



Michaelmas Term

[2021] UKPC 33

Privy Council Appeal No 0080 of 2020

JUDGMENT

Integrity Commission (Appellant) v Kikivarakis (as official liquidator TCI Bank Ltd (in liquidation)) (Respondent) (Turks and Caicos Islands)

From the Court of Appeal of the Turks and Caicos Islands

before

Lord Lloyd-Jones

Lord Leggatt

Lord Burrows

Lord Stephens

Dame Eleanor King

JUDGMENT GIVEN ON

20 December 2021

Heard on 28 October 2021

Appellant

Sandra Minott-Phillips QC

Alexis Robinson

(Instructed by Myers, Fletcher & Gordon (London))

Respondent

Ariel Misick QC

Clayton Greene

(Instructed by Stanfield Greene (Providenciales, Turks and Caicos Islands))

DAME ELEANOR KING: (with whom Lord Lloyd-Jones, Lord Leggatt, Lord Burrows and Lord Stephens agree)

1.

The issue for resolution in this appeal is whether the Integrity Commission of the Turks and Caicos Islands (“the Commission”) has the power under section 20 of the Integrity Commission Ordinance (“the Ordinance”) to issue a summons to a third party requiring them to produce documents as part of an informal investigation, or whether that power can be exercised only in connection with a formal inquiry under section 46 of the Ordinance.

The Facts in Brief

2.

Anthony Kikivarakis (the Respondent in this appeal) is the Official Liquidator of the TCI Bank Ltd (in liquidation). In June 2015, Mr Kikivarakis received an informal request for information concerning a number of House of Assembly members who had accounts with the bank. Mr Kikivarakis declined saying that his duty of confidentiality under the Confidential Relationships Ordinance prevented him from providing the requested information. He was, however, willing to comply with the request upon receiving the written authorisation of the relevant members of the House of Assembly or by order of the court.

3.

On 14 June 2016 a summons issued by the Appellant (“the Commission”) pursuant to section 20 of the Ordinance was personally served on Mr Kikivarakis requiring him to appear before the Commission and to produce documents in relation to the bank accounts of a number of members of the House of Assembly and their dependants.

4.

Mr Kikivarakis refused to comply with the summons and on 14 March 2017, he, having issued proceedings, obtained leave to apply for judicial review. The Chief Justice of the Supreme Court of the Turk and Caicos Islands and then the Court of Appeal of the Turk and Caicos Islands each declared the summons to be ultra vires. It is against that decision that the Commission now appeals.

The Legal Framework

The Constitution Order 2011

5.

In 2011 the Turks and Caicos Islands Constitution Order 2011 (“the Constitution Order 2011”) came into force. Section 4 of the Order mandated that the content of Schedule 2 of the Order should have effect as the Constitution of the Turks and Caicos Islands (“the Constitution”) from the appointed day. Part VII of the Constitution prescribed “Institutions Protecting Good Governance” and at section 97(1) (e) the Commission was established as one of six institutions “protecting good governance”. The independence of the Commission was assured by section 97(2), which provides that neither the Commission nor any person acting on its behalf shall be “subject to the direction or control of any other person or authority.”

6.

Section 102 of the Constitution relates exclusively to the Commission, setting out at section 102(2) its primary responsibility, being “to promote integrity, honesty and good faith in public life in the Islands”. Provision is made: (i) at section 102(3)(b) for a Code of Conduct for Persons in Public Life and, in accordance with an Ordinance, for the Commission to have the power to investigate failures to abide by the Code either in response to a complaint or at its own initiative, and (ii) at section 102(3) (e), for the Commission to exercise functions conferred on it by section 103, which establishes a Register of Interests that, by section 103(4), applies inter alia to all members of the House of Assembly.

7.

By section 102(5) any further provision made in relation to the establishment and operation of the Commission “shall not derogate from any provision of this section”.

The Integrity Commission Ordinance

8.

