceedings from the definition of “civil proceedings against the Crown” in section 23(2), which governs the application of Part II, including section 21, in English law. This exclusion is, of course, readily explained by the fact that Parliament had already reformed the procedure in Crown side proceedings in 1938. Lord Woolf went on to show how the exclusion of Crown side proceedings should be taken to apply to the modern procedure for judicial review which has replaced the prerogative orders. So far as judicial review proceedings were concerned, therefore, section 21 would not apply but, he said at p 422G, “[t]he restriction provided for in section 21(2) of the Act of 1947 does, however, remain in relation to civil proceedings.” In other words, the procedural provisions in Part II do not apply to judicial review proceedings against the Crown which, in English law, now largely cover public law matters: **O’Reilly v Mackman** [1983] 2 AC 237; **Clark v University of Lincolnshire and Humberside** [2000] 1 WLR 1988. The necessary conclusion is that these provisions apply to proceedings in relation to the Crown’s private law obligations.*

79. This is confirmed by the definition of “civil proceedings against the Crown” in section 23(2) governing the application of Part II in English law. Subsection (2)(a) refers to proceedings for the enforcement or vindication of any right or for the obtaining of any relief which, if the Act had not been passed, might have been enforced or vindicated by petition of right or monstrans de droit. The latter was a method of obtaining or recovering possession of real or personal property from the Crown. Both remedies were thus concerned with enforcing the plaintiff’s private law rights.

⁷ Supra

Subsection (2)(b) refers to proceedings replacing an action against the Attorney General, any Government department or any officer of the Crown as such. Again, as the use of the term “action” indicates, Parliament had in mind situations where previously, under statute, ministers or departments or officers of the Crown could have been sued in respect of civil liabilities, especially contracts. A well-known example was the Minister of Transport who, under section 26(1) of the Ministry of Transport Act 1919, as amended by Schedule 2 to the Crown (Transfer of Functions) Act 1946, could be sued “in respect of matters whether relating to contract, tort or otherwise arising in connection with his powers and duties under this Act or any enactment relating to highways, by the name of the Minister of Transport ...” Further details of such situations can be found conveniently in G L Williams, Crown Proceedings (1948), pp 3–5. Finally, subsection (2)(c) refers to all such proceedings as any person is entitled to bring against the Crown by virtue of this Act. This is a reference to proceedings by virtue of Part I of the Act, which are essentially of a private law nature.”

[22] Although Constitutional cases are not specifically referred to, what is eminently clear is that a constitutional claim is not in the class of claims that were previously vindicated by petitions of right or *monstans droit*, in other words it is not a claim in private law.

[23] At page 274 paragraph D of **Scott Davidson v. Scottish Ministers**⁸, Lord Mance observed that Lord Woolf in **M v Home office**⁹ drew support from an article entitled **Injunctive Relief against the Crown and Ministers**¹⁰ in which the late Professor Sir William Wade QC observed that;

“It is of primary constitutional importance that ministers should not be confused with the Crown. All the ordinary powers of government, subject to relatively few inceptions are conferred upon ministers in their own names and not upon the Crown.”

⁸ supra

⁹ [1994]1AC 377

¹⁰ (1991)107 LQR 4-5

This observation is apt in our context. If the view is correct, it reinforces the point that a minister of government, having responsibilities for a department or departments of government bears responsibility for his ministerial conduct and for the actions of his department or ministry. By virtue of Section 70 of our Constitution the Governor General acting in accordance with the advice of the Prime Minister appoints Ministers from members of the two houses of Parliament. Such Ministers are appointed by instrument under the Broad Seal of Jamaica.

[24] The Claimant by his Claim is seeking declarations that his Constitutional rights to freedom of association and equitable and humane treatment were breached by the OUR, SMA and the Minister of Science Energy and Technology. We cannot agree with the submission by learned Queen's Counsel that Constitutional claims are Civil proceedings. Constitutional Claims like Judicial Review are unique and do not fall within the general meaning of Civil Proceedings in the CPA. They are dealing with a specialized area of law, the breaches of the fundamental rights afforded citizens by the Constitution. We agree that a constitutional claim is not to be commenced by virtue of the CPA but pursuant to Section 19 of the Constitution. We conclude that the Attorney General would not be a proper party to this constitution claim.

[25] There is no question that the Attorney General's role as the legal advisor to the Government of Jamaica, provides the basis for that officer's interest in any Constitutional claim brought before the Courts. Part 56.11(3) of The Civil Procedure Rules (CPR) recognizes this and states;

"A Claim Form relating to an application for relief under the Constitution must be served on the Attorney General."

The Court therefore orders that the Attorney General be removed as a party to the claim and be deemed an interested party to the determination of this claim for breaches of the Claimant's constitutional rights.

Issue 1: Whether the use of the term “adverse trace” and the condition attached to the licence granted to Symbiote Investments Limited breached the Claimants right to freedom of association

- [26] The uncontradicted evidence is that in September 2016 a telecommunications licence was granted to Symbiote in the form of a Domestic Mobile Spectrum licence. The Licence had a condition attached to it, that *“Mr. Enos George Neil who was previously the subject of an adverse trace shall not be a part of the company.”*

Submissions of the Claimant

- [27] Counsel Ms. Archer for the Claimant submitted that it was inappropriate for the Minister to use the term “adverse trace” with regard to Mr. Neil because there was no evidence to support its use. She said that there was no suggestion that he had been charged, convicted or even investigated or suspected of having committed any offence. Therefore, it amounted to a baseless use of a term which had no evidential support.
- [28] She further submitted that the labelling of Mr. Neil as someone with “adverse trace” without evidence of same interfered with and ran contrary to the legal principle of the presumption of innocence. It in essence left a perception that he had been convicted of offences which gave rise to an “adverse trace” when he had not even had the benefit of a trial which is his constitutional right.
- [29] Counsel contended that the “adverse traces” were based on mere suspicion and that the relevant authorities never asked Mr. Neil to address the allegations of adverse traces made against him.

- [30] She relied on the case of **Council of the Civil Service Union v Minister for the Civil Service**¹¹ to support her argument that the government is required to show a fair process and is not simply allowed to make bald assertions in the interest of national security.
- [31] She submitted that there was no evidence that explains that an adverse trace used against the Claimant was in the best interest of national security given that all the police had were suspicions.
- [32] Ms. Archer concluded therefore, that Mr. Neil should not be denied the right to associate with a company of his choice when the process of uncovering and employing an adverse trace is based on insufficient evidence and is not fair.

