THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2016-03654

BETWEEN

LEGAL AID AND ADVISORY AUTHORITY

Claimant

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

First Defendant

AND

LAW ASSOCIATION OF TRINIDAD AND TOBAGO

Second Defendant

Before the Honourable Mr Justice Ronnie Boodoosingh

Appearances:

Mr Khemraj Harrikissoon for the Claimant

Mr Sanjeev Lalla for the first Defendant

Mr Ronnie Bissessar for the second Defendant

Date: 25 July 2017

JUDGMENT

1. The Legal Aid and Advisory Authority (the Authority) has brought this claim seeking interpretation of certain provisions of the **Legal Aid and Advice Act, Chapter 7:07**, as amended. The Attorney General and the Law Association were both made parties and all three have made written and oral submissions. The Law Association has indicated it represents the views of its members including the practitioners of the Criminal Bar. The Office of the Director of Public Prosecutions was served with the proceedings but they have not taken part in the proceedings.

2. The matters for interpretation concern the operation of certain provisions of the Act regarding the management and payment of fees for criminal trials.

3. The claim was supported by an affidavit of the Secretary of the Authority, Ms Nancy Arneaud, an attorney at law of many years standing. In that affidavit she detailed some of the background that has led to this claim. There was no evidence filed by the defendants.

4. Ms. Arneaud stated that in 2011 the Authority experienced grave difficulty in retaining Counsel for the "Vindra Naipaul-Coolman murder trial" to represent the accused for these capital offences. This was because of the fee structure for capital offences.

5. The Authority at the time approached the Minister of Justice and after consultation with members of the Criminal Bar, **Legal Notice 180/2013** was passed which amended the fee structure.

6. The Legal Notice went into effect. In an apparent case of "no good deed goes unpunished" the Authority did not envisage at the time the trial would be so lengthy (the trial went on for over two years) resulting in fees being paid to lawyers in excess of $15 million.

7. Based on the substantial amount of resources that had to be used for that case, the Authority initiated these proceedings as a matter of public interest to get guidance on the operation of the relevant sections of one of the Schedules to the Act.

8. The Authority is mandated to be available for persons of "small or moderate means." This cost is to be defrayed wholly or partly out of public funds allocated by Parliament.

9. The cumulative effect of the amendment, according to M. Arneaud, has been to place "the Authority in a position whereby it is unable to meet its financial obligations." The payment of legal fees is putting grave pressure on the budget, according to Ms Arneaud. In terms of fees in the Naipaul-Coolman case this is what was paid:

Year	**Fees**
2012/2013	**$1,162,500.00**
2013/2014	**$5,317,500.00**
2014/2015	**$5,434,485.00**
	(2% higher than 20/3/14)
2015 – May 2016	**$3,440,000.00**

10. The Authority now has to assign Counsel in two multi-accused capital matters – the **"Koury"** and **"Gopaul"** cases. The Authority also owes fees to lawyers in other matters.

11. Along with payment of fees the Authority has recurring expenses for salaries, rental of offices throughout Trinidad and Tobago, stationary, disbursements and other ancillary expenses. All of this comes in the context of constrained economic times and the Government's mandate for expenditure to be cut. The Authority's budget is limited. It is not a money tree.

12. Greater access to legal aid is anticipated with the high rate of crime. The Authority is placed in a precarious position since it cannot refuse persons who qualify for legal aid.

13. It is against this backdrop that the Authority is asking the court to interpret the provisions of the Act.

14. The first provision to be interpreted is **paragraph 3 of Part III of the First Schedule of the Legal Aid Act, Chapter 7:07** which provides as follows:

> 'Where three or more accused persons are appearing in a capital case being tried before the High Court and the Authority reasonably believes that the trial may be lengthy in time, the Authority shall pay to an Attorney at Law representing one or more of the accused, a sum not exceeding thirty thousand dollars per month, during the period of the trial and such payment may be prorated by the Authority as it thinks fit.'

