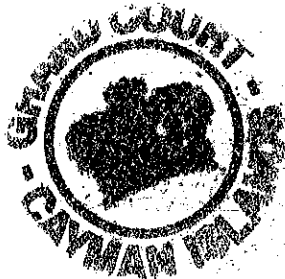


IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL DIVISION

INDICTMENTS 3/13 & 3A/13



AARON JOHN BERNARDO

v.

REGINA

Appearances: Mr. Nick Hoffman of Harney Westwood & Riegels for Aaron Bernardo
Ms. Nicole Petit, Senior Crown Counsel, for the Crown

Before: Hon. Justice Richard Williams

Written submissions

Aaron Bernardo: 10 January 2018

Written submissions

the Crown: 27 April 2018

Draft Judgment

circulated: 01 June 2018

Date of Judgment: 05 June 2018

HEADNOTE

Costs arising out of hearing concerning jurisdiction of the Grand Court to review decision of Taxing officer on application and the inherent jurisdiction of Grand Court

JUDGMENT – COSTS

The Present Application and the Parties' Positions

1. The application before me is one made by Aaron Bernardo ("the Applicant") for costs following the delivery of my decision dated 15 December 2017 relating to the hearing of his Summons filed on 1 November 2017. The parties agreed that I may deal with this

costs issue on the papers and that they did not wish to be heard on the issue. The Applicant filed his Written Skeleton Argument on 10 January 2018. The Crown did not file its Written Submission on costs until 27 April 2018.



Background

(i) The Initial Proceedings and Costs Order

2. On 4 January 2013 the Applicant was charged with robbery and possession of an imitation firearm with intent. On 23 January 2013 Indictment No. 3/13 was laid against the Applicant with one count of robbery and one count of possession of an unlicensed firearm. On 16 August 2013, at a dismissal argument listed before Henderson J. in relation to the indictment, the Crown indicated an intention to offer no evidence in relation to robbery and possession of unlicensed firearm and to amend the indictment to include one count of handling stolen goods. The new Indictment No. 3A/13 was signed by the Director of Public Prosecutions ("the DPP") on 24 September 2013. On 11 December 2013 the Applicant was found not guilty of robbery by a jury. The Applicant had to pay for his own legal representation throughout, because he was unable to obtain Legal Aid as he fell outside of the means test.
3. On 31 October 2014, following an application made by the Applicant, I ordered that the Crown pay reasonable costs incurred by the Applicant for the period 13 March 2013 to 18 August 2013 in relation to Indictment 3/13.

(ii) Background - Events leading up to the Applicant's Summons dated 1

November 2017

4. Events thereafter are set out at paragraphs 8 to 35 of my Judgment delivered on 15 December 2017. I need not repeat all of that detail again herein, but it all forms part of my deliberations when determining the costs application before me. However, to put the costs application into context, I still see merit in now repeating some of that relevant background.
5. On 7 January 2015 the Applicant filed his Bill of Costs, serving the same on the Crown on 9 January 2015. On 6 February 2015 the Crown served its Response to the Applicant's Bill of Costs in which it set out its objections. On 23 April 2015 the Applicant provided the Crown with a reformatted Bill of Costs. On 28 April 2015 the formal order for costs arising from my Judgment of 31 October 2014 was approved. On 6 May 2015 the Crown provided the Applicant with a signed Bill of Costs. In an email dated 19 May 2015 with chasing emails on 26 May 2015, 2 June 2015 and 11 June 2015, the Applicant drew the Crown's attention to GCR O.62, r.(3) and invited it to fully complete the Bill of Costs. On 23 September 2015 the Crown set out the details of its offer concerning the costs they intended to pay.
6. On 11 December 2015 the Applicant filed a Summons to amend the Order dated 28 April 2015 pursuant to the slip rule. On 15 December 2015 the earlier Order was amended under the slip rule to reflect that the costs were to be taxed, if not agreed, on the

indemnity basis rather than on the standard basis. The Applicant served the Crown with a copy of the approved Amended Order and Amended Bill of Costs on 4 January 2016.

7. An application for a default costs certificate was filed on 1 February 2016. The Default Costs Certificate was granted on 12 February 2016 and served on the Crown on 16 February 2016.