The functions of the Commission, which are at the heart of this appeal, are found in section 13 of the Ordinance. It is therefore useful to set out that section in full:

“13(1) The functions of the Commission shall be -

(a) to receive and keep on record all declarations, statements of registrable interests and reports of gifts forwarded by persons in public life;

(b) to examine declarations, statements of registrable interests and reports of gifts and to request from a specified person in public life any information or further information relevant to a declaration, statement of registrable interests or report of a gift made by him, which may assist the Commission in its examination;

(c) to make inquiries and carry out investigations as it considers necessary in order to verify or determine the accuracy of a declaration, statement of registrable interests or report of a gift filed under this Ordinance;

(d) to receive, inquire into and investigate any complaint or report of -

(i) an alleged act of corruption under Part X;

(ii) an alleged contravention of the Code of Conduct;

(iii) the acquisition by a member of the House of Assembly of an interest in a contract with the Government that is contrary to the rules made under section 51(4) of the Constitution and section 100(2); or

(iv) an alleged offence under any Ordinance that assigns responsibility for the investigation of offences to the Commission;

(e) to investigate any matter referred to in paragraph (d) on its own initiative, if the Commission is satisfied that there are reasonable grounds for an investigation or inquiry;

(f) to examine the practices and procedures of public bodies in order to facilitate the discovery of corrupt practices, except where there is a statutory duty on any person to perform that function;

(g) to instruct, advise and assist the management of public bodies of any change in practices or procedures which may be necessary to reduce the occurrence of corrupt acts, except where there is a statutory duty on any person to perform that function; and

(h) to perform functions and exercise powers as it is required by this Ordinance, the Constitution or any other Ordinance.

(2) In the exercise of its powers and performance of its functions under this Ordinance the Commission may not be subject to the direction or control of any person or authority.”

9.

It should be noted that section 13(2) replicates the statement of the independence of the Commission from “direction or control” that is found in section 97(2) of the Constitution 2011 Order.

10.

The declarations referred to in section 13(1)(a) are those which are filed with the Commission pursuant to section 39 of the Ordinance and that require every person who is a specified person in public life, which includes members of the House of Assembly, to file a declaration containing the following particulars:

“(5) A declaration under subsection (1) shall as far as possible be in Form 1 as set out in Schedule 2 and shall give full, true and complete particulars of -

(a) the person’s income, assets and liabilities;

(b) assets of the spouse and the dependent children;

(c) any gift received in the course of the performance of the person’s public function.”

11.

In addition, every member of the House of Assembly is required under section 52(1) of the Ordinance to file a statement of registrable interests.

12.

The obligation of financial disclosure placed on members of the House of Assembly is onerous, given the primary responsibility on the Commission to “promote integrity, honesty and good faith in public life in the Islands”. Not only are the requirements set out in section 39 personally intrusive to the member, his spouse and dependent children, but also criminal liability attaches under section 51 to a failure to file a declaration or to the knowing filing of an incomplete or false declaration.

13.

Having received the declarations, the Commission, by section 43 of the Ordinance, is thereafter under a duty to:

“(a) receive, examine and retain all declarations and documents filed with it or him under this Ordinance; and

(b) make such inquiries as it or he considers necessary in order to verify or determine the accuracy of the financial affairs, as stated in the declarations of persons who are required to file declarations under this Ordinance.”

14.

The Commission can fulfil its duty in one of a number of ways under the terms of the Ordinance. These options can, in broad terms, be categorised as formal or informal. The basic structure of section 13 anticipates increasing levels of enquiry as the Commission moves from “examination” under section 13(1)(b) to verification of accuracy under section 13(1)(c) through to “investigation” of any report or complaint under section 13(1)(d). Each stage has ancillary supportive powers.

15.

Section 44 allows the Commission to request a declarant to provide further particulars in relation to his financial affairs for the purposes of section 13(1)(b).

16.

Investigations which are “necessary” in order to “verify or determine the accuracy of a declaration” under section 13(1)(c) or to “inquire into and investigate any complain or report ...” under section 13(1)(d), are supported by the powers found in section 18.

17.