15. The claimant also seeks specific interpretation of **paragraph 4 of Part III of the First Schedule** which provides as follows:

> 'In respect of capital offences, the Authority shall pay a fee not exceeding fifteen thousand dollars; but the presiding Judge after the conclusion of the trial, may, if he thinks fit, certify that the case was of unusual length or difficulty and increase the fee of the Attorney at Law to a sum not exceeding twenty thousand dollars and, in exceptional circumstances, allow the Attorney at Law an additional fee not exceeding ten thousand dollars.'

16. The questions which the Authority has asked the Court to interpret in relation to these provisions are as follows:

> With regard to Paragraph 3, the claimant seeks determination of the following:
>
> (i) Specific interpretation of who determines the length of trial;
>
> (ii) When and at what stage should the length of trial be ascertained/determined;
>
> (iii) What guidelines should be used to determine a 'lengthy in time' trial;

(iv) What guidelines should the Authority consider in determining the payment of fees to Attorneys at Law in capital offences;

(v) Where an Attorney at Law is representing 'one or more of the accused' should the attorney at Law be paid:

a. From the date the matter is assigned to him, and if so how much; or

b. From the date the trial commences;

(vi) Where an Attorney at Law is representing 'one or more of the accused' should the Attorney at Law be paid:

a. Thirty thousand dollars ($30,000.00) per month per accused in capital offences; or
b. Thirty thousand dollars ($30,000.00) per month for all of the accused in capital offences for the duration of the trial;

(vii) Should an Attorney at Law be paid at the conclusion of a trial the sum of thirty thousand dollars ($30,000.00) or be paid the said sum on a monthly basis for the duration of the trial;

(viii) Alternatively, when and how the sum of thirty thousand dollars ($30,000.00) shall be paid.

17. In respect of **Paragraph 4 of Part III of the First Schedule** referenced above, the claimant seeks interpretation of the following:

(i) What guidelines should be used by the Judge to certify that the case was of 'an unusual length or difficulty';

(ii) What guidelines should be used by the Judge to determine 'exceptional circumstances';

(iii) Should an Attorney at Law be paid the certified fee at the conclusion of a trial or be paid the said fee on a monthly basis for the duration of the trial;

(iv) Where an Attorney At Law is representing one or more of the accused should the Attorney at Law be paid:

a. The certified fee per month per accused in capital offences; or

b. The certified fee per month for all of the accused in capital offences.

(v) Where an Attorney at Law is representing 'one or more of the accused' should the Attorney at Law be paid:

a. From the date the matter is assigned to him, and if so, how much; or
b. From the date the trial commences.

(vi) Where the presiding Judge recommends fees payable and due to an Attorney at Law after a trial, can the Authority vary same? If the answer is yes, when can the Authority vary same?

(vii) Should the same guidelines in (a) (i) to (viii) and (i) to (v) above also be applied to Instructing Attorneys at Law?

18. The Claimant also seeks interpretation of **Paragraph 5 of Part III of the First Schedule of the Act** which provides as follows:

'These sums become due and payable by the Director on the written authority of the presiding Judge.'

19. In respect of this, the claimant seeks determination/interpretation as to whether it is the Judge or the Authority who determines the amount of fees due and payable to an Attorney at Law.

Law

20. It is not in doubt that a judge has the power to interpret a statutory provision. However, the court is not there to fill gaps in a statute. The court's function is also not to perform the administrative functions of others or to perform duties which are within the province of the legislature and the executive.

21. The provisions placed before the court for interpretation can always be clarified, added to, amended or repealed. Those are functions of the executive to determine policy and to the legislature to enact laws. Thus any view expressed by the court is not done to usurp the power of the executive and the legislative.

22. Equally, however, where a party has come to court to seek interpretation of a statute it is a judge's duty to state what he or she understands the provision to be saying in accordance with recognised rules of statutory construction. The court cannot usurp the duties of others, but is also cannot shirk its responsibility.

23. Having said that there are certain of the questions which are not suitable for answer by the court. There are matters upon which the court can properly express a view and some on which it would be imprudent to do.

