



# In The Supreme Court of Bermuda

## CIVIL JURISDICTION

**2013: 239**

IN THE MATTER OF THE OFFICE OF THE BERMUDA OMBUDSMAN

AND IN THE MATTER OF AN APPLICATION TO CERTIFY THE OFFENCE OF  
CONTEMPT PURSUANT TO SECTION 25(2), OMBUDSMAN ACT 2004

AND IN THE MATTER OF THE CORPORATION OF HAMILTON

AND IN THE MATTER OF GRAEME OUTERBRIDGE

AND IN THE MATTER OF DONAL SMITH

## JUDGMENT

(In Court)<sup>1</sup>

Date of hearing: October 3, 2013

Date of Judgment: October 7, 2013

Mr. Nathaniel Turner and Ms. Michelle Ashton, Attride-Stirling & Woloniecki, for the Applicant  
Mr. Eugene Johnston and Mrs. Dawn Johnston, J<sup>2</sup> Chambers, for the Respondents

### Introductory

1. The origins of the present dispute, one suspects partially lie in a clash of strong personalities. Nevertheless, the Ombudsman's application to certify the Mayor and Deputy Mayor of the Corporation of Hamilton for contempt raises important points of

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<sup>1</sup> The Judgment was circulated without a formal hearing in order to save costs.

statutory interpretation in relation to the Ombudsman Act, 2004 (“the Act”). The application arises out of an investigation commenced by the Ombudsman of her own motion, on or about March 19, 2013, into the adequacy (in terms of, *inter alia*, transparency and public consultation) of the processes followed by the Corporation in granting a lease for its Hamilton Waterfront project. Since then the Respondents have each been interviewed at least once and the Corporation (which did not formally appear) has enabled the Ombudsman to obtain copies of various documents.

2. Most narrowly, the application requires the Court to determine whether the Respondents’ failure to respond to summonses requiring them to attend the Ombudsman’s office to be interviewed infringed section 25 of the Act (“Obstruction and contempt”). The Applicant has certified the offence of contempt rather than obstruction in the present case. This section requires proof that, without lawful excuse, the Respondents either:
  - (a) obstructed the Ombudsman in the performance of her functions under the Act;
  - (b) was guilty of an act or omission which, if the investigation was a court proceeding, would constitute a contempt of court.
3. More broadly, however, the contending positions require the Court to consider the scope of the Ombudsman’s investigative discretion in relation to permitting the subject of an investigation to have a lawyer present during an interview in circumstances where:
  - (a) she is subject to a positive statutory duty to comply with the rules of natural justice (section 12(2)(a)); and
  - (b) the Respondents have no positive statutory right to legal representation during an investigation, except in the specific context of being afforded an opportunity to respond to an adverse statement which may be included in a recommendation or report (section 17(2)).

## **Factual findings**

### **Contempt/obstruction**

4. The central facts are not in dispute. On July 23, 2013, the Ombudsman issued Summonses requiring the Respondents to appear before her at 10.00 am the following day. The Summonses had what amounted to penal notices engrossed on them, providing:

*“NOTE that section 25 of the Act provides that it is an offence to: (a) obstruct the Ombudsman in the performance of her functions under the Act; or (b) do any act or make any omission in relation to any investigation under the Act which, if that investigation were a proceeding in the Court, would constitute the offence of contempt of Court.”*

5. The Ombudsman deposed that the date and time were agreed with each Respondent. The Deputy Mayor filed no evidence at all in opposition to the application. The Mayor’s Affidavit (filed in breach of this Court’s directions Order and too late for the Ombudsman to respond to) contained the assertion that the appointment was unilaterally fixed by her. I find that the date and time was agreed with the Deputy Mayor, but make no finding as to the precise basis on which the Mayor’s appointment was agreed.
6. What is more relevant than any agreement is the self-evident fact that the Respondents, the Corporation’s two most senior executives, were given very short notice indeed of being under legal compulsion to attend an interview. They had not been recalcitrant or obstructive for months. The Deputy Mayor when contacted in the second week July, by the Ombudsman’s own account, agreed a second interview date but rescheduled twice. The Mayor himself was interviewed for a second time on July 12, 2013. The main logistical problem apparently faced by the Ombudsman which prompted her decision to issue the Summonses was that the elusiveness of the interviews threatened to undermine her legitimate aim of completing her Report within a reasonable time. The Mayor was going to be unavailable throughout August.
7. Be that as it may, the Respondents failed to comply with the Summonses. The Mayor deposes that he failed to attend because he *“chose not to attend any further meetings until the attorneys had the opportunity to write to the Ombudsman and raise the issues that concerned”* both the Respondents and others at the Corporation (First Outerbridge Affidavit, paragraph 6). After the scheduled time for attending on July 24, 2013 but later that same day, the Respondents’ attorneys wrote the Ombudsman explaining the failure to attend and seeking to justify on the grounds that:
  - (a) the validity of the investigation was under challenge; and
  - (b) the Respondents were entitled to have legal representation at the interviews (notwithstanding the Ombudsman prior indication that this right was not accepted by her).
8. Assuming no valid lawful excuse for ignoring the Summonses arose on these facts, this was a very technical contempt indeed. Had the Respondents attended for interview and