Submissions of the 2nd Defendant

- [33] Mrs. Daniella Gentles-Silvera for the 2nd defendant argued that before the Court can consider a constitutional claim such as this, the claimant is required to prove certain ingredients. She relied on **Maurice Tomlinson v Television Jamaica Ltd et al**¹² where the Full Court stated the criteria for the success of a claimant seeking constitutional relief and on **Julian Robinson v The Attorney General of Jamaica**¹³ as well as **Banton and Others v Alcoa Minerals and Others**¹⁴ which added further requirements. She further submitted that in the instant case some ingredients had been satisfied however the Court in this matter must firstly consider in this claim, the question of whether the defendants' conduct has

¹¹ [1985] AC 374

¹² [2013] JMFC Full 5

¹³ [2019] JMFC Full 04

¹⁴ [1971] 17 WIR 275

infringed the Claimants right to freedom of association. Thereafter it should consider the remaining requirements in order for a constitutional claim to be successful.

- [34] Counsel submitted that the evidence of Mr. Neil has shown that this claim is an abuse of process. Although his claim is based on his wish to associate with Symbiote and to be involved in the telecommunications business Mr. Neil in cross examination expressed complete disinterest in Symbiote and the telecommunications business.

Submission of the 1st & 3rd Defendants

- [35] Ms. White, Counsel for the 1st and 3rd Defendants, reminded the court that the right to freely associate is not new to our legislation and was previously enshrined under section 23 of the Bill of Rights. That section provided for the enjoyment of freedom of peaceful assembly and association and included in particular a freedom to form or belong to trade unions or other associations for the protection of interests.
- [36] She relied on the case of **Banton and Others v. Alcoa Minerals of Jamaica**¹⁵ in particular, Graham-Perkins and Parnell JJ's exposition of the meaning and content of the right of association. She also placed reliance on **Collymore v Attorney General**¹⁶ a case considered by the Judicial Committee of the Privy Council, emanating from Trinidad and Tobago, concerning in part, freedom of association in a trade union .Counsel quoted Lord Donovan, who, in delivering the judgment of the Privy Council approved the dictum of Wooding, CJ in the Court below where he stated;

"In my judgment, then, freedom of association means no more than freedom to enter into consensual arrangements to promote the common

¹⁵ [1971] 17 WIR 275

¹⁶ [1970] A.C. 538

*interest objects of the associating group. The objects may be any of many...”*¹⁷

[37] Counsel went further to agree with the view of the learned authors in **Commonwealth Caribbean Employment and Labour Law**,¹⁸ where they stated that;

*“The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 has repealed Chapter III of the Jamaica (Constitution) Order in Council 1962. Section 13(3)(e) replaces Section 23(1) with the wording ‘the right to freedom of peaceful assembly and association’. The reference to ‘in particular to form or to belong to trade unions’ has been omitted. It can be argued that this omission has effectively widened the definition of the right of freedom of association by eliminating the reference to a specific class of association”*¹⁹

[38] Counsel submitted in addition that it was Symbiote itself which had agreed to no longer associate with the Claimant as a term and condition of having a Spectrum licence. It was not the claimant’s right to associate that was breached, or even engaged in the circumstances. She submitted that in any event, the right to freedom of association does not equate to the right to be granted a licence.

Law & Analysis

[39] The right to freedom of association is to be found at **section 13(3)(e) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011** which provides;

¹⁷ Page 547 of the judgment

¹⁸ Mesdames Natalie Corthesy and Carla-Anne Harris-Roper

¹⁹ at page 264

“(3) The rights and freedoms referred to subsection (2) are as follows-

(e) the right to freedom of peaceful assembly and association.”.

[40] It is clear that before there can be a claim that the right to associate has been breached, there must be evidence of an actual attempt to associate that was thwarted, or at the very least, was threatened. In this claim, an important question must be, with whom did Mr. Neil attempt to associate?

[41] On examination of the evidence of the Claimant the entire tenor of his evidence in chief, and the submissions made on his behalf, was that he was being deprived of his right to associate with Symbiote. However, the evidence which emerged in his cross examination was that he has no interest in Symbiote. He went further to testify that he does not even know whether or not the company currently has a telecommunication licence. In any event he has no interest in the telecommunications business.

[42] A Portion of the Cross-Examination of the Claimant conducted by Mrs. Gentles - Silvera for the 2nd Defendant revealed the following;

“Q: The licence for Symbiote was revoked by the Minister in 2018?

A: I don't know when it was revoked. I wasn't paying much attention to Symbiote

Q: You know that it was revoked?

A: Yes

Q: Do you know that that decision has been challenged by Symbiote in the Supreme Court?

A: I know Symbiote has been in many courts. I don't know which of them.

Q: I am putting to you that that decision has been challenged by Symbiote in the Supreme Court, Court of Appeal and they sought leave to go to the Privy Council

A: I don't know what Symbiote has done because it was no concern of mine whether the licence was cancelled or not.

...

Q: Presently does Symbiote have a telecommunications or spectrum licence?

A: I don't know

Q: Symbiote has no telecommunications licence and they have not had a licence since 2018

A: You're telling me? That's information to me. I didn't know that."

- [43]** Mr. Neil did not resile from his stated position of his disinterest in Symbiote. There is no evidence in this matter of Symbiote protesting that its right to freely associate with Mr. Neil was interfered with. On the contrary Symbiote initially accepted the licence knowing that it carried the condition that Mr. Neil should not be associated with the company.
- [44]** Symbiote has shown no current interest in associating with Mr. Neil and Mr. Neil has been clear that he too is not interested in any such association. In any event, the claimant's initial argument that he was deprived of associating with Symbiote because of the condition attached to the licence that he should not be associated with the Company because of adverse traces, also fails for the reasons which follow.
- [45]** Section 13 of The Telecommunications Act requires the relevant Minister to determine to whom a telecommunications licence is granted, although the licence is granted only on the recommendation of the OUR. In making a determination as to whether the applicant should be recommended for the grant of a licence the OUR must first decide whether such an applicant is a fit and proper person to be granted a licence. The criteria for determining a fit and proper person are not stated in the legislation. However, the evidence shows that the OUR has sought to institute an objective method in order to determine if an applicant is fit and proper to hold a telecommunications licence.
- [46]** That method involves obtaining input from the database of the JCF. That is different from a police record. The latter contains a record of convictions. The

reality is that where a person is suspected of having committed a crime, the process to actually face a trial may take some years. Even then there is a process of appealing of a conviction in the several levels of the court to determine if an applicant has been correctly convicted.