Section 18 gives the Commission powers to designate a person as an investigative officer who can carry out investigations “in relation to any matter, whether or not involving an alleged offence” (my emphasis). The extensive powers of the investigative officer are set out in the Ordinance at “Part IV: Investigations”. Of particular relevance to this appeal is the power to seek a production order under section 30, by which:

“(1) An investigative officer may apply to a judge of the Supreme Court for a production order requiring a specified person -

(a) to give the officer access to material specified in the application; or

(b) to produce the material specified in the application for the officer to take away,

within seven days from the date on which the order is made or such other period as the judge determines would be appropriate in the circumstances.

(2) The judge may make a production order described in subsection (1) if he is satisfied that -

(a) there are reasonable grounds for suspecting that the specified person has committed an offence under this Ordinance or another Ordinance that assigns responsibility for the offences to the Commission; and

(b) there are reasonable grounds for believing that -

(i) the specified person is in possession or control of the material specified in the application;

(ii) the material is likely to be of substantial value to the investigation for the purposes of which the order is sought, whether by itself or together with other material; and

(iii) it is in the public interest for the specified material to be produced or for access to be given to it, having regard to the benefit likely to accrue to the investigation if the material is obtained and the circumstances under which the specified person holds it.

(3) ...”

18.

In summary therefore, the Ordinance gives the Commission a range of increasingly extensive powers; initially at the examination stage to ask for additional information from a declarant, progressing through to the ability, by way of the investigative officer route, to obtain a production order if necessary where “there are reasonable grounds for suspecting that the specified person has committed an offence under this Ordinance or another Ordinance”. All these inquiries, of necessity, require the informant to be notified that the Commission is seeking further information or investigating their declaration.

Formal Inquiry under section 46

19.

The Commission may decide to hold a formal inquiry under section 46 of the Ordinance. Section 46 provides not only the jurisdiction to hold what is a semi-judicial inquiry, but goes on to build in the appropriate requirements of natural justice:

“Commission may hold formal inquiry

46(1) The Commission may in writing request a declarant to furnish such further information or documents and may conduct an inquiry to verify any declaration or other statement filed with it.

(2) The Commission, upon examination of a declaration furnished pursuant to section 39 may require the specified person in public life to attend an enquiry of the Commission at a specified time to be heard on any matter relating to the declaration.

(3) A specified person in public life who is required to attend the Commission may -

(a) be accompanied and represented by an Attorney-at-law and a certified accountant; and

(b) require the Commission to summon witnesses.

(4) The Commission shall not make any adverse decision without giving the specified person in public life an opportunity to be heard.

(5) Where upon examinations the Commission is satisfied that a declaration has been fully made and all questions satisfactorily answered, or that a declaration is incomplete but the declarant cannot reasonably obtain the information required to complete it, the Commission shall forward to the specified person in public life a certificate of compliance in Form 5 as set out in Schedule 2."

20.

Sections 21-27 of Part III of the Ordinance set out the procedural structure which is operative once a summons has been issued, including that: failure to attend is a contempt (section 22(2)); that a witness giving false evidence will be committing perjury (section 21); that witnesses are entitled to expenses as if summoned for a criminal trial (section 22(1)); that the person giving evidence is not compellable to incriminate him or herself (section 22(3)); that the person subject to the enquiry is entitled to legal representation (section 23); and that the witness may be cross-examined on oath (section 26).

21.

The Ordinance does not specify any "trigger" for the launch of a formal inquiry under section 46. When asked to identify the trigger, Counsel for the Commission and Mr Kikivarakis both agreed that the opening of such an inquiry must be founded on some reasonable cause to suspect wrongdoing on the part of the declarant involved. The Board considers that must be right. Section 18 provides for investigative powers "whether or not involving an alleged offence", but with the ability to obtain a production order only where there are "reasonable grounds for suspecting ...". It cannot be supposed that a person can become the subject of a formal inquiry under section 46, with all the semi-judicial powers described at para 19 and 20 above, in circumstances where there is no basis for a suspicion of wrongdoing.

22.

That is not to say that the hurdle is unduly high; see for example *Logan v Chief Constable of the Police Service of Northern Ireland* [2017] NIQB 70 in relation to the power of a constable to arrest without a warrant under section 41(1) of the Terrorism Act 2000 in circumstances where a constable "reasonably suspects" a person of being a terrorist. Stephens J in his judgment at paras 27-29 highlighted that under the test of "reasonable suspicion", anonymous information may be sufficient, as may hearsay evidence. The application of the objective part of the test does not, Stephens J said, "require evidence or information amounting to a prima facie case against the person arrested".

