



CIVIL JURISDICTION

2006: No. 21

BETWEEN:

AUDITOR GENERAL

Plaintiff

-and-

THE BERMUDA HOUSING TRUST

Defendant

JUDGMENT

Date of Hearing: 4 January 2007

Date of Judgment: 12 January 2007

Mr. S. Froomkin QC of Mello Jones & Martin for the Plaintiff

Mr. K. Bean of Smith & Co for the Defendant

Representation

1. Although Mr. Bean of Smith & Co has acted throughout, he was not present when the matter came on for hearing on 4 January, and Mr. Froomkin, who appeared for the plaintiff ("the Auditor General"), understandably showed some diffidence at the prospect of the matter proceeding in Mr. Bean's absence. However, I took the view that the matter should proceed, and it is therefore appropriate for me to refer to the procedural history of the matter in this judgment in order to explain how it was that I came to that view.
2. These proceedings were issued almost a year ago, by way of originating summons, on 20 January 2006. After entry of appearance, counsel appeared before me on a directions hearing on 9 March 2006, at which time I made orders that the proceedings should continue as if begun by writ, that the affidavit of the Auditor General sworn in support of the originating summons should stand as a pleading, and that the defendant ("the Bermuda Housing Trust") should file a reply affidavit within 28 days. No such affidavit was filed, and eventually following correspondence between the parties and with the Registrar, the matter

was set down for hearing on 11 August 2006, with a hearing date in October. That date was vacated at Mr. Bean's request, and the matter was re-listed for 29 November 2006. One week before that proposed hearing date, Mr. Bean again sought an adjournment, although on this occasion he did not have the consent of Mr Froomkin for the Auditor General. In those circumstances I required counsel to attend before me, and the history of the matter was canvassed at a hearing which took place on 24 November 2006. In relation to the failure to file an affidavit in accordance with my previous direction, Mr. Bean indicated that he had taken the view that the issues in the case were matters of argument and that it was not necessary to file evidence. In the event, I indicated that there was no question of my allowing an adjournment for the purpose of instructing counsel overseas (as sought by Mr. Bean), since no steps had yet been taken in that regard, so that the involvement of overseas counsel at that stage would result in a substantial delay. However, I did indicate to Mr. Bean that if there was a need for him to seek a short adjournment, such an application would be dealt with on its merits. In the event, Mr. Bean did seek that short adjournment on 29 November 2006, and Mr. Froomkin did not object. So the matter was again adjourned, this time on the basis that Mr. Bean would file a skeleton argument on or before 4 December 2006. A full skeleton argument on behalf of the Bermuda Housing Trust was duly filed, and the hearing date of 4 January 2007 was set on 4 December 2006.

3. So it was against that background of two previous adjournments that I declined to adjourn the matter further. I took into account that the issues in the proceedings were matters of argument, in respect of which a full skeleton argument had been filed, which I had reviewed in detail shortly before the hearing.
4. There is one further matter in relation to the issue of representation on which I would comment. This is the fact that when Mr. Bean did not appear at the appointed hour, the court associate made enquiry from Smith & Co, the attorneys of record for the Bermuda Housing Trust, and was told that Mr. Bean had not returned to the office as expected some two days previously. In those circumstances, I would have expected some other attorney from Smith & Co to have been present when the case came on for hearing, to explain the position, and indeed, given that the issues before the Court are relatively straightforward, I would have expected that another attorney could have taken over conduct. It is Messrs. Smith & Co who are the attorneys of record for the Bermuda Housing Trust, not Mr. Bean.

The Proceedings

5. As indicated, these proceedings were taken by way of originating summons, in which the Auditor General sought declarations that:
 - (i) pursuant to the provisions of section 6 (1) of the Audit Act 1990 (“the Audit Act”) the Auditor General is required to audit the accounts of the Bermuda Housing Trust, and
 - (ii) the board of trustees of the Bermuda Housing Trust is “Government-controlled”, within the meaning of the Audit Act.

