In The Supreme Court of Bermuda

CIVIL JURISDICTION
2016: No. 322

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

BETWEEN:

BERMUDA EMISSIONS CONTROL LTD

Applicant

-v-

(1)THE PREMIER OF BERMUDA

(2) SIR ANTHONY EVANS

(3) HON JOHN BARRITT

(4) FIONA LUCK

(5) KUMI BRADSHAW

(6) THE ATTORNEY GENERAL FOR BERMUDA

Respondents

RULING

(in Chambers)

Judicial review -Commission of Inquiry Act 1935- appointment of commission-validity of commission –leave to seek judicial review-summary determination of point of construction at interlocutory inter partes leave hearing

Date of hearing: September 2, 2016
Date of Ruling: September 7, 2016

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

Mr Gregory Howard, Attorney-General's Chambers, for the 1st and 6th Respondents
Mr Jeffrey Elkinson and Mr Ben Adamson, Conyers Dill & Pearman Limited, for the 2nd to 5th Respondents

Introductory

1. On February 24, 2016, the Premier appointed the 2nd to 4th Respondents as members of a Commission of Inquiry chaired by the 2nd Respondent (the "COI"). He purported to do so under section 1A of the Commission of Inquiry Act 1935 (the "Act"). The first public hearing of the COI took place on June 27, 2016. At that hearing, the COI announced that they proposed to investigate, *inter alia*, the award of contract and tendering process in relation to the TCD (Transport Control Department) emissions Centre. The Applicant ("BECL") was the relevant contracting party.

2. Under cover of an extremely cordial letter dated July 11, 2016, the COI served Mr Donal Smith, a shareholder of BECL with a *subpoena* which does not directly concern the present application and which was, apparently, not pursued after Mr Smith explained to the COI that the documents sought were not his property. Under cover of a letter dated August 22, 2016, the COI served a *subpoena* on Mr Delroy Duncan on behalf of the corporate director of BECL, Trocan Management Ltd. (the Summons"). The Summons required him to produce corporate records relating to BECL and to appear before the COI on August 28, 2016.

3. Mr Duncan duly appeared before the COI (consisting of one member, the 5th Respondent) and produced the documents sought. However BECL appeared by counsel and objected to the validity of the Subpoena on grounds which apparently prompted the COI's counsel to indicate that any such challenge would have to be pursued before this Court. The documents were not accordingly formally tendered to the COI.

4. By Notice of Application dated August 29, 2016, BECL applied for leave to seek judicial review of various decisions and to obtain an interim stay of the Summons. An oral hearing was requested. The matter was initially listed on an ex parte basis without notice before Hellman J on August 30, 2016, who very properly adjourned the matter for an *inter partes* or ex parte on notice hearing as an obviously controversial stay was sought. In lieu of an interim injunction or stay to hold the ring, he ordered BECL to deliver the documents sought forthwith to the Court to be held under seal until the determination of the injunction application or until further Order of this Court. As Hellman J was unavailable for an early hearing the leave and stay applications were listed before me for substantive hearing.

5. An early hearing was pressed for by the COI which was concerned to avoid disruptions to its schedule which included a public hearing planned for September 28,

2016. This time sensitivity was reiterated before me although I was not much persuaded by this point in its narrowest sense. In approaching the present application, however, I have attempted to balance the need for this Court to properly exercise its supervisory jurisdiction over the COI with the need to avoid the exercise of such supervisory jurisdiction being used to undermine the efficient and clearly lawful workings of the COI in their broadest canvass. The purpose of judicial review is to promote the interests of good public administration. The COI, within a narrower mandate, has a similar objective. Assuming the COI's mandate to be a lawful one, this Court should be astute to avoid so far as is possible a situation where the judicial review processes of this Court have the indirect effect of hampering the due administration of the Inquiry.