24. These principles are outlined in several cases cited by the respective counsel and include **Lord Nicholls in R –v- Secretary of State for the Environment Transport and the Regions, Ex parte Spath Home Ltd (2001) 2 AC 349 at 396; Lord Hoffman in Attorney General of Belize and Others -v- The Belize Telecom Ltd. (2009) All ER 1127 at 1132 F-H; Lord Diplock in Duport Steels Ltd. V Sirs (1980) 1 All ER 529 at 541; Lim Meug Suang and Another –v- Attorney General et al [2015] 2 LRC; PHI Americas Limited –v- The Trinidad and Tobago Civil Aviation Authority CV 2016-00715;** among others.

25. In **Bennion on Statutory Interpretation, 5th Edition, at page 864**, how the court is to undertake the exercise is set out:

> **"In construing an enactment, the text of the enactment, in its setting within the Act or other instrument containing it is to be regarded as the pre-eminent indication of the legislator's intention."**

26. Lord Hoffman in the Belize case cited above said:

> **"The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned**

only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed….It is this objective meaning which is conventionally called the intention of the parties, or the intention of whatever person or body was or is deemed to have been the author of the instrument."

27. Following from the cases and the textbook quoted, all the court can do is to say what it understands the statute to be saying. If there are gaps, or problems in its operation which go to policy issues, it is for the executive to determine the policy and the legislature, to the extent that it requires legislative intervention, to enact the changes.

28. I turn now to dealing with the specific questions asked of the court. Some of these questions posed do not allow for a specific answer but rather for the court to interpret the statutory provision. In doing so the answer may become obvious.

Paragraph 3, Part 3

29. This paragraph requires three conditions to be fulfilled before the payment arrangement can kick in.

30. First, there must be three or more accused indicted together. Second, it must be a capital case – that is to say, one where the death penalty is applicable. A capital case can only be tried in the High Court. Third, the Authority must reasonably believe that the trial may be lengthy in time.

31. It is for the Authority to come to the conclusion that the trial may be lengthy in time. In this regard, it can set itself guidelines on the determination of a lengthy trial. It can fix six months or nine months or twelve months as a baseline for determining if a trial is lengthy in time. It is for the Authority to do so as a function it is mandated to perform under the Act. It cannot cede that responsibility to the court.

32. What follows from this is that the conclusion that the trial may be lengthy in time must be made before it engages the attorneys to represent accused persons. In doing this, the Authority may be entitled to consider various matters such as the number of witnesses; whether oral evidence will be taken from the majority of them; what legal issues may arise; will there be the need for voir dires or preliminary applications; will there likely be other applications such as bad character evidence; and so on. The Authority is entitled to rely on the experience of its own attorneys and members of the Board of the Authority to come to a determination that a trial may be lengthy in time. Furthermore it is also for the Authority to fix the sum which must not exceed $30,000.00 per month. It can fix a sum less than $30,000.00 per month after considering all relevant factors. This may include the considerations above, but may include considerations of the experience of the attorney-at-law or the function being performed by the attorney. Thus it may consider it appropriate to fix a fee for an advocate or for an instructing attorney at law.

33. In terms of the guidelines for payment of fees the Authority is bound by the legislation as reflected in the quoted provisions above.

34. The next questions (v) to (viii) can be taken together.

35. If the Authority comes to the view that the trial may be lengthy in time, the obligation to pay the attorney at a rate not exceeding $30,000.00 per month begins at the start of the trial. The expression "during the period of the trial" can only mean from the start to the end. In law, a trial begins when an accused person is arraigned and pleads not guilty or where a not guilty plea is entered by the court. If a guilty plea is entered and accepted then there is no need for a trial. However, sometimes for convenience or due to necessity, such as where the only evidence is that of a confession which is being challenged, the voir dire may take place before the arraignment. The conduct of the voir dire in such circumstances must necessarily be seen to be part of the trial.