The Auditor

6. Pursuant to section 6 of the Audit Act, the Auditor General is charged with auditing, in every year, those accounts referred to in section 101 (2) of the Constitution, and also, by section 6 (1) (a) (ii) of the Audit Act “the accounts of every Government-controlled entity whose accounts are not referred to in section 101 (2) of the Constitution”.
7. The issue before the Court, therefore, is the very simple one of whether the Bermuda Housing Trust is a “Government-controlled entity” such that the provisions of section 6 of the Audit Act pertain so as to require the Auditor General to conduct an audit of the Bermuda Housing Trust every year.
8. The words “Government-controlled” are defined in section 2 (2) of the Audit Act in the following terms:

“An entity is Government-controlled for the purposes of this Act if the Government has the power -

- (a) by virtue of rights conferred by the constitution of that entity or by some other document regulating that or some other entity; or
- (b) by means of possession of voting power or holding of shares in or in relation to that first-mentioned entity; or
- (c) by some other means,

to secure that the affairs of that first-mentioned entity are conducted in accordance with the wishes of the Government.”

The Bermuda Housing Trust

9. The Bermuda Housing Trust was established pursuant to the provisions of the Bermuda Housing Trust Act 1965 (“the Bermuda Housing Trust Act”), and for the purpose of these proceedings, there are a number of provisions of that act which are relevant. First, there is the recital to the original act, which referred to the purpose of the act as being to provide low cost housing for the needy elderly, and to administer a scheme for that purpose. Next is section 2, and pursuant to subsections 2 and 4 of this section there is provision that the trustees of the Bermuda Housing Trust, including the chairman and the deputy chairman, shall be appointed by the Governor and shall hold office during the Governor’s pleasure. However, subsection 9 of the section provides that in the exercise of his powers under this section, the Governor shall act on the advice of the Minister for the time being responsible for housing.
10. The next section of the Bermuda Housing Trust Act which is relevant is section 7, which provides that:-

“the Trust shall keep proper accounts relating to the finances of the Trust and its activities which accounts shall be audited to the satisfaction of the Minister.”

Finally, sections 9 and 10 make provision for the Bermuda Housing Trust to have the benefit of public funds, in the form of the facilities of the Department of Works and Engineering being available free of charge (section 9) and the real and personal property of the Bermuda Housing Trust being exempt from tax of any kind (section 10).

11. So the issue which arises from the Bermuda Housing Trust Act is whether the provision that the Governor shall act on the advice of the Minister in relation to his appointment of the trustees is sufficient to bring the Bermuda Housing Trust within the definition of “Government-controlled” contained in the Audit Act.

The Arguments of Counsel

12. For the Auditor General, Mr. Froomkin submitted that the following factors are relevant to the issue before the Court:
- (i) that the preamble to the Bermuda Housing Trust Act and section 3 indicate that the Bermuda Housing Trust was set up to satisfy a public need, and public funds were appropriated for that purpose.

- (ii) that each of the trustees (including the chairman and deputy chairman) is appointed by the Governor who is required to act on the advice of the Minister responsible for housing
- (iii) that the Bermuda Housing Trust has the benefit of public funds, as referred to above, and pursuant to sections 9 and 10 of the Bermuda Housing Trust Act.
- (iv) that the Bermuda Housing Trust is listed as a statutory Government board in the Government notices.

In addition, Mr. Froomkin relied upon the definition of the words “Government-controlled” in section 2 of the Audit Act, and relied upon authorities to support his submission that the Bermuda Housing Trust falls within the statutory definition.

13. For the Bermuda Housing Trust, Mr. Bean in his skeleton argument conceded that the composition of the Bermuda Housing Trust was “determinable by the Government”, but drew a distinction between Government’s power to appoint and the exercise by the trustees of their authority once appointed. He submitted that there was no express power given to the Minister to secure that the affairs of the Bermuda Housing Trust were in fact conducted in accordance with Government’s wishes, and submitted that although the Minister could secure the removal of one or more of the trustees, he could not secure that they would do as he or the Government wished. Once appointed, he submitted, the trustees were not the Minister’s delegates, but acted in their own right. Specifically, Mr. Bean drew a distinction between the position of the trustees of the Bermuda Housing Trust, and other bodies to which the responsible Minister had statutory power to give directions.