23.

Such an approach echoes that taken when an investigation is undertaken under section 431 of the Companies Act 1985 in circumstances where an application is made for the appointment of an inspector to investigate the affairs of a company and to report to the Secretary of State. The application to investigate must be supported by evidence showing “good reason” for requiring the investigation.

24.

Similarly, the Financial Conduct Authority has powers to conduct an investigation under section 167 of the Financial Services and Markets Act 2000: “if it appears to [an investigating authority] that there is good reason for doing so ...”. The investigator has under sections 172 and 173 similar powers to those found under the Ordinance to compel the attendance of any person and for the production of information by them, and those not connected with the person under investigation.

25.

The above examples indicate a requirement for some evidence and/or factual basis for initiating an investigation. The baseline requirement can be put a number of ways; “a good reason” or “reasonable grounds to suspect wrongdoing” are two, but however phrased, there must be an objective basis for initiating an investigation or appointing an investigator. The investigating authority must either possess for itself, or be provided with, an objective evidentiary basis to open and pursue an investigation.

26.

The question then arises as to where, within this overall structure, does section 20 of the Ordinance fit? Section 20 is found in “Part III: Procedure of the Commission” and provides that:

“20(1) The Commission acting under this Ordinance shall have the powers of a Supreme Court judge to summon witnesses, and to call for the production of books, plans, and documents, and to examine witnesses and parties concerned on oath.”

27.

If the Commission is correct, section 20 can be used not only as part of the process where a section 46 formal inquiry has been initiated and therefore where there are reasonable grounds to suspect wrongdoing on the part of a declarant, but also as a free-standing power requiring a third party (here the liquidator of the declarant’s bank) to disclose to the Commission confidential financial information belonging to both the declarant and his close family members. Further, on the Commission’s case, the summons can be issued without there being any complaint or suspicion of wrongdoing on the part of the declarant and without it having first utilised the section 44 further enquiries route, or having instigated a section 18 investigation. This case was not accepted by the courts below.

The Proceedings below

28.

On 4 June 2018 Ramsay-Hale J, Chief Justice of the Supreme Court (“the Chief Justice”), determined the judicial review proceedings in favour of Mr Kikivarakis and quashed the summons issued on 14 June 2016 and reissued on 24 January 2017 on the grounds that its issue was ultra vires the powers of the Commission and prohibited by the Confidential Relationships Ordinance.

29.

The Chief Justice referred to the powers of the Commission to apply for a production order under section 30 of the Ordinance where there are reasonable grounds for suspecting that a specified

person in public life has committed an offence under the Ordinance. In holding that the decision to issue the summons for Mr Kikivarakis other than for a formal inquiry was ultra vires the Chief Justice said:

“62. I can see no principled basis on which to hold that the Commission, when conducting small letter ‘i’ inquiries to verify the accuracy of statements filed with it, has the power to compel in secret the production of the banking records of persons in public life, absent any suggestion of wrongdoing.

63. ...

64. Given the very clear provisions for obtaining documents where the Commission is investigating suspected wrongdoing, it would be wrong in my view to hold that it had the power to request such documents by way of summons, particularly where no proceedings were on foot. The material so obtained would of course be admissible in any proceedings.”

30.

The Chief Justice accordingly declared that:

“Outside of verification in the course of a formal inquiry and with the consent of the person in public life, the Respondent has no power to compel by summons the attendance of the Applicant before the Respondent for the purpose of providing the Respondent with information and documents relating to outstanding loans from TCI Bank Ltd (In Liquidation) to Members of the TCI House of Assembly.” (My emphasis)

31.

It is accepted by Mr Misick QC on behalf of Mr Kikivarakis, that the consent of the person in public life is not required before a summons is issued and to that extent he does not oppose the amendment of the declaration made by the Chief Justice to that effect.

32.

