The Court of Appeal for Bermuda

CIVIL APPEAL No 22 of 2015

Between:

THE ALLIED TRUST &

ALLIED DEVELOPMENT PARTNERS LTD

Appellants

-v-

THE ATTORNEY GENERAL &

THE MINISTER OF HOME AFFAIRS

Respondents

Before: **Baker, President**
Kay, JA

Appearances: Mr. Eugene Johnston, J2 Chambers, for the Appellants
Mr. Richard Ambrosio, Attorney General Chambers, for the 1st Respondent
Ms. Jennifer Haworth, MJM ltd, for the 2nd Respondent

Date of Hearing & Decision: **4 March 2016**

Date of Reasons: **18 March 2016**

REASONS

Security for costs-appeal from Registrar-impact of security for costs order on right to a fair trial-Bermuda Constitution s.6-relevance of constitutional character of proceedings-need for evidence of impecuniosity

PRESIDENT

Introduction

1. These are the reasons for dismissing the appellants' appeal against a security for costs Order made by Acting Registrar Miller on 4 February 2016.

Background

2. In late 2012 the appellants entered into various agreements with the Corporation of Hamilton ("the Corporation") in relation to the development of the Hamilton Waterfront. Under a Cooperation Agreement dated 31 October 2012, the second appellant became exclusive development partner. A Development Agreement dated 21 December 2012 between the Corporation and the two appellants contemplated the grant of a lease. On 21 December 2012 the Corporation granted a 262 year lease to the first appellant under an agreement in which the second appellant joined as developer.

3. It is what happened next that upset the appellants and led to the present litigation. The Municipalities Amendment Act 2013 ("the 2013 Act") came into force in October 2013 and Section 14 gave the legislature power to reject any agreement entered into by the Corporation after 1 January 2012. On 7 March 2014 the legislature did just that, rejecting the agreement between the Corporation and the appellants. Then came the Municipalities Amendment Act 2014 ("the 2014 Act") which by Section 14(A) provided that any rejected agreements were void.

4. Section 14 of the 2013 Act provides a mechanism for any person "interested in land" which is the subject of an agreement rejected under the statute to apply for compensation. In March 2014 the appellants made such a claim to the second respondent ("the Minister") and on 5 May 2014 they made a formal demand for and commenced statutory arbitration proceedings as provided in the legislation. Arbitrators were appointed and the arbitration pleadings closed in December 2014. Then on 11 February 2015, the appellants issued an originating summons claiming, inter alia, that the legislation did not have the effect of voiding the agreements or, if it did, it was of no legal effect because it violated the appellants constitutional and common law rights of property. Alternatively there was a claim to at least US$ 90,000,000.

The Hearing Before the Chief Justice

5. In March 2015, the respondents sought to strike out the appellants' summons as an abuse of process for essentially two reasons (1) that the appellants should be bound by their election, having gone down the statutory compensation route and (2) that the relief sought was contrary to the public interest as it cast doubt over the title to the property which was an important national asset due to be used in the first event of the America's Cup.

6. In summary, Kawaley CJ struck out the application to the extent that the appellants could no longer challenge the validity of the voiding of the agreements but they could seek constitutional relief with a view to obtaining adequate compensation. However, that relief could only be provided on the basis that, having exhausted their remedies under the 2013 Act for statutory compensation, there was a shortfall against constitutional relief.

7. Kawaley CJ granted leave of appeal and the appeal is listed to be heard on 30 and 31 May 2016. On 4 February 2016, Acting Registrar Miller made an Order for security for costs against the appellants to be paid into court by 4 March 2016 of US$ 150,000. That security has not been paid. Nor has the cost of preparing the record (see Order 2 Rule 9) albeit Mr Johnston, for the appellants, assured us this sum would be paid by close of business on 4 March 2016.

The Security for Costs Appeal

8. The thrust of Mr. Johnston's submissions was that this is a constitutional case. Constitutional cases are of the highest importance and no security should be ordered. Alternatively, any security should be modest. His clients were not in a position to pay any security or any more than a very modest amount. The Court should not make an order that would prevent a very important point of public law being litigated.

9. At the commencement of the appeal we asked counsel whether an appeal from the Acting Registrar against a security for costs order was by way of review or

rehearing. Neither cited any authority nor made any submissions although Ms. Haworth for the 2nd respondent suggested it was the former. We proceeded on the basis that strictly it was by review but gave some flexibility as to the submission of additional material. In the event it makes no difference to the result of the appeal.

10. The appellants filed no evidence before the Acting Registrar and Mr. Johnston appears to have put his case on the basis that security should be modest rather than no order made at all. We have seen a transcript of the proceedings before the Acting Registrar and at one point (page 10) Mr. Johnston said:

> "I'm not saying we have no money. I'm saying some six figures and $400,000 is derisory and it's going to kill us. We'd be dead in the water. And a constitutional complaint with such importance will not be heard and is not likely to come back again."