8. On 1 March 2016 the Crown emailed the Taxing Officer requesting an eight day extension to file any application to set aside the Default Costs Certificate. The Crown filed the application Form 313 and an affidavit in support on 1 March 2016 and served the same on the Applicant on 8 March 2016. At paragraph 18 of the 15 December 2017 Judgment I found that relevant background detail had not been included in that affidavit and that, as a consequence, the Crown's contentions that the Applicant was out of time for bringing the action and that, as a consequence, the Default Costs Certificate should be set aside unless the Taxing Officer extended time for the application to be filed were grounded on an incomplete version of the events.

9. On 8 March 2016 the Applicant wrote to the Taxing Officer setting out his agreement to the requested extension of time for filing of the application to set aside the Default Costs Certificate to 9 March 2016, whilst at the same time highlighting that the application to set aside was:

"still not compliant with the rules to allow you to consider an application for an extension of time."



10. The Applicant wrote to the Taxing Officer on 18 March, 24 March, 6 April and 30 May 2016 seeking an update about the status of the adjudication of the application to set aside the Default Costs Certificate, and in the first communication, about whether the Respondent had complied with GCR O.62, r.22(5)(b) or (d).
11. On 4 October 2016 I heard a Summons filed by the Applicant on 19 July 2016 in which he sought:
- (i) a declaration that the Default Costs Certificate dated 12 February 2016 in his favour was validly entered:
 - (ii) a declaration that the Crown be required to comply with GCR O.62 r.22(5)(b) and (d) prior to setting aside the Default Costs Certificate.
 - (iii) An order that the Taxing Officer make a determination on the application to set aside the Default Judgment filed by the Respondent within 21 days of the order made under paragraph (ii).
12. At the hearing I made a number of observations. I found that the delay in concluding the proceedings had occurred because the Crown had sought to file an application to set aside the Default Costs Certificate out of time. I reminded the parties that, unless it was set aside, the Default Costs Certificate remained in place and that the Taxing Officer may extend the period within which a party is required by the GCR to commence or do anything in connection with the proceedings for taxation, and she may do this on such terms (if any) as she considers just. I also referred to the four procedural requirements set out at GCR O.62, r.22(5). I indicated that it was a matter for the Taxing Officer



determine whether the application to set aside had been properly brought or whether there should be an extension of time for the requirements to be met.

13. Despite the Crown making the application for an extension of time on 1 March 2016, it seemed that the then Taxing Officer failed to do anything of any substance to progress the matter until she sent the letter dated 26 January 2017 to Crown Counsel. In her letter the Taxing Officer stated that she dismissed the application for extension of time pursuant to GCR O.62, r.22(5). The Taxing Officer failed to specifically identify what application she was referring to but I found that she was refusing to give the Crown an extension of time to file its application pursuant to GCR O.62, r.21(1).
14. Despite refusing an extension of time relating to O.62, r.22(5), the Taxing Officer stated in the letter that she had gone on to set aside the Default Costs Certificate dated 12 February 2016. The Taxing Officer also stated therein that she granted an extension of time for the Applicant to commence taxation by serving the Bill of Costs on the Crown by or on 6 February 2017. I found that, for the Taxing Officer to conclude that such an application was before her, she must have relied upon the incomplete and unbalanced content in the affidavit filed by Crown Counsel dated 1 March 2016¹ and, if she had been provided with the background detail set out at paragraphs 10 to 15 in the 17 December 2017 Judgment, she would have been informed that the taxation had already been properly commenced by the service of the first Bill of Costs of 7 January 2015².

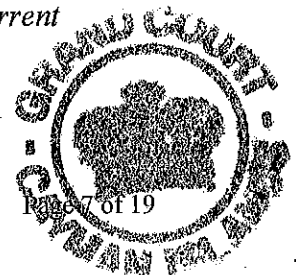
¹ See paragraph 8 above.

² The revised further Bill of Costs was served on 4 January 2016 by the Applicant.