36. The trial ends where the jury returns a verdict or where the jury is directed by the Judge to enter a particular verdict.

37. The provision is clear that the payment of the sum not exceeding $30,000.00 per month is to be paid to an attorney at law if he represents one or more accused. In other words, it is not paid "per accused" but a sum not exceeding $30,000.00 per month is payable whether

it is one accused represented or more than one accused represented by the particular attorney.

38. Under this provision, it is for the Authority to determine if it will pay the fee at the end of each month or whether the accumulated figure based on the figure not exceeding $30,000.00 per month would be paid at the end of the trial. This is entirely a matter within the Authority's remit. No doubt in engaging counsel it could specify which of these options it will follow. But it is for the Authority to determine this.

Paragraph 4 of Part 3 in respect of capital offences

39. This part clearly applies to **all other capital matters** – that is to say all capital matters to which paragraph 3 above does not apply.

40. The fee for a capital matter other than one where: (1) three accused or more are indicted; and (2) the Authority reasonably believes the trial may be lengthy in time, is a sum not exceeding $15,000.00.

41. This is not a "per month" of the trial fee. This is a fee payable for the entire trial. It is to be noted that this provision was contained in the Act before paragraph 3 above was put in. It is not controlled by the per month requirement in paragraph 3.

42. If at the end of the trial, the trial judge certifies that the case was of unusual length or difficulty, he or she may certify that the fee should be increased by a further maximum amount of $5,000.00.

43. The trial judge can also in exceptional circumstances allow the attorney an additional fee not exceeding $10,000.00. Thus this latter additional fee would be circumstances beyond "unusual length" or "difficulty" since these two categories are covered by the initial authority to increase the maximum $15,000.00 fee by $5,000.00.

44. This certification must take place at the end of the trial by the trial judge. The judge will certify what fee up to $15,000.00 would be payable or if this will be increased by up to $5,000.00 or if an additional sum of up to $10,000.00 should be paid.

45. It is not for this court to lay down guidelines on what a judge should consider in determining what are exceptional circumstances. This is best left for the trial judge in the criminal court to consider and to determine in each particular case. No two cases will be the same. A judge resident in the civil court is not well placed to make that determination or to issue guidelines to a judge of concurrent jurisdiction.

46. The Authority has no power to vary the trial judge's certification under this part. This is a function which the judge is required to perform. If the judge does not certify an additional sum, the amount certified by the judge not to exceed $15.000.00 for the trial will be payable.

47. The Act appears to make no distinction between the functions of the advocate and instructing attorney. The profession is a fused one. But the roles of barrister and solicitor previously applicable appears to have survived to some extent as far as the division of labour is concerned among lawyers. In the criminal justice system there has been some evolution on this so that some attorneys may take their own instructions while others will perform advocacy for their clients, but the instructing functions are performed by someone else. It is up to the Authority to determine if it will assign advocate and instructing attorney in respect of specific matters. This may well be something which would have to be negotiated on a case by case basis. But the attorneys from the Legal Aid Authority would be entitled to examine each case and determine what it is prepared to offer legal aid for and the extent of legal aid it should offer.

48. When both instructing and advocate are appointed to act for an accused each other is to be paid the fee. By practice in the civil courts, junior counsel has often claimed, as fees, two thirds of the fee of Queen's Counsel or Senior Counsel and instructing claimed two thirds of junior counsel's fee. But that is not a fixed rule and is subject to negotiation in different cases. The Act does not provide for the distinction between advocate and instructing and it would be wrong for the court to create a differentiation. However, the Authority would be entitled to consider different fees for advocate and instructing attorney up to the maximum permitted. The judge would also be entitled in the other capital cases to certify the fee for advocate and instructing attorney which may not be the same. It is also open to

the legislature to further regulate what the fees should be for advocate and instructing attorney.