declined to answer any questions until they had an opportunity to instruct counsel to make representations on their behalf, no question of contempt would likely have arisen. The Respondents did not ignore the Summonses altogether; they were served very late, and their attorneys wrote the Ombudsman on the date fixed for attendance raising legal arguments to explain their non-attendance.

9. Mr. Johnston invited the Court to infer from the evidence that the Respondents must have been advised by him, in effect, that they need not attend. This inference does not seem justified for two reasons. Firstly, the 1<sup>st</sup> Respondent does not depose that this is what occurred when describing why he did not appear. Secondly, it seems inherently improbable that his attorney would have given such obviously flawed legal advice.
10. Mr. Turner submitted that the Respondents bore the burden of proving the existence of a lawful excuse. I reject this submission. This common law rule of statutory construction in relation to the burden of proving exceptions and qualifications in criminal offences is in my judgment displaced under Bermudian law by the constitutional presumption of innocence under section 6 (2)(a) of the Constitution.
11. Nevertheless, I am satisfied so as to feel sure that the Respondents failed to comply with the Summonses requiring them to attend to be interviewed on July 24, 2013 and in purely evidential terms they have raised no reasonable doubts about the possible existence of any lawful excuse for such failure.

### **Legal representation**

12. It was essentially common ground that the Ombudsman adopted a policy position communicated to the Respondents at an early stage of the investigation that the interviewees could not be represented during the interview process before their express statutory right to such representation was engaged. This position was first formally challenged and communicated to the Ombudsman after the Summonses were issued and the time for appearing had passed. However, the Respondents' attorneys advanced no practical substantive reasons why, in the particular circumstances of the present case, legal representation was required at the interview stage to comply with the rules of natural justice.
13. It is quite understandable that attorneys probably instructed in haste seeking to mitigate the Respondents' non-compliance with the Summonses would be unable to do more than stitch together the bare bones of a legal argument. It was asserted in the July 24, 2013 letter that the validity of the investigation itself needed to be reviewed. However, nearly 2 ½ months later, the invalidity of the investigation argument has not been pursued. Nor

has the factual case for legal representation been developed to any meaningful extent either. From the First Affidavit of Mr Outerbridge, the desire for legal representation appears to be based on the following hodgepodge of factors:

- (a) The Ombudsman's position that the Respondents could not have representation at that stage was "*unsatisfactory*" (paragraph 5);
- (b) the nature of the questions "*seemed inappropriate and more like an interrogation than an inquisitorial investigation*" (paragraph 5);
- (c) an unsubstantiated belief that "*the Ombudsman made her conclusions prior to commencing the investigation and embarked on treating the CoH as 'criminals' without any evidence to justify such a view*" ( paragraph 8).