6. As the Judicial Committee of the Privy Council (Lord Phillips) observed in *R (Mario Hoffman)-v- Commission of Inquiry and Governor of Turks and Caicos Islands* [2012] UKSC 17 (a case which Mr Howard relied upon for more substantive purposes):

> "61. *It seems clear, from the summary set out in the Annexe, that the Commissioner and his staff focussed initially on attempting to obtain information from the members of the House of Assembly and the Cabinet Secretary, the Permanent Secretaries and under Secretaries. The stated intention was that the Commissioner would then decide upon those whose conduct was the subject of the inquiry or who were implicated or concerned in its subject matter and afford them the opportunity to testify. <u>This plan was derailed by the obduracy of members of the Assembly in attempting to bring the inquiry to a halt by judicial review</u> and in failing to respond to the Commissioner's invitation to provide relevant evidence…*" [Emphasis added]

The impugned decisions

7. BECL sought declarations that the following decisions were invalid:

   (1) The decision of the Premier to appoint the COI ("the Inquiry");

   (2) The decision of the COI to investigate the TCD Emissions Centre ("the Emissions Decision");

   (3) The August 22, 2016 decision of the COI to summon BECL to appear and produce documents ("the Summons");

   (4) The intended re-summoning of Mr Duncan ("the Intention").

The validity of the Inquiry

8. This Court's usual approach is to grant leave to pursue judicial review liberally and then give directions for a full hearing on the merits at a later date. Following that course in relation to a legal challenge to the entire validity of the COI would cast a shadow over the entire functioning of the Commission for a protracted period of time. This first of four challenges ultimately turns on the construction of one comparatively short document, a short legal point which all parties were clearly adequately prepared to fully argue at the adjourned leave hearing.

9. The point is at first blush arguable, as Hellman J provisionally opined on August 30, 2016. I accordingly grant leave and proceed to finally determine this issue at this stage on the grounds that further argument on this issue would be wasteful in costs terms and with a view to minimizing the length of time that the COI is left uncertain about the validity of its existence. This is ultimately a case management decision informed by this Court's duty under Order 1A rule 4(2)(c)-(d) to actively manage cases by, *inter alia*,

> "…*identifying the issues at an early stage* [and] *deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*…"

10. The Premier purportedly created the COI with an instrument in the following pertinent terms:

> "*IN EXERCISE of the powers conferred on me by section 1A of the Commission of Inquiry Act 1935, I MICHAEL H DUNKLEY, Premier of Bermuda, do hereby appoint*
>
> *SIR ANTHONY HOWELL MEURIG EVANS (Chairman)*
> *HON JOHN BARRITT*
> *FIONA ELIZABETH LUCK*
> *KUMI DUANE BAMIDELE BRADSHAW*
> *(hereinafter, 'the Commission')*
>
> *To inquire into the following matters, which are, in my opinion, for the public welfare:*
>
> *Having regard to the Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the Financial Years ending in 2010, 2011, and 2012, and with regard to any matters arising under Section 3 of the Report to-*

Scope of Inquiry

1. *Inquire into any potential violation flaw or regulations, including the Civil Service Conditions of Employment and Code of Conduct, Financial Instructions, and Ministerial Code of Conduct, by any person or entity, which the Commission considers significant and determine how such violations arose;*

References to other agencies

2. *Refer any evidence of possible criminal activity, which the Commission may identify, to the Director of Public Prosecutions and the Police;*

3. *Refer any evidence of possible disciplinary offences, which the Commission may identify, to the Head of the Civil Service;*

4. *Draw to the attention of the Minister of Finance any matter, which the Commission may identify, appropriate for surcharge under section 29 of the Public Treasury (Administration and Payments) Act 1969;*

5. *Draw to the attention of the Minister of Legal Affairs (as the Enforcement Authority for Bermuda) any matter, which the Commission may identify, appropriate for civil asset recovery under Part IIIA of the Proceeds of Crime Act 1997;*

6. *Draw to the attention of Attorney-General any matter, which the Commission may identify, appropriate for civil proceedings before the courts;*

Recommendations for the future

7. *Consider the adequacy of current safeguards and the system of financial accountability for the Government of Bermuda;*

8. *Make recommendations to prevent and/or to reduce the risk of recurrences of any violation identified and to mitigate financial, operational and reputational risks to the Government of Bermuda;*

Any other matter

9. *Consider any other matter which the Commission considers relevant to any of the foregoing…* "

11. Mr Johnston's central legal thesis was supported by eminent authority: *Ratnagopal-v-Attorney General* [1970] AC 974 (JCPC); *Re Royal Commission on Licensing* [1945] NZLR 665. When a statute empowers the Executive to appoint a commission of inquiry, the appointing authority must define the commission's terms of reference. A

commission which is so broadly framed as to purportedly empower the appointed body to determine the scope of its own jurisdiction will be unlawful and struck down by the courts. The soundness of this principle was not doubted by the Respondents.

