Neutral Citation Number: [2022] CA (Bda) 9 Civ

Case No: Civ/2021/18

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL COMMERCIAL JURISDICTION
THE HON. MR JUSTICE MUSSENDEN
CASE NUMBER 2020: No. AA348

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 28/04/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL
JUSTICE OF APPEAL ANTHONY SMELLIE

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Between:

RELIANCE GLOBALCOM LIMITED

Appellant

- and -

MINISTER OF FINANCE

Respondents

Mr. David Kessaram of Cox Hallett Wilkinson Limited for the Appellant
Mr. Jeffery Elkinson of Conyers Dill and Pearman Limited for the Respondent

Hearing date(s): On the Papers

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APPROVED RULING ON COSTS

CLARKE P:

1. By our judgment dated 18 March 2022 we allowed the appeal and ordered that, subject to any submissions in writing to be made within 14 days, the Appellant ("RGL") should have its costs of the appeal and of the application for leave to review and of the review carried out by Mussenden J. We have received submissions from the Respondent ("the MoF") to the effect that we should make a different order and from RGL to the effect that we should make the order that we conditionally made. This is our ruling in the light of those submissions

2. The MoF submits that there were two issues, which were distinct: non-disclosure and the relevance of the information sought. The MoF succeeded on the issue of non-disclosure upon which more emphasis had been placed by RGL from the outset and, in particular before Mussenden J, and in three of the five grounds of appeal. In those circumstances we should either order that the MoF should have its costs on the issue on which it did succeed, namely that there was no non-disclosure, or that each party should bear its own costs, each having prevailed on one of the two issues before the court. The MoF's submission does not make clear what order it is suggested that we should make in respect of RGL's costs of the application for leave to review and of the review itself

3. For its part, RGL contends that, in relation to non-disclosure there were two issues: (i) whether there was a duty of full and frank disclosure owed by the MoF to the Court on *ex parte* applications for a production order; and (ii) if so, whether the MoF was in breach of its duty of disclosure in this case. The position of the MoF right up to the hearing of the appeal was that there was no such duty and that, if there was, the MoF complied with it.

4. It was not until the hearing of the appeal that the MoF conceded that there was a duty of full and frank discourse owed by it on *ex parte* applications for production orders. In its written submissions both on appeal and before Mussenden J the application to the Court for a production order was described as an "*administrative process*".

5. Further, it is not correct to say that the MoF was wholly successful on the question as to whether there had been non-disclosure. In paragraph [31] ff of our judgment we said this:

> *"[30] There was before this Court <u>on the appeal</u> and could properly have been, no dispute as to the existence of the duty of disclosure. That the duty exists in Bermuda in relation to applications under the Act and is of a nature similar to that which arises when one is making an ex parte application for an injunction, must now be regarded as settled. It is the subject of a number of pronouncements by the Supreme Court and was most recently explained by this Court in Minister of Finance v AP, Civil Appeal Ap of 2016, Judgment delivered 25 November 2016, per Bell JA, in these clear terms at [15]:*
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> > *"Mr Elkinson [who along with Mr Kessaram seem habitually to appear on behalf of one side or the other in matters involving the Act] urged that the equitable principles were not applicable to applications of this nature. But the principles governing ex parte applications, both in terms of those governing the right to have access to the evidence presented to the judge, and those governing the obligation to give full disclosure of all material facts, are common law principles, and apply to ex parte applications whether made, as here, under the provision of the 2005 Act, or in the context of seeking*

equitable relief, such as when an application for a Mareva injunction is made."

[31] That being the nature of the duty of disclosure, the Minister was indeed obliged to have done more than simply put the evidence before the Chief Justice on the ex parte application. He was obliged, at the very least, to draw to the Court's attention and explain in clear terms that the same Request dated 10 December 2018 from the Government of India which would form the basis for the PO, had also been the basis for the 2019 Production Order which the Minister had discontinued and why the Minister was returning to Court by reliance upon it approximately a year later and despite being on notice of the expiry of the limitation period4.

[32] However, it must be recognised that the breach of the duty was ameliorated in this case, by the fact that the evidence of the history was also placed before Justice Mussenden, both when the matter came before him pursuant to section 5 (6B) of the Act for the grant of leave to apply for review (which he granted in limited terms by ruling dated 26 January 2021) and when the matter actually came for review resulting in the Judgment of 10 November 2021. All of the aforementioned affidavit evidence was brought to his attention and expressly considered by him in the context of both of those contested inter partes hearings.

[33] Moreover, in this regard, it must be recognised that in conducting his review of the matter, Mussenden J was not engaged in an exercise as if considering simply whether or not the Chief Justice had had the relevant evidence brought to his attention, but was himself engaged by way of reconsideration or rehearing de novo, upon an assessment of whether or not the PO should be granted. In that way he was able, having regard to the evidence as to the conformity of the Request with the Act and the TIEA, to decide whether to affirm the PO or not…
[Underlining added]

6. In essence, the MoF was not successful in showing either that there was no duty of disclosure or that there had been no breach of it. Moreover – and we regard this as the major consideration - RGL has succeeded, against the opposition of the MoF, in obtaining all the relief which it sought, and setting aside the production order that was made. The result in real life – to use the phraseology of Lightman J in *BCCI v Ali (No 4)* [1999] NLJ 1734, approved by this Court in *First Atlantic Commerce Ltd V Bank of Bermuda* [2009] Bda L.R 18 – is that it was RGL which succeeded. That does not mean that the court is bound to give RGL all of its costs. At the same time the fact that a successful party has not succeeded on every issue does not require the making of a reduction in respect of the costs recoverable.

7. In the present case we are not persuaded that the fact that the MoF may well have been successful in resisting the appeal if the only question was whether relief should be refused on the ground of its breach of duty (a matter which we did not find it necessary to decide), should mean that RGL's recovery of costs should be reduced. In our view the just result is that RGL should recover all its costs in securing the setting aside of the production order which was wrongly made against it on account of the crucial deficiency of the Request referred to in the judgment,

8. Accordingly, we remain of the view that RGL, the Appellant, should have its costs of the appeal, and of the application for leave to review and of the review carried out by Mussenden J, and we so order.