49. Much of what the court has been asked to answer can be changed by a change in policy of the executive and change of statute by the legislature. The regulations are not comprehensive. The Authority can make such representations as it considers appropriate for amendments to be made. There are gaps. For example one circumstance not provided for is what happens if a lengthy trial is adjourned for a period of several days or weeks. This can happen for any number of legitimate reasons. Should the payment of the monthly fee be suspended in such circumstances? Another is what happens if the particular lawyer is not involved in the trial for certain periods because a voir dire or an application of another accused is taking place and the attorney is not required to be involved in that exercise? Third, what happens if the lawyer is engaged in another court for a day or two, perhaps even in the civil court, doing another trial lasting a day or two, for which he is being paid a fee? Fourth, what about pre-trial preparation such as taking instructions, doing research, meeting witnesses, dealing with pre-trial applications, attending case management, and so on. The present fee structure does not provide for these aspects of the trial. These are likely to become far more important with the coming into force of the Criminal Court Rules. This in itself may require reconsideration of the fee structure. Fifth, should instructing and advocate fees be the same? Sixth, is length of a trial the appropriate or sole yardstick to justify a per month fee? Should there be some cut off period or maximum amount payable per attorney for the trial? Can an open ended provision like this lead to abuse by the prolonging of a trial by a dodgy attorney? All of these are live issues not covered by the present Schedule. And these matters are not for the court to decide.

Intention of the Legal Aid Scheme

50. The intention of the Legal Aid Scheme is to provide competent legal representation to persons who qualify for legal aid. These are persons of small or moderate means.

51. It is an important part of fair trial rights that an accused should be entitled to access to competent legal representation if he does not have the means to pay for it himself. This is especially relevant where accused persons are at risk of being convicted of a capital offence where the ultimate penalty may be imposed.

52. Legal Aid has never been intended to make a livelihood for lawyers. At the same time there must be a recognition that lawyers provide a service and are entitled to be paid. A long capital trial can ruin a lawyer's other practice. A capital trial often requires intense day to day involvement – cross-examining witnesses, dealing with evidential objections, making and resisting applications, studying documents and records, making legal submissions, preparing for and addressing the jury, and so on. Lawyers are also expected to offer their services pro bono (without a fee / reduced fee) in deserving cases. This is separate from any obligation to assist with legal aid.

53. All trials, especially capital ones, take a significant toll on all of the participants in the process. The decisions lawyers take have very far reaching consequences for the accused, but also for the professional reputation and standing of the lawyer. The manner in which lawyers conduct their cases are fair game for the appeal process. Where the ultimate penalty is at stake attorneys have both a legal and moral obligation, within the tenets of the law and ethics of the profession, to do all that they can reasonably do on behalf of their clients. It is not a profession for the slack or the uncommitted or the faint at heart.

54. Equally, however, legal aid is legal aid. There is an element of service and sacrifice involved. A few extracts from the **Code of Ethics to the Legal Profession Act, Chap 90:03** will illustrate the point.

55. Under Part A:

> 8. An Attorney-at-law shall defend the interests of his client without fear of judicial disfavour or public unpopularity and without regard to any unpleasant consequences to himself or to any other person.
>
> …
>
> 17. An Attorney-at-law shall not except for good reasons refuse his services in capital offences.
>
> 18. An Attorney-at-law shall not be deterred from accepting proffered employment owing to the fear or dislike of incurring disapproval of officials, other Attorneys-at-law or members of the public.

19. Where an Attorney-at-law consents to undertake legal aid and he is appointed by the Legal Aid and Advisory Authority or is requested by the Law Association and consents to undertake the representation of a person unable to afford such representation or to obtain legal aid, the Attorney-at-law shall not, except for compelling reasons, seek to be excused from undertaking such representation.

20. An Attorney-at-law in undertaking the defence of persons accused of crime shall use all fair and reasonable means to present every defence available at law.

21. (1) An Attorney-at-law shall always act in the best interests of his client, represent him honestly, competently and zealously and endeavour by all fair and honourable means to obtain for him the benefit of any and every remedy and defence which is authorised by law, steadfastly bearing in mind that the duties and responsibilities of the Attorney-at-law are to be carried out within and not without the bounds of the law.

