COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT
NEW PROVIDENCE

CIVIL (CONSTITUTIONAL) NO. 1644 of 2001

between

MAURICE 0. GLINTON
(carrying on the practice of a Barrister and Counsel and
Attorney under the name and style of Maurice 0. Glinton & Co.)
First Plaintiff

LEANDRA A. ESFAKIS
(carrying on the practice of Barrister and Counsel and
Attorney under the name and style of Leandra Esfakis Counsel & Attorney)
Second Plaintiff

and

THE RT. HON. HUBERT A. INGRAHAM, M.P.
(Prime Minister of the Commonwealth of The Bahamas,
sued in his official and in a representative capacity)
First Defendant

THE HON. SIR WILLIAM ALLEN, M.P.
(Minister of Finance, sued in his official and in a representative capacity)
Second Defendant

THE COMPLIANCE COMMISSION
Third Defendant

THE INSPECTOR OF FINANCIAL AND CORPORATE SERVICES
Fourth Defendant

THE ATTORNEY GENERAL OF THE BAHAMAS
Fifth Defendant

and

THE BAHAMAS BAR COUNCIL
Intervenor

Coram: Hall CJ (in Open Chambers)

3 June; 22, 23 & 30 July 2002

First and Second Plaintiffs in person
Mr Milton Evans, Deputy Director of Legal Affairs, for all Defendants
Mr Dwight Glinton, Mr Jason Maynard with him, for lntervenor

Ruling No. 2

Before I proceed to the substance of this ruling, I would note that the query raised at the beginning of ruling no. 1 has now been resolved with the position of the Bar Council being that of "intervenor:"

2. The Plaintiffs' claim as indorsed on their writ of summons is fully set out at paragraph 3 of ruling no. 1 and I need not repeat it here. I am called on to rule on their applications for interlocutory relief as prayed in their summons, filed contemporaneously with their writ, for:

1. **An order** restraining the Defendants (and each of them) whether by themselves, their servants or agents or Licencees or otherwise howsoever, from taking any steps to enforce the operation of the said alleged Acts against the Plaintiffs directly, or indirectly by or through the Plaintiffs' employees, accountants, auditors, bankers or whomever, and in particular from ordering or requiring them in the absence of any evidence to found a reasonable suspicion of either of the Plaintiffs having committed or being about to commit a criminal offence, to disclose information or produce documents deriving from or which in any way form part of or pertain to transactions and communications of a confidential nature however received or imparted by the Plaintiffs and to which (notwithstanding the provisions of the said alleged Acts to the contrary) lawyer/client privilege apply and is claimed, or to keep a record of and maintain safekeeping of the said documents, information, or communications until after the hearing of the Writ Action, or further order. Further or alternatively,

2. **An order** exempting the Plaintiffs as Counsel and Attorneys of the Supreme Court and as officers of the Court from the effect of such of the provisions of the Financial Services Measures as would apply to them as legal practitioners whose practice is by reference to the definition under *Section 3* of the [Financial Transactions Reporting Act., No. 40 of 2000 ("FTR Act")] classified as a financial institution (and licensees within the meaning and intent of the [Financial and Corporate services Providers Act, no. 41 of 2000 ("FCSP Act")], in particular**: (i)** ***Section 14 of the*** **FTR Act** requiring the Plaintiffs as such financial institutions to report all suspicious transactions to the Financial Intelligence Unit established under *Section 3* of the [Financial Intelligence Unit Act, no.39 of 2000 ("FlU Act")]; **(ii)** ***Section 44 of the*** **FTR Act** rendering them liable to prosecution at the behest of the Third Defendant for failing to produce to him personal records and to disclosure (sic) information as may have been entrusted and communicated to the Plaintiffs and received by them in confidence as Counsel and Attorneys; **(iii) the FTR Regulations, 2000** requiring the Plaintiffs to verify, confirm and reconfirm the identity and other personal particulars of their clients and their clients' facilities (as defined in *Section 2* of the **FTR Act**), and to keep a record of the same; and **(iv) the FTR Regulations, 2001** requiring them to establish and maintain identification and record-keeping procedures, and to institute and maintain internal reporting and employee training procedures, until after the hearing of the Writ Action, or further order.

3. **Such Orders, Writs or Directions** pursuant to *Article 28* of the Constitution as may to the Court seem appropriate for the purpose of enforcing or securing the enforcement of any right or freedom to the protection of which the Plaintiffs are entitled.