11. Ms. Haworth's argument was that the security should be $400,000, the costs owed by the appellants were, albeit not yet taxed or agreed, very considerable and some had been ordered on an indemnity basis and it was quite wrong if the appellants lost their appeal that the public should be left with an irrecoverable bill.

12. Mr. Johnston developed his argument before us on the lines that a requirement to pay security for costs engages section 6 of the Constitution. He cited *Tolstoy Miloslavsky v The United Kingdom* [1995] ECHR 25 Para 59:

> "The Court reiterates that the right of access to the courts secured by Article 6 para. 1 (art. 6-1) may be subject to limitations in the form of regulations by the State. In this respect the State enjoys a certain margin of appreciation. However, the Court must be satisfied, firstly, that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Secondly, a restriction must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be achieved (see, for instance, the *Fayed v. the United Kingdom* judgment of 21 September 1994, Series A no. 294-B, pp. 49-50, para. 65)."

13. But the Court added at Para 61:

> "The Court considers that the security for costs order clearly pursued a legitimate aim, namely to protect Lord Aldington from being faced with an irrecoverable bill for legal costs if the applicant were unsuccessful in the appeal. This was not disputed."

14. He also referred to *Nasser v United Bank of Kuwait* [2002] 1 WLR 1868, pointing out that the same test applied for security for cost appeals. He said that the rules do not make it mandatory for the Court to order security. In every case there is a discretion and the Court has to conduct a balancing exercise. He relied on the limit of $12,000 in respect of appeals to the Privy Council in Section 4 of the Appeals Act 1911 as being relevant to the amount of security the Court should order on an appeal to the Court of Appeal.

15. The fundamental difference between the way Mr. Johnston argued the case before us and before the Acting Registrar was that before us he contended that because of the constitutional importance of the case no security should be ordered at all. I think the fundamental constitutional issue can be defined as follows: whether the State can legislate to nullify retrospectively an agreement or agreements between a public body and an individual or individuals. Important as this issue may be, it does not seem to me to affect anyone other than the parties in the present case. As Sir Maurice Kay put in argument: who else would have standing to join in the proceedings? The fact that the constitutional issue has no direct input on anyone other than the parties to the present litigation to my mind means that it adds nothing to applying the ordinary principles for deciding whether to order security. Ms. Haworth also made the point that we are only here because of the decisions of the appellants. In particular that they chose first to go down the arbitration route.

16. It was suggested on behalf of the appellants that they were bound to receive compensation in the statutory arbitration and that this would more than cover any costs owed to the respondents. This was not accepted by the respondents, Ms. Haworth pointing out that it was still very much a live issue whether either

appellant is entitled to compensation, the point turning on whether they qualified as "any person interested in land which is the subject of an agreement……" In any event Ms. Haworth submits it is highly presumptive that the costs will be less than any compensation.

17. In my judgment the crucial flaw in Mr. Johnston's argument is that there was no evidence before the Acting Registrar and little, if any, evidence before us of the appellants' inability to find security. I accept Ms. Haworth's submission that it is insufficient simply to state impecuniosity, it is necessary to provide the Court with full and complete disclosure of evidence of this. As Mance LJ pointed out in *Nasser* at para 32 it is well established that it was for an appellant to show not only that he could not raise the money from his own resources but also (the onus was on him on this issue too) that he could not raise the money from other sources e.g. friends or supporters. See *Al-Koronky and Anor v Time-Life Entertainment Group Ltd and Anor* [2006] EWCA Civ 1123.

18. No information is provided as to the identity of those who have funded the litigation thus far or why they are not prepared to continue. It is said that the first appellant is the only person appealing with a bank account and it has less than $300 in it. This seems to me to suggest that if the appeal continues without security there is a very high risk that if the respondents succeed on the appeal and they succeeded below on the basis (see para 74 of the Chief Justice's judgment) that it was "plain and obvious that the delay in bringing the proceedings to challenge the voiding of the agreement was an abuse of process…." they will be left with a very substantial bill for the costs of both sides.

Conclusion

19. The constitutional issue arising in this case is not such as to take the case outside the ordinary principles of deciding whether to order security for costs and if so in what amount. The Court has to balance the interest of not depriving a litigant of access to the Court on the one hand with that of leaving a winning litigant with an irrecoverable bill of costs on the other. I do not regard the reference to $12,000 in

section 4 of the Appeals Act 1911 as either helpful or relevant to this issue in the present case. The appellants have failed to discharge the burden of impecuniosity as described by Mance LJ as he then was in *Nasser*. I cannot fault the conclusion of the Acting Registrar Miller to order security of $150,000 and nothing in the fresh material put before the Court causes me to take a different view now.

20. We ordered the security to be paid by 31 March 2016 and directed that if it is not so paid the appeal would stand dismissed.

Signed

Baker, P

I agree *Signed*

Kay, JA