15. The Applicant did not file a further Bill of Costs and did not write to the Taxing Officer or to the Crown prior to 8 February 2017. On 8 February 2017 the Crown wrote to the Taxing Officer by email seeking a dismissal of the application for costs. The Crown's application to dismiss has not been considered by a Taxing Officer.
16. On 20 March 2017 the Applicant's attorney wrote to the new Taxing Officer informing her that the January letter had been incorrectly sent to the Applicant's former Counsel. The attorney rightly pointed out that the Taxing Officer had not been empowered to set aside the Default Costs Certificate as the requirements for bringing such an application set out in GCR O.62, r.22(5) had not been fully complied with. The attorney also highlighted his view that the provision in GCR O.62, r.29(6) about a Taxing Officer not giving reasons related only to the procedure in the taxation process and not to the setting aside pre-taxation issue. An explanation was sought as to why the properly obtained Default Costs Certificate had been set aside, especially when the GCR O.62, r.22(5) requirements had not been fully complied with. In the alternative, the Taxing Officer was invited to extend the time for the service of the Bill of Costs or deem that it had already been served on 4 January 2016. This alternate suggestion, although clearly still of a view that the Bill of Costs had been served back in January 2016, was no doubt made with a view to moving the taxation forward in line with the principles and approach enshrined in Overriding Objective. Having regard to the issue of costs before me today, I noted in my 15 December 2017 Judgment that it was:

"..a great pity that the Crown and/or the Taxing Officer did not take up that opportunity, as it may well have prevented the need for the current application before me."



17. On 24 March 2017 Crown Counsel wrote to the new Taxing Officer, renewing the application to dismiss. In the letter it was contended that the request of the Applicant's attorney was not one upon which the Taxing Officer had the jurisdiction to act, and if she did so she would be acting *ultra vires*. In the letter it was contended that the authority to set aside the Default Costs Certificate was based on GCR O.62, r.22(4)(a), namely that the Applicant was not entitled to the Default Costs Certificate.
18. On 8 May 2017 the Applicant wrote seeking a response to the issues raised in the March letter. The Taxing Officer replied indicating that a response had been given in April 2017, but it appears from an email sent on 26 May 2017 that neither Counsel received that communication. On 13 June 2017 the Taxing Officer recused herself from further dealings with the matter and stated that it should be referred to:

"the Courts/Judge who is seized of the case."

19. On 1 November 2017 the Crown sent an email increasing the offer to settle to \$16,000. On the same date, in an email in reply, that offer was rejected by the Applicant and a sealed copy of the Summons and supporting affidavit in relation to the applications before me were attached. On 21 November 2017 the Crown increased its offer to settle to \$20,000.

(iii) Background - Summons 1 November 2017

20. In light of the approach taken by the Taxing Officer, the Applicant filed a Summons on 1 November 2017 seeking the following orders:

- (i) grant of an extension of time to the Applicant pursuant to GCR O.62, r.30(3) to make an application for review of the Taxing Officer's decision under GCR O.62, r.30(1);
- (ii) a declaration that the decision of the Taxing Officer to set aside a Default Costs Certificate issued on 12 February 2016 was not made on a proper basis;
- (iii) further or in the alternative, a declaration that the Applicant's Bill of Costs served on 4 January 2016 was properly served;
- (iv) further or in the alternative, the Applicant be granted extension of time to serve a Bill of Costs under GCR O.62, r.28(2); and
- (v) such further orders as the Court thinks fit.

21. At paragraph 1.1 in the Applicant's Written Skeleton Argument prepared in relation to that Summons dated 22 November 2017 the orders sought were slightly varied to the following:

- (i) an extension of time in which to bring an application for review of a Taxing Officer's decision under GCR O.62, r.30 and/or inherent jurisdiction of the Court³;
- (ii) a declaration that the Taxing Officer's decision to set aside the Default Costs Certificate was not made in accordance with the relevant requirements and was, therefore, invalid; and
- (iii) Directions for the ongoing conduct of the taxation or, in the alternative, the determination of the Judge of the issues in taxation in accordance with GCR O.62, r. 30(6).

³ My emphasis by underlining.



(iv) Background - The hearing of the Summons on 27 November 2017

22. At paragraph 2.13 in the Applicant's Skeleton Argument filed in support of his Summons, he sought an order that the Court set aside the Taxing Officer's decision and either:

- (a.) order that a new Taxing Officer remake a decision on the Crown's application; or
- (b.) determine the Crown's application for itself under GCR O.62, r.30(6). At paragraph 4.6 in the Skeleton Argument the Applicant submits that the Court should reinstate the Default Costs Certificate and award the costs of the proceedings in accordance with GCR O.62, r.30(6).