14. Mr. Bean also submitted that section 101 of the Constitution circumscribed the entities to be audited by the Auditor General, and suggested that it would be ultra vires his constitutional mandate for the Auditor General to act as auditor of the Bermuda Housing Trust.

Findings

15. In relation to the definition of “Government-controlled” appearing in section 2 (2) of the Audit Act, Mr. Froomkin submitted that each of the three alternatives was relevant. Strictly, I would not have thought that the second of the three alternatives is relevant, insofar as there is no voting power or shareholding as such. However, it does seem to me that the right given to the Government, in the form of the Minister responsible for housing, to secure the appointment of such

trustees as it wishes, is very much akin to the control exercised by a shareholder in the election of a director to the board of directors of a company. Once elected, the director has a duty to act in the interests of the company, but the reality is that a shareholder owning the majority of shares in a company may achieve the election of directors of his choice, and thus, in practical terms, controls the affairs of the company. But I bear in mind that in this case the test for “Government-controlled” is that set out in section 2 of the Audit Act.

16. In regard to Mr. Bean’s argument that section 101 of the Constitution excludes the Auditor General acting as auditor of the Bermuda Housing Trust, my view is that section 101 of the Constitution is not restrictive, and the position is clearly governed by section 6 (1) (a) (ii) of the Audit Act. I do not regard this statutory provision as being inconsistent with the Constitution, insofar as it imposes a duty upon the Auditor General to audit the accounts of every Government-controlled entity whose accounts are not referred to in section 101 (2) of the Constitution.
17. The only provision of the Bermuda Housing Trust Act which seems on its face inconsistent with the position for which Mr. Froomkin contends is section 7, to which I have already referred. But on a proper consideration, it seems to me that there is no inconsistency between his position and section 7. This section appears likely to have been held over from the passing of the Bermuda Housing Trust Act in 1965, but in any event, my view is that this section can only govern the relations between the Bermuda Housing Trust and the Minister. The Auditor General has autonomy both under the Constitution and under section 18 of the Audit Act, so there can be no question of this section imposing any obligation or restriction on the Auditor General.
18. I did not find any of Mr. Froomkin’s authorities to be directly on point. At the end of the day, the exercise for the Court is to determine whether the provisions of section 2 of the Bermuda Housing Trust Act fall within the terms of section 2 of the Audit Act.
19. I do not accept Mr. Bean’s submission that because there is no express power given to the Minister to give directions to the trustees, or otherwise to control the exercise of their powers, it can then be said that Government does not have the power to secure that the affairs of the Bermuda Housing Trust are conducted in accordance with its wishes. The reality is that if the trustees do not act as the Government wishes, Government can secure their replacement.
20. In my view, that power of appointment falls within the meaning of the words “by some other means”. I am therefore satisfied that the provisions of section 2 of the

Bermuda Housing Trust Act do operate so as to give to the Government (acting through the Minister for the time being responsible for housing) the necessary level of control over the affairs of the Bermuda Housing Trust. It follows, in my view, that the Bermuda Housing Trust is “Government-controlled” within the definition of section 2 (2) of the Audit Act, and I so hold.

Conclusion

21. Hence I find that section 2 of the Bermuda Housing Trust Act, coupled with sections 2 and 6 of the Audit Act, operates so as to require the Auditor General to conduct an audit of the Bermuda Housing Trust on an annual basis. Accordingly, I grant the declarations sought.

Costs

22. I would expect that costs would follow the event in the usual way, but will hear counsel on costs if they so wish.

Dated the 12 January 2007.

Hon. Geoffrey R. Bell
Puisne Judge