[47] The unchallenged evidence is that input from the database of the JCF is intelligence driven, and does not depend on or require that charges are laid against an individual and certainly does not require that that individual be convicted of any offence. The information provided here included instances of civil claims brought against the Claimant. According to DCP Bailey, the information entered into the database is considered to be reliable information garnered from reliable intelligence sources and which is/was under the contemplation of the JCF.

[48] The evidence from DCP Bailey is that the intelligence is very carefully gathered. A portion of the Cross-Examination conducted by Ms. Archer, Counsel for the Claimant, with Deputy Commissioner of Police Fitz Bailey which follows is quite instructive:

“Q: What type of method is used to input data in that database?”

A: Intelligence cycle is used. It involves collection of data, analysing, verification and ultimately dissemination so the intelligence cycle is actually applied in that process.

Q: Within that cycle you mentioned verification?

A: There are varying processes. A lot. In the interest of national security, I can't say some of them. There are sources that are used – open sources; persons who are Intelligence Officers who are employed; and other means of verification.”

[49] It is to be expected that in a free and democratic society, reliance will regularly need to be placed on intelligence driven conclusions in order for the society to function in an orderly, secure manner. Were it otherwise there would be extreme

delays in the public's business in order for the processes of trial conviction and appeal to be exhausted before certain decisions could be made.

[50] It is unchallenged that the holder of a telecommunications licence has the ability to greatly affect national security. Telecommunication systems allow access to, and handling of, very important, critical, sensitive and also personal data. The character and integrity of the holder of such a licence must be above reproach. Here the evidence is that the intelligence concerning the Claimant has been collected from the 1980's and touches on a variety of potentially criminal activities. The intelligence deemed to be adverse traces against the Claimant is;

- a) The Claimant has been inextricably linked to the illegal narcotics trade and a major player for a protracted period dated back to the 1980s.
- b) He was suspected in the 1990s to be at the helm of an illegal telephone bypass operation in Olympic Gardens, Kingston 11 and at Laws Street where persons were charged to access local and international telephone calls at a rate less than the service provider. These activities were a target of police operations which compelled them to cease.
- c) In 2007 the Claimant was arrested and charged for the offence of fraudulent conversion and breach of the Bank of Jamaica Act whilst being the principal Director of Gotel. These charges arose out of allegations that the Claimant, through two of his companies, Index Lease Finance and Dexin Holdings secured a deposit of US\$200,000.00 from a complainant and failed to deliver on his promise to pay the money.
- d) The Claimant's company Gotel had been sued by Cable & Wireless Jamaica Limited for monies owed and for an injunction on 26th May, 2014. Judgment was entered against Gotel.
- e) In 2016 a file was submitted to the Director of Public Prosecutions (DPP) to rule on whether charges should be laid against the

principals of Caricel and Symbiote (companies owned or controlled by the Claimant) for using the same telecommunications licence.

On 27th July 2017 the Claimant was arrested for the offence of forgery which charges were subsequently dismissed for insufficient evidence.

- [51]** Background checks could unearth no information on the principals of Narysingh Limited (a company which was the principal shareholder of Symbiote, an applicant for a licence) which was initially represented to be incorporated in Cayman but subsequently in St. Lucia; however, Narysingh was reported to be the maiden name of the Claimant's wife. The Claimant was the initial shareholder of Narysingh.
- [52]** The Then Minister of Science, Energy and Technology by letter dated June 12, 2018 to Symbiote regarding Mr. George Neil's adverse traces, explained the reasons for his decision to revoke the licence to Symbiote. The Minister stated that he had found no breach of the rules of procedural fairness by the OUR in the conduct of its investigation into the operations of Symbiote. Rather, it was Symbiote which had failed to declare important information. It had been aware, from at least 2014 when it submitted its application to the OUR for mobile carrier and mobile service provider licences, that there was an adverse trace in relation to Mr. George Neil. At that time Symbiote's majority shareholder was Narysingh Limited and Mr. Neil had held shares in it. Symbiote had advised the OUR that Mr. Neil no longer held shares in Narysingh Limited, and had tendered cancelled share certificates for Mr. Neil in relation to Narysingh Limited in support of this assertion.
- [53]** The Minister added in the letter that the banking documents presented by the OUR suggested that for the period January 3, 2015 to March 23, 2015, there was some relationship of agency between Mr. Enos George Neil and Symbiote. At the very least, Mr. Enos George Neil was holding himself out as having authority to act on behalf of the Company, in its affairs with the National Commercial Bank. The letter continued that Symbiote denied having knowingly withheld information about

accounts. Yet It had been given the opportunity to dispute the veracity of the banking information and it had not been refuted.

- [54] The Minister's view was that the relationship with Mr. Neil ought to have been disclosed by Symbiote in its application for a licence. From 2015, Symbiote ought to have been aware that there would be a challenge to the grant of its telecommunications licences if Mr. Neil were associated with the company. It would have a duty to indicate to the OUR any change in Mr. Neil's relationship with the company.
- [55] Symbiote, in failing to provide information which was very pertinent to its application for its domestic mobile carrier and domestic mobile service provider licences showed itself to not be fit and proper to hold its telecommunications licences.
- [56] The Minister had thus provided the basis on which he had made the decision to revoke the telecommunications licences held by Symbiote. We find that in the absence of clear, precise criteria for the granting/revoking of telecommunications licences to applicants, the method utilized by the authorities which included an objective recommendation from the police, is reasonable. There is no evidence to support the submission that the methodology employed by the OUR in determining the criterion of "fit and proper" was unreasonable.
- [57] It was Wooding, CJ, in **Collymore v Attorney General**²⁰ as approved by the Judicial Committee of the Privy Council who opined that,

"..... the freedom to associate confers neither right nor licence for a course of conduct or for the commission of acts which in the view of Parliament are inimical to the peace, order and good government of the country."

²⁰ Supra

[58] A careful, objective manner of considering the grant of telecommunications licences is essential for national security, which in turn contributes to the peace, order and good government of the country. The process of garnering and using adverse traces from the police intelligence source in such granting, is as fair as is practicable in the circumstances.