23. At the hearing the Applicant accepted that arguably GCR O.62, r.30(1) might not apply to the circumstances of this case. It was submitted that the Court's jurisdiction to review came about under its inherent jurisdiction to regulate its own proceedings. In relation to GCR O.62, r.30(3) and any delay in bringing his application following the decision of the Taxing Officer, the Applicant contended if the application was brought under the inherent jurisdiction then the Court was not restricted to bring the same within 14 days. At the hearing the Applicant submitted that Court should dismiss the order of the Taxing Officer and reinstate the Default Costs Certificate.

24. The Crown's position at the outset of the hearing was that the Court did not have the jurisdiction to review the Taxing Officer's decision either:

- (i) pursuant to GCR O.62, r.30 as no decision in relation to the amount of costs has been made; or

(ii) upon its inherent jurisdiction. However, at the close of her oral submissions and after hearing the Submissions made on behalf of the Applicant⁴ Crown Counsel conceded that the Court had an inherent jurisdiction, but argued that the Court should not intervene at this stage, save to make an observation to the Taxing Officer that she should resume the process.

25. Accordingly, due to the exceptional circumstances of this case and to prevent a real injustice, pursuant to the Court's inherent jurisdiction, I deemed it appropriate for me to examine the activities of the Taxing Officer. The hearing was partly required, and the hearing lengthier than it might otherwise have been, due to the Crown's initial position concerning the Court's jurisdiction. The hearing was also required and more extended because there was no agreement about whether I should exercise that jurisdiction and the extent to which I may interfere with the Taxing Officer's decision.

(v) Background - Findings in the 15 December 2017 Judgment

26. Following my review of the background, I concluded with some regret that the decision of the Taxing Officer contained in her letter dated 26 January 2017 displayed a lack of understanding of the facts and issues raised by each party in the case, as well as poor case management. The delay in this matter now being before me is due to the above, as well as the failure by the Taxing Officers to promptly respond to Counsels' written requests for updates about the status of the various applications and for information about the decisions made by the Taxing Officers.

⁴ My emphasis by underlining.



27. I found that from the Taxing Officer's letter of January 2017 it was evident that she had failed to recognise that need for the four GCR O.62, r.22(5) requirements to be complied with before she could go on to consider whether to dismiss the Default Costs Certificate. After hearing from Counsel I found that the requirements in O.62, r.22(5)(b) or (d)⁵ had not been complied with by the Crown. I found that, as a consequence, any application to set aside the Default Costs Certificate was not properly brought before her and that the only discretion she had in relation to the requirements was to extend the time for the conditions to be met. I found that there was no evidence of the Taxing Officer granting an extension of time for the requirements to be met, as she simply dismissed:

"the application for extension of time pursuant to O.62, r.22(5)".

I concluded that the Taxing Officer did not, in such circumstances, have the jurisdiction to make the order to set the Certificate aside and I found that her decision to set aside the Default Costs Certificate was deficient and invalid. Therefore, the Applicant was successful in his submissions in this regard, whereas the Crown was not.

28. I concluded by saying at paragraph 47 of the 15 December 2017 Judgment that:

"....as the current Taxing Officer feels unable to consider whether her predecessor acted incorrectly without the matter first being referred to the Grand Court, an injustice would result if this Court failed to review and intervene. In such circumstances, I am satisfied that this is a case in which a Judge should interfere and overturn the Taxing Officer's decision to set aside the Default Costs Certificate. I also feel it appropriate to overturn the direction of the Taxing Officer requiring the Applicant to serve a Bill of Costs on the Crown by 6 February 2017, as a Bill of Costs and an



⁵ See paragraph 16 above.

amended Bill of Costs have already been served by the Applicant. The Taxing Officer was wrong to have found otherwise, even though that conclusion and her decisions may have been based on the unfortunately incomplete detail provided in the affidavit sworn by Crown Counsel⁶. Even if I had not overturned the Taxing Officer's decision to set aside the Default Costs certificate, the setting aside would not have affected the validity of the already properly served Bill of Costs and the taxation proceeding would have been restored to the stage that existed immediately before the Default Costs Certificate was granted."