12. Whether or not the Inquiry was established in breach of this principle turned on one narrow interpretative controversy, namely whether the following crucial paragraph amounts merely to a preamble (as the Applicant contended) or forms part of the COI terms of reference (as the Respondents contended):

> "*Having regard to the Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the Financial Years ending in 2010, 2011, and 2012, and with regard to any matters arising under Section 3 of the Report to-…*"

13. If the quoted paragraph forms part of the terms of reference, it is not seriously arguable that the terms of reference are too broad. If the quoted paragraph does not form part of the terms of reference, the numbered paragraphs in the commission which follow would fall afoul of the principle that it is for the appointing authority to determine the ambit of inquiry, not the appointed body itself. That principle derives from section 1 of the Act which provides so far as is relevant to this point as follows:

> "(1) *The Governor may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing them, or any quorum of them therein mentioned, to inquire into the conduct of any civil servant, the conduct or management of any department of the public service or into any matter in which an inquiry would in the opinion of the Governor be for the public welfare.*
>
> *(2) Each such commission shall specify the subject of inquiry, and may, in the discretion of the Governor, if there is more than one commissioner, direct which commissioner shall be chairman, and direct where and when such inquiry shall be made, and the report thereof rendered, and prescribe how such commission shall be executed, and may direct whether the inquiry shall or shall not be held in public...*" [Emphasis added]

14. Section 1A of the Act, which became operative on March 17, 2015, also provides:

> "1A (1) *The Premier shall, in addition to the Governor, have the authority to issue commissions of inquiry under this Act.*
>
> *(2)When the Premier acts under subsection (1), sections 1 to 6 and 11, and the First and Second Schedules, shall be read with 'Premier' in place of 'Governor', and the rest of those provisions shall be construed accordingly.*"

15. The Privy Council, construed a similar Ceylonese provision[1] in *Ratnagopal-v-Attorney General* [1970] AC 974 in the context of a commission which required the Commissioner to inquire into abuses relating to Government contracts during a certain period, being such contracts or tenders "*as you the said commissioner may in your absolute discretion deem to be …of sufficient importance in the public welfare to warrant such inquiry*". Lord Guest (at pages 981-982) crucially opined as follows:

> "*When the appointment of the commissioner is examined it will be found that the scope of the inquiry is left entirely to the commissioner's discretion….It may be that another form of reference might by different means have attained the same end. But their Lordships attention must be confined to the terms of the actual warrant of appointment.*
>
> *The importance of construing section 2 of the Commissions of Inquiry Act quite strictly is illustrated when section 12(1) (b) is considered. In that section the safeguard provided to a witness against being required to answer irrelevant questions is to be tested by whether the question touches the matter directed to be inquired into by the commissioner. If the ambit of the inquiry is not limited to any particular matter but is at large, then there would be no limit to the questions which a witness might be obliged to answer.*
>
> *Their Lordships have reached the conclusion that for these reasons the appointment of the commissioner was ultra vires and of the Act and cannot stand.*"

16. Section 11(2) (c) of the Bermuda Act makes it an offence for a witness to refuse to answer questions "*without sufficient cause*", subject to the proviso that the same protections available to witnesses before this Court apply. A basic rule of evidence is that witnesses are only required to answer relevant questions. It must be possible to easily determine what is or is not relevant by reference to well-defined terms of reference. Accordingly, the reasoning of the Privy Council in *Ratnagopal* clearly applies to the present case and is binding on this Court.

17. Although the New Zealand Court of Appeal decision of *Re Royal Commission on Licensing* [1945] NZLR 665 was not seemingly cited in argument in *Ratnagopal*, this earlier decision aptly demonstrates the practical importance for the purposes of taking evidence of having clearly defined terms of reference. In that case the Court held that witnesses could not be asked questions about matters unrelated to the defined terms of reference pursuant to a power "*generally to inquire and report upon such other matters arising out of the premises*". There was no suggestion that the entire commission was invalid because it left to the commissioners the task of deciding what the scope of the inquiry should be.