4. This cause is within the original jurisdiction of the Supreme Court Pursuant to Article 28 and 93 of the Constitution as it involves an allegation of the (likely) contravention, in relation to the Plaintiffs, of Articles 20, 21, 23, 26 and 27 thereof, and also involves its interpretation in respect of the provisions of Articles 1, 2,15, 29, 3052, 54, 71, 79, 108, 127 and 137 thereof.

3. The case for both plaintiffs and the intervenor may be summarised by reference to the excerpts from the skeleton submissions prepared by the second plaintiff:

- The FCSP Act s.4(1) requires the Plaintiffs to acquire a license to carry on a corporate practice, and thereby submit to a regime that would violate their duty as counsel and attorney, and fundamental rights under the Constitution, that is to say:

- The FCSP Act ss. 14 & 15, require the Plaintiffs to collect and store information on their clients, in contravention of the clients' rights to privacy and confidentiality, contrary to Article 23 of the Constitution.

- The FCSP Act Sec. 12 appoints an Inspector of Financial and Corporate Services, who is mandated and obliged under the provisions of sec. 12 on an annual basis, and as otherwise required by the Minister, to conduct on-site examinations of the licencee at his expense, to ensure compliance with the provisions of the FTRA, in contravention of Articles 2, 27, and 23.

- The FTR Act, by designating the Plaintiffs as "financial institutions" again purports to submit the Plaintiffs to a regime which would violate their duties as counsel and attorney, and fundamental rights under the Constitution, that is to say:

    - The FTR Act, sec. 14 obliges the Plaintiffs to provide information on certain clients to the Financial Intelligence Unit, contrary to Art. 23

    - The FTR Act, sec. 15 obliges the Plaintiffs' Auditors, to report on the transactions of their clients to the police, contrary to Art. 23, and 26(1).

    - The FTR Act, ss. 23 — 30 obliges the Plaintiffs to collect information on financial transactions and make them available to the FlU, contrary to Art. 23.

    - The FTR Act, sec. 43, mandates and obliges the

Compliance Commission, the 3rd Defendant to conduct on an annual basis, and as otherwise required by 3rd Defendant to conduct on-site examinations of the Plaintiffs, at the Plaintiffs expense, to ensure compliance with the provisions of the Act, contrary to Arts. 21 and 23.

- The Financial Intelligence (Transactions Reporting) Regulations, 2001 Unit sec. 5, obliges the Plaintiffs to employ persons to act as a "Money Laundering Reporting Officer, and "Compliance Officer" for the purposes of reporting to the executive agencies under the Financial Laws, contrary to Arts. 21, 23, 24 and 27.

- Inter alia, the Financial Services Measures, in particular section 43(b) of the FTRA and section 12 of the FCSPA, require the 3rd and 4th Defendants to conduct examinations of the Plaintiffs' premises, in breach of the Plaintiffs' rights under Articles 21(1) and 23(1) and 23(2)(ii) of the Constitution, and in violation of the common law right to lawyer-client privilege.

- Section 43 of the FTRA and section 12 of the FCSPA mandate annual searches and as deemed necessary by the Commission, of the premises of "Financial Institutions" and "Financial and Corporate Service Providers by the 3rd and 4th Defendants, for the purposes of ensuring compliance with the Financial legislation and the Plaintiffs claim the right to protection of their premises form such arbitrary entry and search by virtue of Article 21(1) of the Constitution

- Section 43(b) of the FTRA states that where the Commission is unable to conduct such examination, it can "appoint an auditor at the expense of the financial institution to conduct such examination and to report thereon to the Commission". The letter dated 15th October, 2001 from the 3rd Defendant and attached notice evidence the intention of the 3rd Defendant to proceed by requiring the Plaintiffs to engage a public accountant to carry out the examination, so

as to achieve the search of the Plaintiffs' premises in violation of the Plaintiffs right under Article 21(1) of the Constitution and in derogation of the common law right to lawyer-client privilege.

- The provisions of section 43(b) of the FTRA and section 12 of the FCSPA go too far in authorizing the 3rd and 4th Defendants to enter premises of the Plaintiffs whether by themselves or by their nominees or agents without cause. The grant of this power is excessive and cannot be shown to be reasonably justifiable in a democratic society.