14. These highly emotive remarks suggest a deep-seated hostility to the very idea of the investigation and a failure to fully comprehend the character and purpose of the Ombudsman's role. Such hostility may well have reduced the prospects of the investigation being carried out in a cordial and mutually respectful manner. There was no direct evidence of any specific issues raised by the interview process prior to July 24, 2013 which gave rise to a positive need for legal representation. One can only infer from this, and the way the Respondents legally advanced their case, that no recognised grounds for legal representation presently exist. Because the Ombudsman has not yet reached the stage of revealing to the Respondents any specific adverse comments which she is contemplating including in her Report.
15. On the other hand, it is equally clear that the Mayor was genuinely anxious about the legal propriety of the questions he was likely to face in circumstances where he and the Deputy Mayor were possibly involved as subjects of an Ombudsman's investigation for the first time. The Office of the Ombudsman in Bermuda is still a comparatively new one and the number of persons in Bermuda, be they public officials or ordinary citizens who have an instinctive appreciation for the principles underlying the review of administrative action is probably comparatively small.
16. Bermuda's formal constitutional adoption of democratic governance in 1968 was merely a legal and political step into modernity; the Ombudsman Act, designed to facilitate practical good governance in modern real world terms, is still an infant less than ten years old. Against this background the idea of an investigation into whether the processes deployed by the Corporation in granting a lease conformed to best good governance standards in terms of, inter alia, requirements of transparency and public consultation might be viewed, understandably, as revolutionary in public policy terms.

17. In these circumstances, I have no reason to doubt that the Respondents' desire to involve legal counsel was motivated by the genuine goal of protecting the interests of the Corporation (as well as their individual positions as officers of the Corporation) and not delaying the investigation by raising spurious arguments.

### **Legal findings**

#### **Did the Respondents have a statutory right to legal representation at the interview stage?**

18. It is clear beyond serious argument that the Respondents only express statutory right to legal representation arises under section 17 of the Act, which provides as follows:

***“Adverse comment***

*17 (1) The Ombudsman shall not —*

*(a) in any recommendation given under section 15(3); or*

*(b) in any report made under section 24,*

*make any statement that is adverse to any authority or person unless that person has been given an opportunity to be heard.*

*(2) A person to whom subsection (1) applies may be represented at the hearing by a barrister and attorney or any other person.*

*(3) In this section, "barrister and attorney" means a person admitted and enrolled as a barrister and attorney under section 51 of the Supreme Court Act 1905.”*

19. There is a right to be heard and to have legal representation when the Ombudsman has decided to make a recommendation based on a finding of maladministration under section 15(3) at the conclusion of the investigation. Corresponding rights exist where the Ombudsman proposes to make an adverse comment about an authority or person in a report to the House of Assembly. Mr. Johnston sought to extract a further right to legal representation at the investigation stage merely because section 12 of the Act provides as follows:

*“(2) When conducting an investigation, the Ombudsman —*

*(a) shall not be bound by the rules of evidence but shall comply with the rules of natural justice...”*

20. That argument is unsustainable. In the investigative context generally, as well as in the specific context of the Act itself, the mere fact that the rules of natural justice are engaged

does not without more signify that a right to legal representation exists. Section 12 must be read as a whole, as Mr. Turner correctly submitted. Two provisions within section 12 itself, putting aside the crucial section 17, in my judgment further undermine the Respondents' counsel's argument:

(a) Section 12(3)-(4) provides as follows:

*“(3) If, during the course of an investigation or thereafter, the Ombudsman is of the opinion that there is evidence of any breach of duty or misconduct on the part of any officer or employee of any authority, or of an offence, he shall refer the matter to an appropriate authority for further consideration.*

*“(4) Where the Ombudsman makes a reference to an appropriate authority under subsection (3), proceedings under this Act with respect to any investigation are stayed pending consideration of the matter by the appropriate authority.”;*

(b) Subsection (5) of section 12 provides as follows:

*“(5) Subject to the provisions of this Act, the Ombudsman may regulate investigations and proceedings under this Act in such manner as he sees fit.”*

21. Mr. Turner also referred to the string confidentiality provisions found in sections 20 and 21 of the Act.
22. Having regard to the scheme of the Act, therefore, there is no proper basis on which the Ombudsman can make findings of a breach of duty or misconduct in her report. If she finds any such evidence, she must refer it to some other authority and suspend her own investigation. The Respondents' apparent fears that such findings may be made, and that fairness requires them to be legally represented to ward off such threats, are legally misconceived. The express power conferred on the Ombudsman to regulate investigations as she sees fit (subject to the terms of the Act) is incompatible with the idea of interviewees having an implied right to legal representation at the interview stage.
23. The main jurisdictional function of the Ombudsman is to investigate maladministration on behalf of a public authority (section 5). And section 17 expressly provides that no adverse comment may be made about an authority at the end of an investigation without affording the subject of the investigation an opportunity to be heard through a legal representative at this stage.