18. Mr Howard relied primarily on *R (Mario Hoffman)-v- Commission of Inquiry and Governor of Turks and Caicos Islands* [2012] UKSC 17 to illustrate the point that mere generality of terms of reference was not fatal to their validity. Sir Robin Auld was commissioned to inquire into:

[1] Section 2(1) of the Ceylonese Commission of Inquiry Act and section 1(1) of the Bermudian Act are substantially the same.

"*Whether there is information that corruption or other serious dishonesty in relation to past and present elected members of the TCI House of Assembly…may have taken place in recent years..*."

19. No challenge was made to the validity of the entire commission in this case as an earlier such challenge had apparently failed in another case[2]. Having reviewed these cases and identified the core legal principles governing when a commission as a whole will be *ultra vires* the Act, one can return again to consider the terms of the COI's commission in the present case. The parameters of the Inquiry are defined both directly and indirectly in the following terms:

    (a) directly, by the terms of the commission itself; and

    (b) indirectly, assuming what BECL contends to be a preamble forms part of the substantive definition of the scope of the Inquiry, by Section 3 of the Auditor-General's Report as well.

20. On this basis there can be no serious contention that the COI has been given a roving brief to investigate whatever it sees fit. Its brief is clearly delineated by "*the Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the Financial Years ending in 2010, 2011, and 2012, and with regard to any matters arising under Section 3 of the Report*". In my judgment, while it may not be immediately obvious, a relatively straightforward reading of the commission in the present case only supports the decisive finding that the crucial paragraph does form part of the terms of reference. However the instrument is not drafted in quite as straightforward a manner as Mr Howard contended.

21. Somewhat like the TCI commission, the draftsman separates the primary statement of the matter to be inquired into, as defined by the appointing authority, from the subsidiary or supplemental powers conferred upon the COI. It must be conceded in BECL's favour, however, that the placement of the heading "*Scope of Inquiry*" above the first of the numbered paragraphs which follow the true definition of the scope of matter to be inquired into is both visually confusing and linguistically misleading. It encourages the reader to ignore the preceding unnumbered paragraph and to assume that the scope of the inquiry is exhaustively defined by paragraph 1 in terms which impermissibly leave the Commission with complete latitude to decide what matters it "*considers significant*". This very literal, mechanistic, narrow and context-blind reading cannot, on closer analysis, prevail.

22. Most significantly, the crucial paragraph comes after an identification of the members of the COI and immediately after the following introductory phrase:

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[2] *Robinson and Been-v-Sir Robin Auld and Attorney General*, Turks and Caicos Islands Court of Appeal, Civil Appeal 17/2008, judgment dated September 26, 2008 (Edward Zacca P, Elliot Mottley and Richard Ground JJA) (unreported). The Court crucially held as follows: "*16. In the instant case the express language of the appointment does not purport to confer a discretion on the commissioner. We have to look at the actual wording used. We consider that language, for the reasons identified by the learned Chief Justice, to be sufficiently specific.*"

"*…to inquire into the following matters, which are, in my opinion, for the public welfare…*"

23. This language demonstrates that far from ignoring the terms of section 1(1) of the Act, the draftsman had the governing statutory provisions very much in mind. The crucial words of the statute empower the Governor (and Premier) to appoint a commission to inquire "*into any matter in which an inquiry would in the opinion of the Governor be for the public welfare*". The commission issued by the Premier in the present case appoints the Commission to inquire into what are expressly identified as "*matters, which are, in my opinion, for the public welfare*". This tracks the language of section 1(1) of the Act. To my mind the oddly located subsequent heading "*scope of inquiry*" provides little justification for viewing this legally fundamental governing clause as a mere preamble not intended to have any significant legal effect.

