



# The Court of Appeal for Bermuda

CIVIL APPEAL No. 23 of 2015

Between:

**THE ATTORNEY-GENERAL**

-v-

Appellant

**MARTIN HOLMAN et al**

Respondents

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**Before:** Baker, President  
Bernard, JA  
Kawaley, JA (Acting)

**Appearances:** Mr. Norman MacDonald, Attorney-General's Chambers, for the Appellant

**Date of Hearing and Reasons:**

**30 May 2016**

## REASONS

*Approval of consent order – Court declines to clarify principles for costs orders in Constitutional cases without full argument*

### PRESIDENT

1. This is an appeal from an order of Mr. Justice Hellman, which both sides agree should be allowed.
2. Mr. Norman MacDonald has appeared before the Court for the Attorney General today, the Respondents are, for obvious reasons, not represented. The terms of the draft Order are as follows:
  - 1) Leave to Appeal and Extension of Time to apply for Leave to Appeal granted;
  - 2) Appeal allowed;

- 3) The judge's ruling of the 13 October 2015 is set aside;
  - 4) The respondent's proceeding in the Supreme Court is dismissed;
  - 5) And the Respondent to pay the Appellant's costs of this appeal and the costs in the Supreme Court, fixed in the amount of \$5,000.00.
3. This Court has no difficulty in approving the terms of this Order which are plainly a sensible disposal of the litigation.
  4. It is necessary to explain briefly the history of what happened. The Respondents brought proceedings for relief under Section 15 of the Bermuda Constitution, but they discontinued the proceedings when the Appellant sought security for costs. The Appellant sought partial costs from the Respondent, but Justice Hellman dismissed the application on the 13 October of last year and in the course of his expanded reasons, he said this:

“In an application under Section 15 of the Constitution, the applicant should not be ordered to pay the respondents or any third parties costs, unless the court is satisfied that the applicant has acted unreasonably in making an application or in the proceedings. Thus, if the applicant is unsuccessful each party will normally bear their own costs; however, if the applicant is successful, the respondent will normally be ordered to pay the applicants costs.”
  5. Mr. MacDonald submits that that is an incorrect statement of the law and that the law is correctly stated by Justice Kawaley, as he then was, in *Fay v the Governor and the Bermuda Dental Board* [2006] Bda LR 72, in particular, paragraph 5.
  6. It is apparent that Justice Hellman based his decision on a number of other authorities. And indeed there is the Caribbean Authority subsequent to *Fay* in which the Court approached matters on slightly different basis.
  7. We are invited to give a statement of the law following *Fay* and not following the decision of Justice Hellman. We decline to do so for this reason.

- 8. It is obviously a matter of some importance to establish the principles on which costs are awarded in Constitutional cases, in particular in Constitutional cases which are commenced but subsequently abandoned. We think that this is a difficult issue which requires careful consideration of all the authorities and indeed argument from both sides, not just from the Attorney General. Having said that, we simply highlight that is it not accepted by the Attorney General that Mr. Justice Hellman's statement of the law is correct and that an opportunity should be taken in the future for a court having heard argument on both sides to lay down clear principles as to the basis on which the court's undoubted discretion should be exercised.
- 9. Having said that, we approve the terms of the Consent Order, with the substitution of "order" for "ruling" in paragraph 2 thereof.



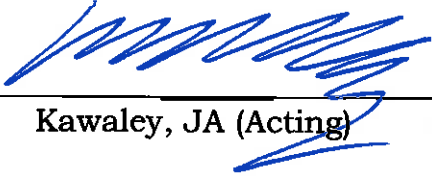
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Baker, P

I agree



\_\_\_\_\_  
Bernard, JA

I agree



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Kawaley, JA (Acting)