Adderley JA delivered the judgment of the Court of Appeal on 26 September 2019. In his judgment Adderley JA highlighted at para 35 that in the present case there was not yet any investigation of any wrongdoing but he said that, if there was, the Commission would have had the power to apply for a production order where there were reasonable grounds to suspect that the specified person had committed an offence under the Ordinance. The Court of Appeal dismissed the appeal concluding that, upon a proper review of the functions listed in section 13(1)(a)-(h) “it could not have been contemplated by Parliament that section 20 could be employed to issue freestanding summonses generally in pursuance of performing any one of its many functions”.

Submissions

33.

Ms Minott-Phillips QC on behalf of the Commission submits that, whereas the power of summoning held by the Commission and a Supreme Court judge is the same under section 20, the parameters within which each exercises its/his power is not. So long, she says, as the power to summon is being exercised to carry out a function of the issuer, that falls within the terms of reference and is amenable to the use of that power and the exercise of that power is legitimate. In interpreting the section, the court should look at the consequences of adopting each of the two constructions. The more restrictive approach preferred by the Supreme Court and the Court of Appeal would, she says, be adverse to the law generally and to the ability of the Commission to carry out its primary responsibilities. The narrow interpretation curtails the Commission’s power to perform its functions efficiently in the way it

determines best in the discharge of its constitutional responsibility. Curtailing the breadth of its functions would not, Ms Minott-Phillips submits, be in keeping with the overarching constitutional mandate and would therefore be incorrect.

34.

Mr Misick responds that the argument put forward on the part of the Commission is untenable as it gives no meaning to the words “the powers of a judge of the Supreme Court”. They are words of limitation which circumscribe the circumstances under which the power may be exercised to that in which a judge of the Supreme Court may issue a witness summons. It follows, Mr Misick submits, that the Commission has the same, but not greater, powers than a judge to issue a witness summons. This, he says, is buttressed by the fact that section 20 appears in Part III of the Ordinance which deals exclusively with procedure and not with investigations.

35.

Mr Misick goes on to submit that it cannot have been the intention of the legislature to confer on the Commission power to issue a summons to third parties where no allegation of any wrongdoing against any person is made and in circumstances where the Supreme Court would not have similar powers.

36.

Mr Misick submits that the requirement that the Commission must initiate a semi-judicial inquiry before exercising the power to issue a summons under section 20 does not in any way undermine its independence nor does it prevent or interfere in its discharge of its primary duty to promote integrity, honesty and good faith in public life given the wide powers of investigation which are at its disposal, none of which require the issue of a summons to third parties in order to be effective. Limiting the issue of a section 20 summons to formal inquiries under section 46 is in no way inconsistent with the constitutional mandate.

The Board’s reasoning on the central legal issues

Confidentiality

37.

The issue of Mr Kikivarakis’s obligations of confidentiality was a subsidiary issue at the hearings below and was scarcely touched upon in this appeal. It should however be discussed, albeit briefly. It will be recollected that Mr Kikivarakis based his objection to producing details of the bank accounts of various members of the House of Assembly on his duty of confidentiality, declining to disclose the information without the consent of the holders of the accounts. The Confidential Relationships Ordinance imposes, at section 3(1), statutory obligations of confidentiality with respect to all business of a professional nature which arises in or has been brought to the Islands. By section 2, Mr Kikivarakis as a banker conducts “business of a professional nature which arises in, or is brought into, the Islands”. The liquidator of the bank is a professional person and his relationship with members of the House of Assembly who were customers of the bank constitutes business of a professional nature.

38.

The Commission argued at first instance and on appeal to the Court of Appeal that Mr Kikivarakis would not have been in breach of section 3(1) had he complied with the summons issued by the Commission. Disclosure it was submitted, would have been authorised by section 3(2)(e) of the Confidential Relationships Ordinance which disapplies section 3(1) when the information has been received by “any person in accordance with the provisions of any other Ordinance.”

39.

The Court of Appeal held that section 3(2)(e) was of no assistance to the Commission as it refers to various Ordinances such as the Mutual Legal Assistance Ordinance, the Financial Services Commission Ordinance and the Prevention of Terrorism Ordinance, where in each case, the power to override the duty of confidentiality is expressly provided. The Ordinance with which this court is concerned neither expressly nor impliedly authorises the disclosure of confidential information.