29. I did not find it to be appropriate for me, as requested by the Applicant, to consider an application to set aside the Default Costs Certificate, as I was not satisfied that such an application has been properly brought due to non-compliance with O.62, r.22(5). I approved the alternative approach suggested by the Applicant at paragraph 1.1⁷ and 2.13⁸ in his Written Skeleton Argument dated 22 November 2017 and gave certain directions which would enable the Taxing Officer to have conduct of the taxation. Accordingly, having overturned the Taxing Officer's decision to set aside the Default Costs Certificate, I remitted the matter back to the Taxing Officer.

30. In relation to cost of that hearing I stated that:

"If a party wishes to make an application for costs then they would need to file an application in the normal way."

⁶ See paragraphs 18 and 26 above.

⁷ See paragraph 21 above.

⁸ See paragraph 22 above.



The Crown's Submissions on Costs

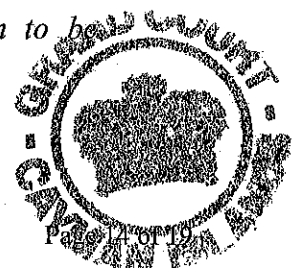
31. The Crown submits that costs should not be awarded against either party in this case. The reasoning for this contention is set out in two paragraphs in its Written Submissions. It is contended that the Court found that both Taxing Officers acted in error and to award costs against the Crown would be to:

“penalise the Respondent for things outside of its control and to hold the Respondent liable for administrative errors of the Taxing Officers.”

32. This submission by the Crown fails to acknowledge that, although a hearing may have been required due to the Taxing Officers' conduct, the hearing may have taken a more abridged form if prior to the hearing the Crown had not taken the position that it had. The Applicant's Summons had to be determined at a contested hearing due to the stance being taken by the Crown. It was not until the latter part of the hearing, after the Submissions had been made by the Applicant, that the Crown conceded that the Court had the inherent jurisdiction to review the decision of a taxing officer. The Crown did not agree that the jurisdiction should be exercised in this case or the degree to which it should be exercised. The fact that these issues were all disputed substantially increased the length of the hearing of the Applicant's Summons as well as the degree of preparation required for the hearing. It is clear that the Applicant was the successful party at the hearing.

33. There is no merit in the second and final point in the Crown's submission, namely that an award of costs in favour of the Applicant should not be made as it would:

“create satellite litigation in a matter that has already proven to be contentious.”



The Applicant's Submissions on Costs

34. The Applicant rightly contends that ordinarily costs follow the event and that, as the successful party at the hearing, the Crown should be ordered to pay their costs.

35. The Applicant further submits that the costs should be awarded on the indemnity basis claiming, on the basis of matters raised in paragraph 15 of the Skeleton Argument that the Crown's conduct has been:

"improper, unreasonable or negligent."

The Applicant contends that the Crown has not progressed the taxation process in a manner consistent with GCR Ord. 62, r.4(2) and that the Crown's conduct of the taxation has been inconsistent with the Overriding Objective. The Applicant contends that an inference should be drawn that the Crown never engaged in the taxation process in good faith and has sought to delay the payment of the payment of the costs.

The Law and Conclusions

36. GCR O.62, rr.4 (2) and (5) provide:

"(2) The overriding objective of this Order is that a successful party to any proceeding should recover from the opposing party the reasonable costs incurred by him in conducting that proceeding in an economical, expeditious and proper manner unless otherwise ordered by the Court.

(3) ...

(4)

(5) If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of



the case some other order should be made as to the whole or any part of the costs."

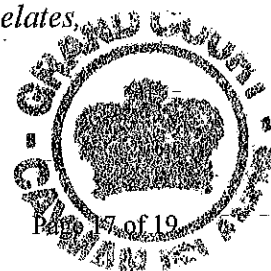
37. The award of costs is in the discretion of the Judge, but the discretion should be exercised along well-settled lines. The basic principle set out in GCR O.62, r.4 is that costs should follow the event, except where it appears in all the circumstances of the case that some other order should be made as to the whole or any part of the costs. Therefore, I have a wide discretion to do justice between the parties, although this discretion must be exercised judicially, having regard to the underlying principle that the "real winner", as distinct from a nominal winner, is generally entitled to his costs. Further, I should not embark on a minute examination of all the various issues and the time taken to determine every issue, but should consider the event or outcome of the litigation and, in the light of that consideration, any timely offers of settlement that were made, and should use a broad brush in attempting to arrive at a just result.

