In The Supreme Court of Bermuda

CIVIL JURISDICTION
2015: No. 348

BETWEEN:-

HARRY MATTHIE
(on behalf of himself, and the executive and certain other members of the Bermuda Parent Teacher Student Association)

Applicant

-and-

(1) THE MINISTER OF EDUCATION
(2) THE COMMISSIONER OF EDUCATION

Respondents

RULING
(In Chambers)

Whether unsuccessful applicant should bear costs of judicial review application – whether single costs regime for judicial review and constitutional claims – if so, whether costs regime hitherto applicable only in constitutional cases now applies to judicial review – whether application brought in the public interest

Date of hearing: 17th October 2016
Date of ruling: 18th November 2016

Mr Eugene Johnston and Ms Dawn Johnston, J2 Chambers, for the Applicant

Mr Delroy Duncan, Trott & Duncan Limited, and Mr Brian Myrie, Attorney General's Chambers, for the Respondents

1. This is a ruling on the hearing as to the costs of Mr Matthie's application for judicial review of the following decisions.

   (1) The Second Respondent's decision to transfer, move, and/or alternate various teachers and/or principals throughout the public school system for the 2015/2016 school year ("**the Transfers**");

   (2) The First Respondent's decision to make the Education (Parent Council) Rules 2015, on 24th July 2015 ("**the Rules**"); and

   (3) The First Respondent's decision to appoint a working group known as the School Reorganisation Advisory Committee ("SCORE") to recommend which schools should be consolidated or closed for the 2016/17 academic year and beyond ("**the Reorganisation**").

2. At a hearing on 27th August 2015 Mr Matthie sought interim orders that the Transfers and the implementation of the Rules be stayed so as to preserve the status quo pending the determination of the judicial review application. By an *ex tempore* ruling given on 28th August 2015, and a supplemental *ex tempore* ruling, pursuant to further written submissions from the parties, given on 9th September 2015, Mr Matthie's application was dismissed.

3. The substantive hearing of the judicial review application took place on 21st – 23rd March 2015. By a written judgment dated 3rd June 2016: (i) the application for judicial review of the Transfers, apart from some very limited declaratory relief, was dismissed; (ii) the application for judicial review of the Rules was dismissed; and (iii) the application for judicial review of the Reorganisation was adjourned with liberty to restore.

4. The starting point as to costs is Order 62(3) of the Rules of the Supreme Court 1985 ("RSC"), which provides:

> "*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.*"

5. In Binns v Burrows [2012] Bda LR 3 SC at para 6, Kawaley J (as he then was) summarised the applicable principles thus:

> "*…unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:*
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> *i. determine which party has in common sense or "real life" terms succeeded;*
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> *ii. award the successful party its/his costs; and*
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> *iii. consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event*."

6. In Kentucky Fried Chicken (Bermuda) Ltd v Minister of Economy Trade and Industry [2013] Bda LR 34 at para 20, Kawaley CJ (as he now was) applied these principles to a case of judicial review when awarding the respondents their costs. This reflects what has hitherto, at any rate, been the position in Bermuda. Ie that the starting point that costs follow the event is the same in judicial review proceedings as in other types of cases. This is also the position in England and Wales: see eg the cases cited in Fordham, Judicial Review Handbook, Sixth Edition at para 18.1.3.

7. The Respondents, represented by Delroy Duncan, submit, in my judgment correctly, that in "*real life*" terms they were successful at the hearing for interim orders and in relation to the Transfers and the Rules at the substantive hearing. They accept that neither party was successful at the substantive hearing in relation to the Reorganisation. The Respondents therefore seek their costs of the interim hearing and two thirds of their costs of the substantive hearing.

8. Mr Matthie, represented by Eugene Johnston, submits that the Court should make no order as to costs. His primary submission is that costs in judicial review cases now fall within the same regime as costs in constitutional cases.

9. As to costs in constitutional cases, I held in Holman and Ors v Attorney General (Costs) [2015] Bda LR 93 at para 16:

> "*… that in an application under section 15 of the Constitution the applicant should not be ordered to pay the respondent's or any third party's costs unless the Court is satisfied that the applicant has acted unreasonably in making the application or in the conduct of the proceedings.*"

10. This ruling was based on the premise, supported by decisions of the Supreme Court of South Africa and the Court of Appeal of the Eastern Caribbean, that costs in constitutional cases fall into a special category. I declined to follow the decision of Kawaley J in Fay v Governor and Bermuda Dental Board (Costs) [2006] Bda LR that, except in cases where the applicant has no personal or financial interest in the proceedings, the ordinary rules as to costs apply to constitutional cases just as they do to other public law cases.

11. Holman went to the Court of Appeal, where an appeal against my order was allowed by consent. However the Court declined to rule on the question of costs in constitutional cases as it had not heard argument on the point. Baker P stated at para 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.*"

12. The argument before me proceeded on the assumption (which the Attorney General would not necessarily make in future cases) that the position on costs in constitutional cases in Bermuda is as stated at first instance in Holman.

13. In Minister for Home Affairs v BIU [2016] Bda LR 32 at para 8, Kawaley CJ referred to the first instance decision in Holman as:

> "*... the instance of an individual of limited means bringing proceedings to enforce his fundamental rights*".

I agree with that statement. In Holman at para 16 I stated a principle which is applicable to applicants under section 15 of the Constitution irrespective of their means. I then applied that principle to the particular facts of the case, which involved two applicants of limited means.