24. Moreover, at common law as the Ombudsman’s counsel pointed out, there is no general right to legal representation even when appearing before an adjudicative tribunal: ‘*de Smith’s Judicial Review*’, 7<sup>th</sup> Edition, paragraph 7-04.

**Does the Ombudsman possess a statutory discretion to permit access to legal counsel at the investigative phase?**

25. I find that the Ombudsman is subject to an implied duty to consider whether the rules of natural justice require, in any particular case, the subject of an investigation to be afforded access to legal representation at any relevant stage of that process before the rights under section 17(2) of the Act are engaged. The rules of natural justice are far too fluid to permit any inflexible policy to exclude access to legal advice in all cases even though the statutory context may justify the practical view that the need for counsel will only arise in exceptional cases at the investigative phase. The following provisions of the Act point to one general factual area in which legal issues may arise at the investigative stage:

***“Protection and privileges of witnesses***

*14 (1) Every person shall have the same privileges in relation to the giving of information to the Ombudsman, the answering of questions put by the Ombudsman, and the production of documents and things to the Ombudsman, as witnesses have in the Court.”*

26. The Ombudsman’s counsel placed various authorities before the Court which support the need for this flexible approach. Most eloquent is the following *dictum* of Lord Denning in *Selvarajan-v-Race Relations Board* [1976] 1 All ER 12 at page 19, cited with approval by the Supreme Court of Canada (Estey, J) in *Irvine-v-Canada (Restrictive Trade Practices Commission)* [1987]1 S.C.R. 181 at 217:

*“In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. [Emphasis added.]”*



27. In the present case, there is no evidence whatsoever that the Respondents have identified (let alone advanced) any legally tenable basis for contending that fairness requires that they be entitled to involve legal counsel in any further interview sessions.

**The Ombudsman’s summoning powers and the contempt jurisdiction of this Court**

28. Section 13 of the Act provides in material regards as follows:

***“Evidence***

*13 (1) Subject to this Act, for the purposes of an investigation the Ombudsman –*

*(a) may require any officer or member of the authority that is the subject of the investigation, the complainant or any other person who is in his opinion able to provide information or produce documents relevant to the investigation to give such information or produce such documents; and*

*(b) may summon before him and examine on oath or affirmation any person referred to in paragraph (a).*

*(2) For the purposes of such investigation, the Ombudsman shall have the same powers as the Court in so far as those powers relate to the attendance and examination of persons (including the administration of oaths or affirmations) and in respect of the production of documents.”*

29. The Summonses issued by the Ombudsman in the present case were, accordingly, the equivalent of a summons or other order issued by this Court. The Summonses are more akin to a Court order because they were actually signed by the Ombudsman herself as opposed to being issued administratively like a writ or summons. Section 25 of the Act provides as follows:

***“Obstruction and contempt***

*25 (1) If any person without lawful excuse –*

*(a) obstructs the Ombudsman in the performance of his functions under this Act;  
or*

*(b) does any act or makes any omission in relation to an inquiry or investigation under this Act which, if that inquiry or investigation were a proceeding in the Court, would constitute the offence of contempt of Court,*

*that person commits the offence of contempt under this Act.*

*(2) Where a person commits an offence under subsection (1), the Ombudsman may certify the offence to the Court.*

*(3) Where an offence is certified under subsection (2), the Court may inquire into the matter.*

*(4) After hearing any witnesses who may be produced against or on behalf of the person charged with the offence, and after hearing any statement that may be offered in defence, the Court may deal with him in any manner in which the Court could deal with him if he had committed the like offence in relation to the Court.”*

30. The Ombudsman has certified the offence of contempt, not obstruction, in the present case. Failure to comply with a Court order is punishable as a contempt of court under section 5 of the Administration of Justice (Prerogative Writs) Act 1978. The combined effect of sections 13 and 25 of the Act is that the Respondents’ failure without lawful excuse to comply with the Summonses issued by the Ombudsman constitutes a contempt of court punishable by this Court.
31. What constitutes a lawful excuse? The range of factual matters which the Court may recognise as constituting a lawful excuse is infinite. But, deciding not to attend is clearly not one of them. The most obvious examples would all be based on inability to attend due to, for instance, being abroad or incapacitated in some way, or of course not being given any or sufficient notice of the hearing. The mere fact that the Summons compels attendance at an inconvenient time or place or, as here, the interviewees wish to obtain legal advice, in my judgment cannot constitute a lawful excuse for failing to comply with an Ombudsman’s Summons.