[59] The freedom to associate cannot mean that the government should be compelled to grant a licence to that entity with which the claimant is associated. The evidence shows that there was never any restraint on the claimant being able to freely associate with Symbiote. The position was clear, a licence would not be granted to Symbiote if the claimant remained associated with the entity. It is important to note that the claim before the court does not involve a complaint by Symbiote. If anything, it is Symbiote whose conduct is in essence being circumscribed. It is Symbiote who is being denied the licence on account of its association with the claimant. In these circumstances therefore, there is no evidence of the breach of the Claimants right to freedom to associate.

Issue #2: Whether the assignment of the moniker “Adverse Trace” to the Claimant resulted in a breach of his right to Equitable and Humane Treatment

Submissions of the Claimant

[60] The Claimant is maintaining that the actions of the defendants towards him were inequitable and inhumane. Counsel for Mr. Neil relied on **Rural Transit Association Limited v Jamaica Urban Transit Company Limited et al**²¹ to say that the words equitable and humane are to be read conjunctively, “equitable” meaning fair or just, not equal, “inhumane” meaning without compassion for misery

²¹ [2016] JMFC FULL 04

or suffering; cruel”. Counsel argued that the test of that assertion was whether the application of the adverse trace process was just and fair.

Submissions of the 2nd Defendant

- [61]** Mrs. Gentles-Silvera for the 2nd Defendant, argued that there has not been the alleged breach of the right to equitable and humane treatment of the Claimant. She emphasized that s.11(2) of the Telecommunications Act sets out that the OUR should determine whether a recommendation should be made to the Minister responsible for telecommunications for a licence to be granted.
- [62]** She argued that between 2001 to 2003 the Claimant had been Director of the companies Index, GoTel and GoTel2 and telecommunications licences had been issued to all of them. Indeed, in 2007 the domestic carrier licence and domestic voice service provider licence for GoTel were amended to enable the company to deploy domestic mobile service.
- [63]** Mrs. Gentles-Silvera submitted that the claimant had received fair treatment from the OUR. The Minister of National Security had indicated the need for background checks of the companies and their principals before giving final approval for a licence²². The JCF had reported the presence of adverse traces against the claimant. Still despite this the OUR had recommended that a licence be granted to Symbiote.
- [64]** In a letter dated April 30, 2008 from the OUR to the then Minister, there was a request for the JCF to provide information supporting the adverse traces as it would be “difficult and unwise for the office to recommend suspension or

²² letter dated February 18, 2003 the Minister of National Security

revocation of the licence at this stage.” There was no recommendation of revocation.

[65] Mrs. Gentles-Silvera argued that the OUR did not recommend the revocation of the licences which had been issued to Index, GoTel and GoTel2, companies of which the claimant had been a director, despite the fact that the Claimant had admitted to conduct that could well amount to criminal wrongdoing.²³

[66] Counsel based her submission regarding the fair and humane treatment of the claimant by the OUR on the fact that despite the existence of that admission of criminal behaviour, as well as the adverse traces, OUR still did not revoke the licences issued to Index, GoTel and GoTel2. Rather, the licences were surrendered and that was not until in 2014.

[67] Counsel for the OUR highlighted that it was the Minister who had revoked the licences issued to Symbiote.²⁴ and confirmed that revocation subsequently²⁵. As a consequence of that revocation of the carrier and service licence, the spectrum licence was revoked with immediate effect²⁶

[68] The argument concluded that the procedure to which Symbiote had been subjected was of routine security checks as to whether an applicant was fit and proper. The OUR had applied that same procedure to assess all applicants and had thus treated the Claimant fairly and equitably in all the circumstances.

²³ In a letter dated April 11, 2008

²⁴ in a letter dated October 25, 2017

²⁵ letter by the Minister on June 12, 2018

²⁶ in letter dated December 10, 2018 by the Minister.

Submissions of 1st & 3rd Defendants

- [69] As with the right to freely associate, Miss White submitted that the right to equitable and humane treatment has not been engaged. Any allegations of infringement she urged have not been proved.
- [70] Counsel acknowledged that SMA would be regarded as a public authority in the circumstances. She submitted that **Sean Harvey v Board of Management of Moneague College, Ministry of Education Youth and Culture and Attorney General of Jamaica**²⁷, a matter in which s13(3)(h) of the Charter, concerning equitable and humane treatment was considered supported her view. There the factors to be considered when seeking to determine whether an entity is a public authority were delineated. This was done in a context where a claim of inhumane treatment was alleged against a body said by the Claimant to be a public authority.
- [71] She relied further on **Sean Harvey**²⁸ to argue that the claimant has to show that he has been treated differently from some other similarly circumstanced person²⁹ and she submitted that he had failed to so prove.

Law & Analysis

- [72] The claim is that the actions of the defendants in the processing of the application for a licence by Symbiote was unfair and unjust towards the claimant and breached his constitutional right to equitable and humane treatment by a public authority.
- [73] The claim is further that the defendants, as public authorities, stigmatized the claimant as a person with an “adverse trace”, and prohibited his involvement with

²⁷ [2018] JMSC Full 3

²⁸ supra

²⁹ paragraph 63

a licensee in the Telecommunications Industry. In addition, it was those defendants who had induced him to surrender existing licences which surrender was a prerequisite to the granting of the spectrum licence which they later revoked on the basis of the Claimant's involvement. The Claimant contends that those actions substantiate the claim of inequitable and inhumane treatment by the defendants.