4. It is obvious that the intention of Parliament (even if one could claim ignorance of the controversy which the fierce public debate occasioned) was to alter in a substantial manner the way in which financial matters were regulated in this country.

This is a matter of the public policy of The Bahamas as expressed through the parliamentary will. The courts could have no contrary policy position and could only intervene if the plaintiffs establish at trial, not merely a policy preference different from that pronounced by Parliament, but that Parliament was incompetent to do what it purported to do.

5. This indeed is what their suit attempts and, anticipating such harm to themselves within the intendment of Article 28 of the Constitution ("If any person alleges that any of the [fundamental rights provisions]... Is likely to be contravened in relation to him...") they make the present application.

6. They seek interlocutory relief, not to prohibit the regulatory regime of the new legislation taking effect generally, but only insofar as it alters the manner in which they, qua counsel and attorneys, relate to their clients. They seek not to disrupt the application of the laws but only to disapply them in the case of themselves. The basis is, not that the legal profession is a class of service providers superior to bankers, insurers, realtors and other "financial institutions" caught in the net of the new laws, but that their duties to assert legal professional privilege is so vital a component of the administration of justice that it is a fundamental right guaranteed by the Constitution and so attracts the peculiar protection of Article 28.

7. The plaintiffs submit that Article 23:

> (1) Except with his consent, no person shall be hindered in the enjoyment of his freedom of expression, and for the purposes of this Article the said freedom includes freedom to hold opinions, to receive and impart ideas and information without interference, and freedom from interference with his correspondence.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision —
>
> (a) which is reasonably required —
>
> (i) in the interests of defence, public safety, public order, public morality or public health; or
>
> (ii) for the purpose of protecting the rights, reputations and freedoms of other persons, preventing the disclosure of information received in confidence...
>
> and except so far as the provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society has codified and clothed with constitutional protection the common law concept of legal professional privilege.

8. I confess that I see no plinth of legal professional privilege so conspicuously erected by Article 23 as the plaintiffs submit. However, having regard to the judgment of the House of Lords in ***R v Special Commissioner, ex p Morgan Grenfell,*** handed down in May of this year,

anticipated a year earlier by Meerabux J in the Supreme Court of Bermuda in ***Re an Application by Braswell*** (2001) 4 ITLR 226 and a half century ago in New Zealand in ***Commissioner of Inland Revenue v West-Walker*** 11954] NZLR 191, I am prepared to hold that, whether teased out of the interstices of Article 23 or coaxed out of the penumbra of that provision read in the context of the fundamental rights chapter of the Constitution, legal professional privilege is a fundamental human right.

9. Similarly, when one appreciates the intrusive nature of other of the legislative provisions now challenged, the provisions of Article 21:

> (1) Except with his consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question makes provision —
>
> (a) which is reasonably required —
>
> (i) in the interests of defence, public safety, public order, public morality, public health, town and country planning, the development of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit; or
>
> (ii) for the purpose of protecting the rights and freedoms other persons;
>
> (b) to enable an officer or agent of the Government of The Bahamas, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due or

> in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or
>
> (c) to authorise, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or the entry upon any premises by such order.

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society appear to sustain the challenge by the plaintiffs for the reasons given by the Court of Appeal of Antigua and Barbuda in voiding provisions which empowered the Commissioner of Inland Revenue to enter premises and inspect and take copies of books and documents: ***Attorney General v Goodwin*** [2001] 2 LRC 1.

10. On the principle that the purpose of provisions such as Article 28 is "to protect against loss of the privilege to the greatest extent possible, not to engage in damage control once the privilege is lost" ***(Festing v Attorney General of Canada*** [2002] 206 DLR (4th) 98, 130) and, in choosing "the course which, in all the circumstances, appears to offer the best prospect that eventual injustice will be avoided or minimised" ***(R*** V ***Transport Sec, ex p Factortame Ltd (no.,*** 2)11991] AC 603, per Lord Bridge of Harwich at 659), I would have adopted the approach of Allan J of the Supreme Court of British Columbia in ***The Law Society of British Columbia v Attorney General of Canada, Canadian Bar Association Intervenor*** [2001] (unreported).