38. The general rule governing that the award of costs to a successful Defendant was laid down by Atkin LJ in *Ritter v Godfrey* [1920] 2 KB 47 at 60:

"In the case of a wholly successful defendant, in my opinion the judge must give the defendant his costs unless there is evidence that the defendant (1) brought about the litigation, or (2) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense, or (3) has done some wrongful act in the course of the transaction of which the plaintiff complains."

39. The Crown, in its submission has not referred to, or sought to rely on any of the exceptions set out in *Ritter*. I am satisfied that none of those exceptions arise in the matter before me. Accordingly, I order that the Crown pay the Applicant's costs.
40. The issue for me to now determine is whether those costs should be on the standard or indemnity basis. The Crown is opposed to any costs order at all being made, but, although its Written Submissions are silent as to the nature of any costs of (if made), I approach this issue that its position is that no basis has been established for the exercise of my discretion to award indemnity costs.
41. Although the general rule in litigation is that costs follow the event and that a successful party will be awarded costs on a party and party basis, it is recognised that this can leave a successful party out of pocket. The gap between the amount of costs in fact paid by a successful litigant and the amount of party and party costs which are recoverable can be substantial.
42. As highlighted by Henderson J. in *Sagicor General Insurance (Cayman) Limited and another v Crawford Adjusters (Cayman) Limited* Cause No. 78 of 2006 GCR, O.62 r.4(11) provides an alternative basis upon which costs may be ordered. The rule provides in respect of costs ordered on an indemnity basis that:

"The Court may make an inter-partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently."



43. The discretion under the rule is not fettered or circumscribed, and it must be exercised judicially in the light of the particular facts of each case. There are many cases which have considered the appropriate principles to be applied in exercising the discretion to award costs on the basis other than party and party. It is accepted that something special or unusual must be demonstrated in order to justify a departure from the ordinary costs order.⁹ These include where a losing party has misconducted itself in relation to the proceedings, where the institution of the proceedings was plainly unreasonable or where the proceedings were issued for multi-collateral purpose.

44. The award of costs on an indemnity basis is generally reserved to cases where the Court wishes to indicate its disapproval of the conduct of the paying party. In the words of Halsbury's Laws, 4th Edition (2007) Volume 10, paragraph 23, Note 8:



"Indemnity costs may be awarded against the party whose conduct has been unreasonable, even though the conduct could not properly be regarded as lacking moral probity or deserving moral condemnation: Reid Minty (A Firm) v Taylor [2002] 2 All ER 150."

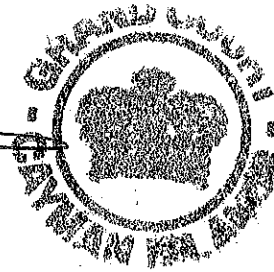
45. It is right that I have been critical of the Crown's failure to provide the Taxing Officer with a more balanced and complete affidavit containing the detail set out at paragraphs 10 to 15 in the 15 December 2017 Judgment in support of its application to set aside the Default Costs Certificate and that, as a result, the Taxing Officer was not informed that the taxation had already been properly commenced by the service of the first Bill of Costs of 7 January 2015. Despite this, and although I have carefully considered the full arguments set out in the Applicant's Skelton Argument and briefly summarised in

⁹ *Billson v Residential Apartments Ltd* [1992] 1 AC 494.

paragraph 35 above, in circumstances where the hearing was necessary due to the manner in which the taxation process has been handled by the Taxing Officers (including her recusal and her direction that the matter should be referred to the Grand Court Judge who is seized do the matter¹⁰), the conduct of the Crown relating to the issues raised in the Applicant's Summons have not been sufficiently unreasonable or a meritorious so as to justify departure from the ordinary rule as to the basis of assessment of costs.

46. Accordingly, I order that the Defendants should pay the Plaintiff's cost of the Summons on the standard basis, to be taxed if not agreed.

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



¹⁰ See Paragraph 18 above.