- [74] The claim form states that the treatment breached s.13(3)(g) of the Charter but the arguments and submissions all refer correctly instead to s. 13(3)(h).
- [75] There was an argument that the treatment was guided by national security concerns. The submission from Ms. Archer for the claimant that the government is required to show a fair process and is not simply allowed to make bald assertions of the interest of national security is correct.
- [76] In the **Council of the Civil Service Union v Minister for the Civil Service**³⁰ their Lordships opined that the decision of whether the interests of national security ought to outweigh the duty of fairness is a matter for the Government because the Executive is in possession of the relevant information to make those decisions.
- [77] However, where there is a challenge as to the fairness of the process by which that decision is made then the Government must provide the Court with evidence that the decision was in fact made in the interest of national security. There, the Court stated;

*"The point of principle in the appeal is as to the duty of the court when in proceedings properly brought before it a question arises as to what is required in the interest of national security. The question can take one of several forms. It may be a question of fact which Parliament has left to the court to determine.... It may arise for consideration as a factor in the exercise of an executive discretionary power. But, however it arises, it is a matter to be considered by the court in the circumstances and context of the case. **Though there are limits dictated by law and common sense which the court must observe in dealing with the question, the court does not abdicate its judicial function. If the question arises as a***

³⁰ [1985] A.C. 374

matter of fact, the court requires evidence to be given. If it arises as a factor to be considered in reviewing the exercise of a discretionary power, evidence is also needed so that the court may determine whether it should intervene to correct excess or abuse of the power." (Emphasis supplied)³¹

[78] The issue as to the fairness of the process in considering whether or not to grant a licence includes a determination as to whether the procedure to determine if the applicant is a fit and proper person, was fair. A question which must be answered is as to whether or not there is a standard procedure for the application for, and the revocation of, a licence, and if so, what the procedure is. The Telecommunications Act provides the method to apply for a telecommunications licence which is by a prescribed form and accompanying statement containing specific information.³² The Act then specifies the considerations of the OUR in deciding whether to recommend to the Minister that an applicant be granted a licence³³. One such is the determination as to whether the applicant is a fit and proper person to be granted a licence.

[79] As it concerns the spectrum licence, this must be considered by the SMA which makes that determination as to whether or not it will recommend the application to the Minister for approval. The process for revocation of a licence is stated in the Telecommunications (Amendment) Act 2012³⁴ which clearly stipulates the basis on which such action may be taken. One such basis is if the licensee knowingly made any false statement in an application for a licence or in any statement made to the Office.

³¹ Lord Scarman at page 404

³² Telecommunications Act 2000 Section 11(1)

³³ Telecommunications Act 2000 Section 11(2)

³⁴ Section 14

- [80]** The evidence is that the process of deciding if a licence should be granted involved security checks of the applicant company and any directors or officers in order to determine that the Applicant meets the fit and proper criterion. It is unchallenged that an entity which has such access to the telecommunications system of Jamaica would have access to critical information and systems which could allow for the commission of criminal offences including money laundering, and could in general threaten the security of the country.
- [81]** One of the methods used for security checks was to obtain information from the JCF which maintains a database based on its intelligence. Included in that intelligence are reports on matters which result in the designation “adverse_traces” which were given in outline concerning Mr. Neil. Whether they are true or not is not the issue when considering whether the Claimant was treated fairly. Rather, there are two issues here. One is whether that type of security check was applied to all applicants. The second is whether the intelligence provided by the JCF, the adverse traces, were garnered and used in the same manner as it concerned all applicants.
- [82]** The term “adverse traces” has no legal definition but is accepted by the JCF as including intelligence which would warrant a person being considered to be not fit and proper for purposes of an application for a telecommunications licence. Deputy Commissioner of Police Fitz Bailey testified that the intelligence giving rise to a conclusion of adverse trace does not necessarily impute a criminal conviction. Rather, it includes activity that has come to the attention of the police, of alleged involvement in criminal activities or other activities that negatively impact national security. A person found to have adverse traces would therefore not be regarded as being a fit and proper person to be granted a telecommunications licence.
- [83]** It was his evidence further that where the allegation is proved to be wrong, that finding is recorded on the police database but the original allegation is not erased. There was no evidence or submission as to a lawful basis for this treatment by the police, of allegations proved to be wrong, remaining on the database.

[84] The Constitution wraps each person with the cloak of the presumption of innocence. Section 18(5) of the Constitution provides that:

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty...”

The presumption must be even more appropriate where there has not been a charge.

[85] Any issue concerning the presumption of innocence as it concerns a person determined by the JCF to have an adverse trace, does not need to be determined for the purposes of this claim. The issues in this claim are whether this claimant has been free to associate and whether he has received just and humane treatment. There is no evidence of any difference in treatment of the claimant from any other individual who is connected to an entity which is an applicant for a telecommunication or spectrum licence from any other applicant for such a licence. Indeed, the evidence is that the application for a licence initially was granted to Symbiote, even in the face of an admission of what could arguably be criminal behaviour by Mr. Neil and the presence of adverse traces.

[86] In cross-examination, there were enquiries as to whether telecommunications licences had been granted to other providers, namely, Digicel and to Cable and Wireless, in the face of allegations of dishonesty by a financial investor in Digicel and directors at Cable and Wireless respectively. The evidence was that OUR was not aware of any such allegations. We find that the evidence before the Court does not substantiate the submission of unjust or unfair treatment.

[87] The Judicial Committee of the Privy Council pronounced on the issue of inequality of treatment. In **Bhagwadeen v Attorney General of Trinidad and Tobago**³⁵ that Court said;

*“A Claimant who alleges inequality of treatment or its synonym discrimination must be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] 2 All ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that the relevant circumstances in the one case are the same, or not materially different, in the other.”*³⁶

[88] The submissions were copious as to the application of the adverse trace process being unjust and unfair. However, there was neither the evidence, nor indeed the submission, that the adverse trace method was not applied to other applicants by the defendants. In fact, the converse was established. There was evidence that other shareholders of Symbiote were investigated and no adverse traces were found against them.

[89] There is no evidence of any difference in the procedure adopted by any of the Defendants in treating with the Claimant during the process of Symbiote’s application for a licence. There was no evidence of the breach of the right to equitable and humane treatment.

³⁵ (2004) 64 WIR 402

³⁶ per Lord Carswell at paragraph 18; page 408;

Issue 3: Were the actions of the Defendants demonstrably justifiable in a Free and Democratic society

Submission of the Claimant

- [90] Ms. Archer, Counsel for the Claimant, submitted that the conduct of the Defendants perverted the ordinary meaning and application of the law and therefore raised the issue of the constitutionality of their conduct.
- [91] She relied on **R v Oakes**³⁷ to argue that where rights and freedoms are restricted, that should occur where the unfettered exercise of those rights and freedoms would prove to be detrimental to the realization of fundamentally important collective goals. There was no such goal which made it necessary for the defendants to ban the Claimant from participating in the telecommunications industry in association with the persons he chose.
- [92] Counsel argued that therefore the ban imposed by the Defendants was unconstitutional and disproportionate to any objective that they put forward and that the justification for any restriction must be strictly proven. Ms. Archer relied on **Julian Robinson v The Attorney General of Jamaica**³⁸ and argued that the defendants bore the burden to demonstrate that the restriction on the Claimant's right to associate with his business partners was demonstrably justifiable in a free and democratic society, and that the restriction had been determined and imposed in a justifiable manner.