> [21] The narrow issue on this application is whether legal counsel should be exempted from the provisions of s. 5 of the Regulations pending the hearing of the petitions on their merits. The petitioners do not question the general principle that the effect of democratically enacted legislation should not be suspended temporarily pending a determination of the issues of unconstitutionality or invalidity on the merits. However, they assert that this case is an exception to the

general rule and they seek only an exemption from the legislation, continuing the status quo, rather than a suspension of the legislative scheme...

[56] The basic test for granting interlocutory relief in constitutional proceedings is threefold:

- is there a serious constitutional issue to be determined?

- will the applicant suffer irreparable harm if the relief is not granted? and

- does the balance of convenience, taking into account the public interest, favour the granting of the relief?...

[102] Although the status quo is not determinative in an interlocutory application in a constitutional challenge, I consider that an exemption in this case would continue the status quo, preserving the confidentiality inherent in the historic solicitor-client relationship. I am unable to agree with (counsel for the respondent] that the status quo has been defined by the introduction of the impugned legislation.

[103] The harm identified by the petitioners is serious. The harm to the Government by exempting lawyers until the merits of the issues are fully argued is minimal. The Act itself does not impose a reporting duty on legal counsel. By exempting lawyers from the Regulations, the Act remains intact and applicable to all other persons and entities described in the Act and the Regulations.

[104] It should be noted that, even without the obligations imposed by this legislation, lawyers are subject to codes of conduct and ethical obligations imposed by Law Societies and to the provisions of Part XlI.2 of the Criminal Code. They cannot engage in money laundering schemes or be a

party to any transactions with clients that conceal or convert property or proceeds that they believe to involve money laundering.

11. However, notwithstanding my inclination to embrace the reasons and the result of that Canadian provincial decision and to grant the interlocutory relief sought, I am unable to follow this course. Between the time when submissions on this application concluded and the ruling was prepared, counsel for the defendants, under cover of a letter to my chambers which was copied to the other parties, alerted me to judgment of the Court of Appeal of The Bahamas in ***lngraham, et al v McEwan,*** Civil Appeal No. 24 of 2002, published on 25 July, a case in which that Court had vacated an order which I had made granting interlocutory relief on a constitutional challenge to the validity of an Act of Parliament, the Court held, at pages 3 to 5:

> Just as the grant or refusal of an interlocutory injunction in civil cases is a serious matter as Megarry J (as he then was) pointed out in ***Bates v Lord Hailsham of St.*** *Marylebone* [1972] 1 WLR p 1373 at p 1378-1 380 so the grant of an injunction which may have the effect of tying the hands of the Crown . . . is a very serious matter — if there could be said to be degrees of seriousness of the work of these courts.
>
> While (counsel for the respondent] tried to support the decision of the Chief Justice, he was ambivalent as to whether there had been an express or implied finding that the impugned provision was unconstitutional.
>
> In the absence of such express finding, the learned Chief Justice would have had no jurisdiction to order the revising officers to disobey an existing statutory provision.
>
> In addition, it seemed to me that there needed to be a great deal of research and serious consideration about the provisions of the Act as a whole as well as the relevant provisions of the Constitution ... before such an order could be contemplated as statutory provisions are not to be struck down lightly — see e.g., *Attorney*

> *General v Antigua Times Newspapers Ltd* [1975] 3 WLR 232, (1975] 3 All 81.....
>
> In other words, at the interlocutory stage, in light of the presumption of constitutionality, the balance of convenience would favour the refusal of the order sought unless it was clear beyond any reasonable doubt that the right [claimed] was an entrenched constitutional right and that the provision of the impugned subparagraph was not reasonably required in the interests of public order or public morality
>
> In addition, as a matter of practice, even ordinary declarations are not to be made lightly by a court ... since it is the duty of the courts to decide matters of law…Acts of Parliament are deemed to be constitutional and are not to be declared unconstitutional unless the court is satisfied beyond any reasonable doubt that there is a deliberate contravention of a provision of the Constitution.

12. I did not consider it necessary to reconvene the hearing for further submissions in the wake of this judgment since it appeared to me that the Court of Appeal was quite unambiguous on the question of how first instance courts should approach interlocutory applications on challenges to legislation on the ground of constitutional infirmity.

13. In the result, notwithstanding the persuasive authorities that support the application by the plaintiffs, being bound by the decision of the Court of Appeal, I refuse the reliefs sought.

14. Costs of and occasioned by this application will be costs in the cause.

Sgd.

Burton P C Hall (CJ)

30 July 2002