14. Mr Johnston's submission that costs in judicial review cases fall to be treated in the same way as costs in applications under section 15 of the Constitution rests on the recent decision of Centre for Justice v Attorney General [2016] SC Bda 72 Civ (11th July 2016), in which Kawaley CJ held that it was not necessary to use section 15 of the Constitution in order to complain that constitutional rights had been infringed. The learned Judge stated:

> "*29. On proper analysis, one does not need to commence proceedings under section 15 of the Constitution to seek declaratory and/or injunctive relief in relation to an alleged breach of fundamental rights by legislation said to be invalid on its face (or indeed administrative action said to be invalid in its effect). The general jurisdiction to grant declaratory and/or injunctive relief is sufficiently broad and flexible to make recourse to section 15 only optional in many cases.*
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> . . . . .
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> *30. Accordingly, while I accepted the Respondent's submission that the purely constitutional relief sought (i.e. the challenge to the validity of primary legislation) fell beyond the bounds of judicial review, I found instead that this Court's general jurisdiction to grant declaratory and injunctive relief was sufficiently broad to entertain complaints grounded in an allegation that constitutional rights have been or are likely to*

be contravened without the need for a separate application under section 15 of the Constitution."

15. Mr Johnston submits that, except where the court is asked to strike down a legislative provision, which he accepts can only be done through section 15 of the Constitution, this decision has obliterated the distinction between judicial review and constitutional claims. Consequently, he submits, the court should adopt the same costs regime for all public law cases. That regime, he submits, should be the one in Holman.

16. Mr Johnston's application echoes Fordham at para 18.3 that: "*public law costs principles need a bold and far-reaching re-examination*". However, while the costs principles applicable to judicial review cases are not cast in stone they are well established. It is not for me as a first instance judge to overturn them. By contrast, the principles relating to costs in constitutional cases are, in Bermuda, quite novel. If I were to accept Mr Johnston's submission that there was a single regime for costs in all public law cases, the consequence would be that the judicial review regime for costs would apply to constitutional cases rather than vice versa. Thus I would be constrained to find that Fay v Governor and Bermuda Dental Board (Costs) was, after all, correctly decided. This would not avail Mr Matthie.

17. But I am not so constrained. The Centre for Justice case did not obliterate the conceptual distinction between applications seeking constitutional relief and other public law proceedings. It merely provided that as a matter of procedure at least some constitutional claims could be brought using a vehicle other than section 15 of the Constitution. Eg they could piggyback onto an application for judicial review. That is not a sufficient reason for eliding the separate costs regimes, although it may make the taxation of costs more challenging.

18. Constitutional claims have a different costs regime to judicial review claims because, irrespective of the vehicle used to bring them before the court, they are different in character. Constitutional claims are concerned with the infringement of fundamental rights whereas judicial review claims are

concerned with the way in which decisions are made. Admittedly there is an overlap where fundamental rights claims engage issues of due process, eg under section 6 of the Constitution, which contains provisions to secure the protection of law. But there was no such overlap in the present case as there was no suggestion – nor could there credibly have been one – that Mr Matthie's constitutional rights were engaged.

19. Mr Johnston submits that separate but overlapping costs regimes raise the spectre of what are in reality claims for judicial review being argued on dubious constitutional grounds so as to attract the benefits of the constitutional costs regime. I see no difficulty here. If a claim is properly arguable as a constitutional claim then, and is argued as such, then, irrespective of whether it could equally well be argued on conventional judicial review grounds, it should attract the benefit of the constitutional costs regime. If a claim is not properly arguable as a constitutional claim then, irrespective of how it is dressed up , it should not attract that benefit.

20. In this context the rider to section 15(2) of the Constitution is relevant:

> "*Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.*"

This subsection does not mean that the Court will only grant constitutional relief as a last resort. Rather, it means that the Court will only grant constitutional relief under section 15 if constitutional or other relief is not available elsewhere. See the Centre for Justice case at para 25.

21. If an applicant is nonetheless in doubt as to how his claim will be treated for costs purposes, then, as the Respondents submits, he can at the outset of his claim seek a protective costs order. This happened eg in Bermuda Environmental Sustainability Taskforce v Minister of Home Affairs [2014] Bda LR 68 SC.

22. One of the reasons why costs are not generally awarded against unsuccessful applicants in constitutional cases is that constitutional litigation, whatever

the outcome, ordinarily bears not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. See the judgment of Sachs J, giving the judgment of the South African Constitutional Court, in Biowatch Trust v Registrar: Genetic Resources and Others [2009] ZACC 14 at para 23. Similarly, it is well established in the law of judicial review that a claim brought partly or wholly in the public interest may properly result in no order for costs. See the cases cited in Fordham at para 18.3.2.

23. Mr Johnston relies upon this principle to found an alternative argument that Mr Matthie should not have to pay the Respondents' costs as the action was brought in the public interest. In this context I take "*public interest*" to mean, in the words of Lord Phillips MR (as he then was) in R (Corner House) v Trade and Industry Secretary [2005] 1 WLR 2600 EWCA at para 70: "*a public interest in the elucidation of public law by the higher courts in addition to the interests of the individual parties*". Although I accept the sincerity of Mr Matthie's motives in bringing it, I am not persuaded that there was any such public interest served by this litigation.

24. The upshot is that I find no reason to depart from the principle that costs follow the event. Although there are two Respondents, they both represent the same Department and are both represented by the same counsel, so there is only one set of costs.

25. Mr Matthie will pay the Respondents' costs of the interim hearing and two thirds of their costs of the substantive hearing. He will pay the Respondents' costs of any directions hearings in full in so far as the hearings related to the interim hearing and on a two thirds basis insofar as they related to the substantive hearing.

Dated this 18th day of November 2016

Hellman J