³⁷ [1986] 1 SCR 103

³⁸ [2019] JMFC Full 04

- [93] As it concerns the issue of proportionality, Counsel Ms. Archer argued further that the defendants had destroyed the business which the claimant had with a group of investors at a time when there was a need for the telecommunications service which they offered. That group of investors were unable to benefit from his participation and the Claimant had been denied due process.
- [94] Counsel contended that the Telecommunications Act imposed a statutory duty on the OUR, the 2nd Defendant, to receive and process applications for licences. Counsel submitted further that the OUR and the Spectrum Authority had decided to delegate its due diligence functions to the JCF without regard for Mr. Neil's interests. In treating with those Police reports the defendants had violated Mr. Neil's right to due process, to freedom of association, and to equitable and humane treatment by the relevant public officers. The claimant had not been informed of the adverse findings against him which were being used by the 2nd Defendant to prohibit him from associating with a company of which he was a part.
- [95] Further, by that action the OUR harmed other individuals' association because of their alleged association with the Claimant. Consequently, the OUR's actions are contrary to the second component of the **Oakes** Test - the means should impair "as little as possible" the right or freedom in question.
- [96] In addition, the argument continued, Mr. Neil ought to have been given the opportunity to be heard in relation to the allegations against him before infringing on his rights. He was entitled to the benefit of the presumption of innocence.

Submissions for the 2nd Defendant

- [97] Mrs Gentles Silvera, maintained that the Claimants rights under the Charter had not been breached. However, she argued that if the court found that the 2nd Defendant, had in fact infringed a right, then such an infringement is demonstrably justifiable in a free and democratic society.

[98] She too relied on **R v Oakes**³⁹ arguing that the rights and freedoms conferred by the Charter are not absolute as it may become necessary in certain circumstances to limit those rights. Counsel argued that the Telecommunications Act obliged the OUR to evaluate whether an applicant for a telecommunications licence or the persons who could exercise influence over it are fit and proper. The OUR sought to achieve this by obtaining objective reports from the police. Those reports may indicate that persons are suspected of having a criminal history or that they do in fact have one.

[99] Counsel for the 2nd Defendant argued that the OUR had been guided by the Statute and the material which it had obtained concerning Mr. Neil. Together they had caused the OUR to decide that he ought not to be issued with mobile carrier licence as he was a threat to national security.

[100] She submitted that in **Symbiote Investments Limited v Minister of Science and Technology and the Office of the Utilities Regulation**⁴⁰ the Court had noted that it is important to treat with possible national security implications. Therefore, even if the Claimant's rights were infringed by the 2nd Defendant, the infringement was reasonably justifiable. It was the least possible action which could have been taken to address the seriousness of the national security concerns found.

Submissions of the 1st & 3rd Defendants

[101] Miss White likewise for the 3rd Defendant submitted that if the court held the view that the Claimant's rights were in fact breached, then such a breach was demonstrably justified. Counsel supported that argument by relying on section

³⁹ supra

⁴⁰ supra

13(2) of the Constitution of Jamaica which provides that certain rights can be limited if that is demonstrably justified in a free and democratic society.

[102] She urged the Court to apply the criteria for the modified **Oakes** test as stated in **Jamaica Bar Association v The Attorney General and The General Legal Council**⁴¹. There McDonald-Bishop JA opined that:

*“[515] According to the **Oakes** test, there are two central criteria to be satisfied in order to establish that a limit is demonstrably justified in a free and democratic society. The first is that the objective, which the measures responsible for a limit on a Charter right or freedom are designed to serve, must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. The standard must be high in order to ensure that objectives, which are trivial or discordant with the principles integral to a free and democratic society, do not gain the constitutional protection afforded by the justificatory criterion.*

[516] The second criterion is that once a sufficiently significant objective is recognised, the party invoking the exception must show that the means chosen are reasonable and demonstrably justified. This, it is said, involves a form of proportionality test. The proportionality test comprises three important components, which are:

i. the measures must not be arbitrary, unfair or based on irrational considerations;

ii. they must be rationally connected to the objective, and should impair “as little as possible” the right or freedom in question (that is, there should be minimal impairment of the right or freedom); and

iii. there must be proportionality between the effects of the measures, which are responsible for limiting the Charter right or freedom, and the objective identified to be of sufficient importance.”

[103] Counsel also relied on **Council of Civil Service Unions and others v Minister for the Civil Service**⁴² to argue that national security is the responsibility of the

⁴¹ [2020] JMCA Civ 37 per McDonald JA

⁴² 1984] 3 All ER 935

executive, and in this matter, the prohibition of Mr. Neil from being a part of Symbiote was necessary in the interest of national security.

[104] Counsel further submitted that if the evidence satisfies the Court that the interest of national security is a relevant factor to be considered in determining the case, then unless it is possible to show that the opinion of the Crown or its responsible officer could not have been reasonably held in the circumstances, then the court will accept the opinion of the Crown or that responsible officer.

[105] Miss White argued that nonetheless there was no evidence that the said restriction prevented Symbiote from operating its business. Further, Symbiote had agreed to the restriction. The submission was therefore that the prohibition “was as least as is reasonably possible” to protect the interests of national security.

Law & Analysis

[106] It is clear from our reasoning and conclusions on the first two issues that there have been none of the breaches that were alleged. The issues of constitutionality and proportionality therefore do not arise. However, out of respect for the arguments which have been advanced in that regard, we opine on the submissions. We recognize that it is sometimes necessary to restrict a right and freedom but whenever that occurs it must be reasonably justified in a free and democratic society. **Section 13 (2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011** dictates:

*“13 - (2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and **save only as may be demonstrably justified in a free and democratic society-***

(a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17;

[107] In **R v Oakes**⁴³ the Court held that the justification for any restriction on the exercise of rights and freedoms must be strictly proven. If there had been a breach of either the right to freedom of association or to humane and equitable treatment by a public authority, that would be unconstitutional unless it could be strictly proven that such a breach was demonstrably justifiable in a free and democratic society.