(2) The interests of his client and the exigencies of the administration of justice should always be the first concern of an Attorney-at-law and rank before his right to compensation for his services.

22. (1) Before advising on a client's cause an Attorney-at-law should obtain full knowledge thereof and give a candid opinion of the merits or demerits and probable results of pending or contemplated litigation.

25. It is the right of an Attorney-at-law to undertake the defence of a person accused of crime regardless of his own personal opinion as to the guilt of the accused and having undertaken such defence he is bound by all fair and honourable means to present every defence that the law of the land permits so that no person may be deprived of life or liberty except by due process of law.

26. (1) An Attorney-at-law may represent multiple clients only if he can adequately represent the interests of each and if each consents to such representation after full disclosure of the possible effects of multiple representation.

27. (1) An Attorney-at-law shall deal with his client's business with all due expedition and shall whenever reasonably so required by the client provide him with full information as to the progress of the client's business.

(2) It is improper for an Attorney-at-law to accept a case unless he can handle it without undue delay.

31. (1) An Attorney-at-law is entitled to reasonable compensation for his services but should avoid charges which either overestimate or undervalue the service rendered.

(2) The ability of a client to pay cannot justify a charge in excess of the value of the service rendered, though the client's indigence may require a charge that is below such value, or even no charge at all.

(3) An Attorney-at-law should avoid controversies with clients regarding compensation for his services as far as is compatible with self-respect and his right to receive reasonable compensation for his services.

32. The right of an Attorney-at-law to ask for a deposit or to demand payment of out-of-pocket expenses and commitments, failing payment of which he may withdraw from the case or refuse to handle it, shall not be exercised where the client may be unable to find other assistance in time to prevent irreparable damage being done.

56. This selection of obligations shows the onerous responsibility placed on the shoulders of lawyers. There is a significant aspect of service involved. Attorneys cannot lightly refuse their services in capital cases. When a Legal Aid obligation is accepted the lawyer must advance the case with the same vigour as if it is on behalf of a "well paying" client. Legal aid does not mean less aid. The attorney has a duty to account to the client. Every fair defence has to be put forward. The attorney cannot allow unpopularity of the cause to deter him or her.

57. What is a reasonable fee for a legal aid case involves, at the end of the day, a careful balancing exercise. At this time, notwithstanding the large numbers of persons being admitted to practise each year in this jurisdiction, the fact remains that few lawyers are offering their services at the Criminal Bar. Further, to handle a murder case requires both experience and competence. Thus often the same lawyers will be engaged over and over.

The pool of lawyers willing to offer their services to accused persons who require legal aid has undoubtedly to be expanded. Experienced lawyers have to be prepared to offer their services. However, the question of how much lawyers are to be paid for legal aid services is ultimately a matter for the executive and legislature. Allocation of money to legal aid necessarily means that the money is not allocated for other areas such as health or education or even other aspects of the criminal justice system such as prisons or victim support or efficiency of the court system. It is not for the court to say how this allocation of scarce resources is to be made.

58. Where there are disputes, problems, changed circumstances and concerns a resolution has to be arrived at. But the process of problem solving must involve continuing dialogue among the lawyers, the Authority, and the Attorney General's office and the Parliament to ensure that the right balance is struck between lawyers "giving back" to the community by their service and fair compensation for demanding work. The efficient functioning of the overburdened criminal justice system demands no less.

59. Further, without cooperation among the various interested parties, including the Bench, the legal aid system will be placed under further strain. If it collapses, this will be another blow to the criminal justice system and fair trial rights in the process. I would respectfully urge that the Legal Aid Authority, the Bar, the Attorney General's office and other interested groups meet as a matter of urgency to find workable solutions to the present problems identified here.

60. I thank the attorneys for their assistance. It is hoped that I have been able to clarify some aspects of the sections of the Act even as I have raised many more questions to be considered. No issue of costs arises in this claim.

Ronnie Boodoosingh

Judge