40.

I respectfully agree with the interpretation of section 3(2)(e) by the Court of Appeal. That such is the case does not alter the fact that a valid summons issued under section 20 will have the effect of overriding the Confidential Relationships Ordinance and will release the witness from their obligations under section 3(1). It equally follows that where, as in this case, an invalid summons is issued, the proposed witness remains so bound.

Section 20

41.

Returning to the main issue, the question of whether the use of section 20 is limited to a section 46 formal inquiry is a question of statutory interpretation. The modern approach to statutory interpretation, with its emphasis on context, was recently considered by the Board in *Misick v Attorney General of the Turks and Caicos Islands* [2020] UKPC 30, where Lord Hamblen and Lord Stephens said this:

“38. ... As stated in *Bennion on Statutory Interpretation* (7th ed) at para 9.2 context ‘is relevant not simply for resolving ambiguities and other uncertainties, but for ascertaining meaning (whether or not there is an ambiguity or other uncertainty), and indeed for identifying whether something is (or is not) ambiguous or uncertain in the first place.’”

42.

Context also requires the Ordinance to be considered against the backdrop of the central importance of the rule of law in a democratic society. In my judgement, whilst section 20 does not in terms limit its application to a formal inquiry, a power of the type which the Commission seeks to justify, whereby confidential financial information could be obtained from a third party in respect not only of a member of the House of Assembly but his/her spouse and children, in secret and in circumstances where no allegations of wrongdoing are made, cannot in my judgment, be considered on any basis to be a fair process or to fall within the powers conferred by the legislature upon the Commission.

43.

In considering context, the positioning of the section 20 power within the Ordinance is revealing. It is not found in “Part IV: Investigations” but in “Part III: Procedure of the Commission” and, as described at para 20 above, is the first of a bundle of sections in relation to the procedure which applies following the issue of a summons and thereafter the treatment and obligations on the witnesses who attend in response to that summons. The issue of a summons is by reference to the power of a Supreme Court judge and each of the subsequent provisions have the same effect as they would in a court of law. For my part, I cannot see on what basis a witness could possibly be examined on oath and be held to be at risk of prosecution for perjury other than at a formal sitting of the Commission.

44.

Section 22(1) provides that all persons summoned to attend “at any sitting of the Commission, shall be bound to obey the summons served upon them as fully in all respects as witnesses are bound to obey

subpoenas issued from the Supreme Court". Ms Minott-Phillips submitted that a "sitting" is simply any meeting of the Commission provided it is conducted in accordance with the requirements of section 8(1) and (2) of the Ordinance. I do not agree. Section 8 requires the Commission to "to meet at times as may be expedient" to carry out its functions with the quorum being four. Section 22(1) requires a person to attend a "sitting" and not a meeting of the Commission, the word "sitting" being the term almost universally used to describe the business of a court, tribunal or semi-judicial inquiry.

45.

Nor do I accept the submission that the lack of such a draconian power would in any way inhibit the performance of the constitutional obligations of the Commission. The Ordinance, as is set out in detail earlier in this judgment, has ample and progressive powers to obtain both information and material culminating, if there is good reason, in the issue of a section 20 summons in the course of a formal section 46 inquiry. At that stage, if the person served with the summons is a third party who would have been until that time protected by the cloak of confidentiality by virtue of the provisions of the Confidential Relationships Ordinance, that "duty of non-divulgence of information" will no longer apply and he or she will be obliged to give evidence and produce documents as required by the Inquiry.

46.

It follows that I agree with the conclusion of both the Chief Justice and the Court of Appeal, that the Commissioner's power to issue a summons to a third party to produce documents can be exercised only in connection with a formal inquiry under section 46 of the Ordinance. The conclusion is consistent with the position of the power within the structure of the Ordinance and is strongly supported by the context of the overall statutory scheme.

Conclusion

47.

The declaration should, as agreed between the parties, be amended to delete the words "and with the consent of the person in public life". Otherwise, for the reasons set out above, the Board will humbly advise Her Majesty that the appeal should be dismissed.