[108] The decisions of the defendants to attach a condition to the licence granted to Symbiote, would in fact prohibit its association with the claimant if the directors chose to accept the conditional licence. The evidence is that the decision of the defendants concerning the conditional grant of the licence to Symbiote, was in large part, based on the adverse traces which the JCF database provided concerning Mr. Neil.

[109] Following on the approach in **Oakes** in determining whether a breach is demonstrably justified, the objective to be served in this case is said to be the interest of national security. It is of interest that the Minister of National Security was concerned about the Claimant's connection with a company providing services in a sensitive area of telecommunications. Those concerns were based on the intelligence that the Claimant had adverse traces as discussed above⁴⁴. It is a rather fulsome list which includes allegations of criminal behaviour which appear on the police intelligence database. It also includes allegations of dishonesty and fraud. Also to be considered is the admission by the Claimant that he was party to extortion and bribery of persons, even if as an unwilling party who according to him felt pressured to pay monies to corrupt public officials in order to continue to carry on his lawful business.

⁴³ [1986] 1 SCR 103

⁴⁴ Paragraph 54.

[110] The question arises as to whether there was sufficient basis on the strength of the available information for the view to have been taken that the Claimant was not a fit and proper person. Notwithstanding the vagueness of the assertion that the Claimant was involved in the narcotics trade, it was nevertheless a matter to be given serious consideration given the sensitive nature of the telecommunications industry.

[111] The adverse traces constituting the basis of the assignment of the moniker may individually not have been sufficient for the OUR to conclude that the Claimant was not a fit and proper person. However, taken cumulatively the evidence shows that the authorities had a reasonable basis for concluding that the claimant would not be a fit and proper person to have a telecommunications licence or to be associated with persons with such a licence.

[112] A democratic and free society carries with it the expectation that there will be in place a telecommunication system that is safe and not subject to intelligence vulnerabilities given its central role in growth and development of the economy. The cumulative information including that provided by the JCF showed the basis for the JCF's conclusion that Mr. Neil's involvement may have been inimical to national security. We find that a restriction on his rights to be involved with Symbiote if Symbiote were to retain its licence was justified in the interest of national security. The imposition of a prohibition on Symbiote as a condition of its licence infringes (if it was indeed an infringement), the protected rights "as little as is reasonably possible".⁴⁵

[113] It is concluded that charged with the statutory duty to receive and process applications, and to determine if applicants are fit and proper, it was reasonable

⁴⁵ **Jamaica Bar Association v The Attorney General and The General Legal Council [2020] JMCA Civ 37 per McDonald JA**

for the OUR to consult with the JCF as to intelligence which it had concerning applicants. A responsible officer of the Crown could reasonably have held the view that in the circumstances reliance could properly be placed on the JCF. The OUR was not in a position to confirm if what was alleged was entirely accurate as it does not possess investigative capacity in that regard. It would however be reasonable to anticipate that the information from the JCF was intelligence driven and objective.

[114] There is of course the fact that the adverse traces in this instance are not convictions and the claimant did not have the opportunity to challenge them. However, that must be weighed in the balance with the concerns for the security of the nation which can be seriously and irreversibly threatened if a telecommunications licence falls into inappropriate hands. The statutory duty imposed on the OUR is fundamental to the national security. An efficient and objective method of discharging that duty by selecting fit and proper persons to hold telecommunications licences has to be determined. The assistance of the JCF can reasonably be regarded as an objective manner of obtaining such information. Reliance on a presumably objectively prepared report from the JCF would be justifiable in a free and democratic society.

[115] The Spectrum Authority had before it information relevant to the grant of a spectrum licence that included:

- a) the relevant letters from the Minister of National Security highlighting the potential for the use of the telecommunications industry in money laundering and the concerns of a threat to the national security of Jamaica and another country
- b) the letters from the Jamaica Constabulary Force concerning adverse traces against the Claimant;
- c) the Claimant's letter dated 11th April, 2008 to the Honourable Minister in which he admitted to bribing Spectrum Management Authority officials

- d) the findings against the Claimant in the Office of the Contractor General's Reports.

The dawn of the telecommunication age carried with it an extreme reliance by the society on a secure, private and reliable service. We find that the measures adopted to determine suitability for the selection of holders of licences to provide such a service were in no way arbitrary or unfair, nor were they based on irrational considerations.

[116] As it concerns proportionality, although Counsel Miss Archer argued that the Defendants had destroyed the business which the Claimant had with a group of investors, there was no evidence to support that argument. There was no evidence that any business had been destroyed and moreso by the absence of Mr. Neil. In fact, Mr. Neil in cross-examination sought to disassociate himself from Symbiote.

[117] The threats to national security in the instant case would warrant extreme caution to be taken in awarding a telecommunications licence. If a condition of the grant of the licence included a restriction on rights of the Claimant under Sections 13(3)(e) and 13(3)(h) of the Charter, it would have been appropriate.

Issue 4: Whether the Claimant would be entitled to Constitutional Redress

[118] Counsel for the 2nd Defendant argued that this Court should refuse to consider the claim because the Claimant had not made use of the alternative remedies available to him and therefore could not be regarded as having properly commenced this claim for constitutional redress⁴⁶. She relied on the case of

⁴⁶ Section 19(4) of the Constitution of Jamaica

Attorney General v. Siewchand Ramsoop⁴⁷ in support of the principle that unless other remedies are shown to be inadequate, a Constitutional Court should not exercise its discretion to adjudicate upon the claim. Mrs. Gentles- Silvera submitted that in the event that the Court were to find that there was a breach any award of compensation should be nominal.⁴⁸

[119] Counsel Miss White submitted that the Claimant is not entitled to any remedies sought in his claim. Further she argued that the orders being sought by the Claimant should not be made as the issue was *res judicata*, as the Supreme Court and the Court of Appeal had already considered the issues in an application for judicial review of the Ministers decision to revoke Symbiote's licence.