24. Mr Johnston in reply could only counter this eminently sensible reading of the commission with an alternative reading of the instrument which did far more violence to its plain and ultimately intelligible terms. He suggested that the key paragraph beginning "*Having regard to*" should be read as if it were inserted at the beginning of the instrument rather than where the phrase actually appeared. Such linguistic contortions can never be justified when the natural and ordinary meaning of the words of an instrument, in their proper context, conform entirely to rationality and common sense and do not result in a manifestly absurd or unworkable result. That is particularly the case in light of the fact that:

    (a) the commission being construed is an official Government instrument, which is entitled to the benefit of the presumption of validity in relation to official acts (*omnia praesumuntur rite esse acta*); and

    (b) there is general legal policy interpretation leaning in favour of upholding the validity rather than the invalidity of statutory and other legal instruments (*ut res magis valeat quam pereat*).

25. There is on what I consider to be a proper reading of the COI's commission no credible basis for concluding that the commission is invalid because, as is contended, "*the Premier unlawfully delegated the power to set the scope of the public inquiry to the Commission, pursuant to paragraphs 1 and 9 of the Commission's Terms of Reference*". The impugned paragraphs ought not to be read in a contextual vacuum but, rather, as being subservient to the umbrella definition of the matters to be inquired into which is set out in the governing words which they follow.

26. The powers conferred by the following paragraphs are accordingly inextricably linked with the Auditor-General's Report on Financial Years 2010, 2011 and 2012 and the matters arising under Section 3 thereof:

    "*…1. Inquire into any potential violation flaw or regulations, including the Civil Service Conditions of Employment and Code of Conduct, Financial Instructions, and Ministerial Code of Conduct, by any person or entity, which the Commission considers significant and determine how such violations arose…*

9. Consider any other matter which the Commission considers relevant to any of the foregoing."

27. I reject the complaint that either the entire Inquiry or paragraphs 1 and 9 of the Terms of Reference are ultra vires the Act. Accordingly, the Inquiry was a valid administrative law decision. The position in this case is in broad terms the same as that in *Bethel-v-Douglas* [1995] 1 W.L.R. 794 where the Privy Council (Lord Jauncey at 802F-G) summarised the effect of a similar attack on the validity of a commission of inquiry as follows:

> "*Ratnagopal's case is authority for the proposition that in appointing a commission under statutory powers such as were contained in section 2 of the Ceylon Commissions of Inquiry Act and in section 2 of the Act of 1911 the Governor-General must specify the matters to be inquired into and is not entitled to leave it to the commission to determine what those matters are to be. In the present case the Governor-General did exactly that by confining the matters to those arising out of or in connection with the affairs of three named companies. There was accordingly no such delegation of discretion as occurred in Ratnagopal's case and no ground for challenging the validity of the reference.*"

The Emissions Decision

28. The challenge to the Emissions Decision as set out in the Applicant's grounds was parasitic on the alleged invalidity of the Inquiry itself. Having found that the COI's commission was valid, the main legal basis of this second complaint is no longer arguable.

29. At the practical level BECL complained that it contracted with the Government before the period covered by the Auditor-General's Report. The COI very convincingly counters that its contract is potentially relevant because, pursuant to the governing contract, funds paid to the Applicant are referenced in the relevant section of the Report as amounts not approved by Cabinet in 2011. While there may be room for argument about the scope of documents to be produced pursuant to the Summons (which is an entirely different matter), the suggestion that the Emissions Decision is wholly invalid on relevance grounds is in my judgment unsustainable.

30. Leave to challenge the Emissions Decision is accordingly refused.

The Summons

31. The validity of the Summons is challenged on six grounds, three of which Mr Elkinson succeeded in demonstrating appear to be unarguable on their face in light of the evidence already before the Court (paragraph 8 (a)-(c)). I consider the oppression argument to be tenuous, but have no sufficient basis to fairly determine that this complaint is wholly unarguable at the present stage. The same applies the

constitutional complaints that sections 6, 7 and/or 9 have been infringed. As freestanding complaints these constitutional arguments seem extremely dubious. But in my judgment Mr Johnston was correct to contend that constitutional rights are "engaged' by the Summons. This merely means that there is a potential conflict between the issue of the Summons and the recipient's constitutional rights so that the legality of the Summons must be assessed against this legal backdrop. At this stage, however, it seems improbable indeed that any such potential conflicts as do arise in relation to sections 7 and 9 will be shown to be constitutionally impermissible, having regard to the array of potentially justifying public interest considerations upon which the COI will be able to rely[3]. The most arguable point appears to me at this stage to be the following ground of complaint which engages common law fair hearing rights ultimately protected by section 6(8) of the Constitution:

> "*9…the Summons was unlawful because it required BECL/Trocan to appear at a time when the Commission was not sitting.*"

32. The Summons required the production of documents at a hearing which only one Commissioner was present. Was that a lawful hearing? The COI has yet to publish procedural rules to explain to the recipients of summonses what its quorum procedures are. It is arguable that the COI has no power to fix a special quorum for different categories of meetings because that power is vested in the Governor/Premier alone under section 1(1) of the Act, as Mr Johnston pointed out:

> "(1)*The Governor may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing them, or any quorum of them therein mentioned*…" [emphasis added]

33. These complaints are both technical and of practical importance for the further conduct of the COI's work, this Court having decided that the Commission is lawfully established. Even if the COI can summon a witness to produce documents before a single Commissioner, what procedure will be followed if disputes about production arise and have to be determined? In the present case, for instance, it is not clear to what extent BECL can (in the first instance at least) be required to produce documents outside of the three financial years covered by the Auditor-General's Report.

34. It is possible that these points may not have to be formally determined by this Court because the COI, in the interim, elects to adopt procedural rules which make these points largely academic. The course of the further conduct of the Summons before the COI might conceivably be agreed. However the challenge to the Summons is plainly arguable and raises matters of public importance in an undeveloped area of Bermudian law. Leave to pursue this complaint is granted accordingly.

[3] Interference with sections 7 and 9 of the Constitution is expressly permitted to the extent of executive or legislative action which is "*reasonably required… in the interests of…the…utilisation… of any other property in such a manner as to promote the public benefit*" (section 7(a)(i)) and "*to the extent that the law in question makes provision…that imposes restrictions upon public officers*" (section 9(2)(b)). It would be surprising if the Constitution did not permit public inquiries into the expenditure of public monies and the conduct of public officers.

The Intention Decision

35. The challenge to the Intention Decision is so closely aligned with the attack on the Summons to be almost indistinguishable from it. Leave is granted to pursue this ground for the same reasons.

The Injunction/Stay

36. Having granted leave to seek judicial review of two of the four impugned decisions including the challenge to the Summons, it follows logically that all proceedings relating to the Summons before the COI should be stayed until the final determination of the present proceedings or further Order of this Court and otherwise on the same terms as ordered by Hellman J (as regards preservation of the documents to be produced) at the initial ex parte hearing on August 30, 2016.

Summary

37. Leave to seek judicial review of the Premier's decision dated February 24, 2016 to establish the Commission of Inquiry is granted. However, having considered the argument that the COI was not lawfully established on its merits, this Court finds that the Commission was validly constituted. It is important to acknowledge that the adjudication of this question has been of assistance to the COI in that it has clarified the scope of its legal mandate. This mandate is primarily anchored to the Financial Years 2010, 2011 and 2012 and the matters addressed in Section 3 of the Auditor-General's Report. This finding *may* (not must) have implications for the range of documents falling outside this time period which can properly be sought[4].

38. Leave to seek judicial review of the Commission's decision to investigate BECL's dealings with the Department of Transport Control during the period covered by the Auditor-General's Report on Financial Years 2010, 2011 and 2012 is refused on the grounds that no arguable basis for challenging the decision has been established.

39. Leave is granted to challenge the validity of (a) the subpoena issued to BECL dated August 22, 2016, and (b) the related decision to recall the Applicant's corporate director to appear before the Commission to produce documents. Commissions of inquiry are a rare occurrence in Bermuda. The procedural challenges which have been made raise questions of public importance in an undeveloped area of Bermudian law.

40. Unless any party applies within 21 days by letter to the Registrar to be heard as to costs, the costs of the leave application shall be reserved.

Dated this 7th day of September, 2016 _____
IAN RC KAWALEY CJ

[4] It may also have implications, as I observed in the course of the hearing, for the COI's evinced intention of investigating the current Airport Project.