**Conclusion: consequential relief-provisional views**

32. At the end of the hearing there was insufficient time to hear counsel on consequential relief. I indicated that I would set out my provisional views in my decision and then hear counsel if required.
33. My provisional view is that no question of any penalty for a purely technical contempt properly arises in all the circumstances of the present case over and above the usual indemnity costs order. The contempt occurred because the Respondents, who had been doing their best to cooperate with an investigation they did not truly welcome, most likely because they were heavily committed to matters which they considered to be far more important, allowed their personal irritation to get the better of their judgment. In the result, they have effectively compelled the Ombudsman to issue the present proceedings to prove an ultimately obvious legal point. When the Ombudsman issues a summons, it

has the same legal force as a court order, and cannot be ignored by the summoned parties at their own whim.

34. It seems likely, although this observation is admittedly somewhat speculative, that the Respondents' inclination to cooperate was undermined in part by the novel nature of the Ombudsman's investigation in local administrative law terms combined with the fact that the Respondents had comparatively recently assumed their current public offices. The Ombudsman deposed to three previous investigations of the Corporation when it was under the control of a different administration, all of which involved far more pedestrian concerns however<sup>2</sup>.
35. In addition, even assuming that both the Mayor and the Deputy Mayor had agreed the appointment dates with the Ombudsman, they were given very short notice that they were legally obliged to attend the interviews in question. This is an additional mitigating factor.
36. Be that as it may, the evidence clearly paints the following scene. The Respondents cooperated at best in a half-hearted manner with the investigation. The Ombudsman, in turn, dealt with the Respondents in a far more formal and punctilious manner than might usually have been the case had she, and the subjects of the investigation, established genuinely cordial lines of communication. If a pot of "angst" soup was simmering in the lead up to July 23, 2013, it came to a boil on that date when the Summonses were issued.
37. The Court can, if required, surely grant a formal declaration that:
  - (a) The Respondents' failure to appear before the Ombudsman on July 24, 2013 in response to the July 23, 2013 Summonses constituted a contempt; and
  - (b) The Respondents have no entitlement to legal representation as of right at the investigation stage.
38. Having regard to the history of the investigation and the provisions in particular of section 12(5) of the Act, however, it is a matter for the Ombudsman and not this Court to determine the further course of the investigation. Nevertheless, Mr. Johnston must be given credit for raising, in the course of argument, one valid practical legal point which is supported by the above-quoted passage from *Irvine-v-Canada (Restrictive Trade Practices Commission)* [1987]1 S.C.R. 181 at 217<sup>3</sup>. Where the Ombudsman wishes to

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<sup>2</sup> I take judicial notice of the fact that the Ombudsman has conducted high level investigations in different areas, most notably in relation to Special Development Orders.

<sup>3</sup> See paragraph 26 above.

interview someone, great flexibility exists in terms of how the ‘interview’ is conducted. It need not be face to face. She could submit written interrogatories. She could conduct the interview by phone or via Skype. The choice of investigative tools would logically be dictated by the means most likely to produce the best quality information production results, having regard to the nature of the enquiry and taking into account so far as is possible the Respondents’ work commitments.

39. The same flexible approach applies to a request for legal representation. The Ombudsman’s discretion in this regard is very broad. She will no doubt take into account whether the involvement of legal counsel is likely to impede the expeditious conclusion of the investigation by exacerbating existing scheduling problems by adding another piece to the diary puzzle. Equally, the Ombudsman will doubtless consider whether the involvement of a lawyer might, on the other hand, make the final interview process more fruitful through reducing the anxiety level of the interviewees<sup>4</sup>.
40. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs and/ or any other consequential matters arising from the present judgment, the costs of the present application are awarded to the Applicant to be taxed if not agreed on an indemnity basis.

Dated this 7<sup>th</sup> day of October, 2013

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IAN R.C. KAWALEY CJ

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<sup>4</sup> My own pre-hearing research revealed that the Victorian Ombudsman (Australia) as a matter of practice permits legal representation at the investigation stage unless there was good reason to exclude the adviser. Having subsequently perused section 18C of the Ombudsman Act 1973, however, it is clear that this ‘practice’ merely reflects the statutory position in Victoria.