Law & Analysis

[120] In **Symbiote Investments v The Spectrum Management Authority and Others**,⁴⁹ a matter arising from the issuance of the December 6 and 7, 2016 letters by the SMA and the OUR intimating their intention to carry out investigations into the affairs of Symbiote, the Court reiterated that an alternative remedy was available to parties aggrieved under the Telecommunications Act.⁵⁰ . Pusey J observed that:

“The OUR has also pointed out that the Act has a review process set out in Part XII. That Part provides for a person aggrieved to make an application to review a decision made by the OUR, the SMA or the Minister. In addition to a review, an aggrieved person may apply to the Appeals Tribunal. The Appeals Tribunal is established by section 61 of the Act and the Second Schedule indicates that one member should be a retired judge

⁴⁷ [2005] UKPC 15

⁴⁸ Reyes & Others v, Zabeneh and Another [1979] WIR 165

⁴⁹ [2017] JMISC CIV 10

⁵⁰ Pusey J, at paragraphs 48 and 49

of the Supreme Court or Court of Appeal. The other members are appointed on the recommendation of the Advisory Council and the Consumer Affairs commission. [49] This provision of the Act provides the Applicant with a viable alternate remedy for any grievance it may have”

[121] The law has been long established that to pursue a constitutional claim where there are other available remedies, may well constitute an abuse of process. **See The Attorney General of Trinidad and Tobago v Ramanoop⁵¹ and Durity v. Attorney general of Trinidad and Tobago⁵²** This principle was applied by Henry-McKenzie, J and upheld by the Court of Appeal in our jurisdiction in the case **Deborah Chen v The University of the West Indies⁵³** It must be borne in mind however, that given the fact that the claimant was not the party whose licence was revoked, it is arguable that it was not open to him to pursue the grievance process set out in the Telecommunications Act. Symbiote agreed to the claimant being removed from the company as a condition to the grant of the licence. The Claimant was named as an interested party in the claim referred to in paragraph 120, but he did not actively participate in the claim.

[122] This Court has noted that Symbiote embarked on such a course despite the evidence given of the Claimant’s dominant position in the company, he being a majority shareholder in Narysingh, a company that had controlling interests in Symbiote. It would be reasonable to conclude that the Claimant approved of that course of action that is, he be removed from the company as a condition to the grant of the licence. If that is so, then it cannot be said that it was not open to the Claimant to apply for judicial review of the decision of the Minister to grant a licence on condition that he not be associated with the Symbiote. In any event, we find

⁵¹ [2005] UKPC15

⁵² [2002] UKPC 20

⁵³ [2021] JMSC Civ 01

that there has been no evidence of a breach of the right to freedom of association or of the right to equitable and humane treatment hence there is no need to further expound on this matter.

Issue 5: Whether the Minister of Science, Energy & Technology should be added after the close of the case

[123] During the final submissions in this matter, Counsel for the Claimant first introduced the argument that the Minister of Science, Energy and Technology ought to be added to the claim. Reliance was placed on Rule 19.2(3) of the Civil Procedure Rules, 2002 (CPR) which stipulates that the court has the discretion to add a new party to proceedings without an application in certain circumstances.

[124] Miss Archer reminded the Court of its duty to the claimant and urged the court not to fail in that duty and its duty to contribute “to our growing jurisprudence in this area”. She continued that there would be such a failure if the Court permits the Claimant to be non-suited at the instance of the Attorney General because of lack of information which prevented him from naming with accuracy the true decision maker in his complaint.

[125] Counsel for the 3rd Defendant opposed the application and argued that the (CPR) required that permission of the court be obtained for an addition of a party at such a late stage in the proceedings⁵⁴. Counsel cited rule 19.3 of the CPR and pointed out that the trial has come to the end and the procedure as set out in rule 19.3 has not been followed. Reference was made to the case of **Index Communications**

⁵⁴ Rule 19.3 Civil Procedure Rules 2002

Network limited v Capital Solutions Limited⁵⁵ and an analogy drawn between the present application and the case where as Mangatal, J described it. a party faced with an application to strike out turns up with a newly amended statement of case that has been filed without the Courts permission and “pulls the rug out” from underneath the feet of the party seeking to strike out.

[126] Ms. White highlighted to the Court the principle to be extracted from that case which is that it would offend the principle of natural justice and the constitutional right to a fair hearing for a statement of case at that stage of the proceedings to be amended without the leave of the Court. She urged the Court to find that the enunciated principle is applicable to the circumstances of this case. She said that this is so because the then 1st Defendant (now Interested Party) had from the commencement of the trial raised a preliminary objection.

Law & Analysis

[127] The evidence, including exhibited correspondence, shows that the decisions referred to in this matter were made by various Ministers of Government. Proceedings commenced on December 20, 2018 and it was not until the passage of 3 years and 6 months that the submission was being made to add a Minister. The trial had already progressed for days and the Defendants had closed their respective cases. There is no basis to now at this extremely late stage in the proceedings add another party to the claim when the role played by the proposed Defendant was well known to the Claimant for years.

[128] Further, it does not appear to us that rule 19.3 contemplates the addition of a party at this late stage in proceedings. The rules contemplate the service of an order of the court to that effect on persons affected by the order and the giving of

⁵⁵ [2012] JMSC Civ 50

consequential directions after an order adding, removing or substituting a party. It is also required that the claim form be served on the new Defendant. What it would mean in essence if that were to be done after the Claimant made final submissions, is that the case would be reopened. The purpose of serving a party with the relevant documents is to alert that party to the claim against him, give that party an opportunity to put forward his defence, file witness statements and supporting documents, and participate in the trial. The Minister's participation in this case was as a witness rather than as a party. The absence of the opportunity to participate as a Defendant, would in result grave unfairness to the Minister. This outcome would result in a breach of the rules of natural justice as well as a breach of the Minister's constitutional rights. What the claimant is asking this court to do is to give judgment adverse to the Minister who was not afforded an opportunity to participate in the trial as a Defendant. That would be an unjust result.

Conclusion

[129] There is no evidence to support the Claimant's contention that his constitutional rights were breached. Even if it had been determined that his rights were impaired as he alleges, the infringement would have been proportionate and reasonably justified in a free and democratic society. Any such infringements would have been imposed in the interest of national security.

[130] The Attorney General is not properly named as a party in this matter and is therefore removed as a Defendant and is instead named as an interested party.

[131] The Minister is not added as a party. Any such addition after the close of the case, as has been urged, would be patently unjust.

ORDERS

1. The Attorney General is removed as a defendant and added as an interested party.
2. The Application to Add the Minister of Science Energy & Technology as a party to this claim is refused.
3. The Declarations sought in Paragraphs 1, 2, 3, 4, 5 of the Claim Form are refused.
4. The Order sought for damages is also refused.
5. Submissions on costs to be filed and served by Monday October 31, 2022.

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LAWRENCE- BESWICK C., J

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PETTIGREW-COLLINS A., J

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WOLFE-REECE S., J