In The Supreme Court of Bermuda

CIVIL JURISDICTION
2022: No. 178

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER ORDER 53, RULE 3 OF THE RULES OF THE SUPREME COURT 1985

BETWEEN:

ROBERT G. G. MOULDER

Applicant

-and-

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondent

Before: Assistant Justice David Hugh Southey KC

Appearances: Mr Robert G. G. Moulder, Applicant in Person and Ms Judith Chambers, McKenzie Friend

Mr Delroy Duncan KC and Mr Ryan Hawthorne for the Respondent

Date of Hearing: 18 October 2022

Date of Judgment: 21 October 2022

RULING

Costs of vacated hearing – Costs of applications for a stay and disclosure – Extent to which costs should be assessed on indemnity basis.

SOUTHEY AJ:

Introduction

1. The circumstances that have led to this judgment are set out below. In essence, the Respondent in this application for judicial review seeks indemnity costs that resulted from:
   a. A vacated hearing listed for 17 and 18 October 2022.
   b. A failed application for disclosure.
   c. A failed application for a stay.

2. I thank Mr Moulder, who appeared as a litigant in person, and Mr Delroy Duncan KC and Mr Ryan Hawthorne, who represented the Commission of Inquiry, for their assistance.

Factual background

3. In a reserved judgment delivered on 5 August 2022 ("the Judgment"), I ordered a rolled-up hearing in relation to this application to judicial review. The Judgment should be read with this judgment. As a consequence, I will not repeat the matters set out in the Judgment.

4. I refused leave in relation to a number of grounds. The grounds in relation to which I ordered a rolled-up hearing were:

> *"1. The Commission of Inquiry erred by failing to hold the Applicant's case in public and failing to disclose the Commission's records regarding the case.*
>
> *2. The Commission of Inquiry's reasons for making no recommendation in the Applicant's case were flawed. In particular, there was no basis for refusing to consider matters that followed the order of the Court of Appeal returning Mr Moulder's land. The Commission also erred by refusing to consider criminality."*

5. The limited nature of the grounds in relation to which leave was granted is significant. I did not order some free-standing investigation of the Commission of Inquiry's work. I concluded that illegality might be established in relation to certain specific decisions.

6. On 5 August 2022 I set a number of directions ("the Order"). These were intended to result in the trial of this matter on 17/18 October. The directions included a direction for the Respondent to file evidence by 9 September 2022. In fact the evidence was filed on 12 September 2022. I accept that there was good reason for that in light of Hurricane Earl. Nobody has suggested that there was not good reason.

7. The Applicant was initially directed to file evidence in response by 30 September 2022. Following Hurricane Earl it appears to have been agreed between the parties that any evidence should have been filed by 3 October 2022.

8. Orally the Applicant has suggested at times that the volume of exhibits attached to affidavit filed on behalf of the Respondent placed a significant burden on him when complying with directions. I do not accept that. As Mr Hawthorne, attorney for the Commission of Inquiry, has pointed out in an affidavit filed on behalf of the Respondent, the evidence in response consisted of:

> *"(a) Pages 1-532 contained: (a) the Notice in the Official Gazette; (b) the COI Rules; and (c) the COI Report.*
> *(b) Pages 533-861 contained the documents submitted by Mr. Moulder to the COI ...*
> *(c) Pages 863-878 contained correspondence between Mr. Moulder and the COI;*
> *(d) Pages 877-898 contained adverse notices sent out in relation to Mr. Moulder's claim before the COI; and*
> *(e) Pages 899-1062 contained the transcripts of Mr. Moulder's hearing before the COI."*

9. It appears to me that the documents up to page 898 are documents that Mr Moulder had access to. Indeed, it is arguable that he was obliged to file them in order to comply with his duty of candour.

10. On 21 September 2022 a Constitutional Motion brought against me (as well as the Registrar) alleging that I had breached Constitutional fair trial rights was withdrawn at a hearing in this court. I understand it was withdrawn on the basis that Mr Moulder would be seeking a stay from me in light of pending appeals in 2 other matters that I have determined and that relate to the Commission of Inquiry. However, no steps were taken following that hearing to alert this Court that a stay would be sought or make a formal application for a stay.

11. Mr Moulder has filed affidavit evidence stating that early on 3 October 2022 he became aware that the transcripts disclosed by the Respondent did not include the transcripts for a hearing on 11 March 2021. This was said to be relevant because the final report of the Commission of Inquiry stated that Mr Moulder *"appeared before the COI on ... 11th March, 2021"'*.

12. Despite the pending deadline, Mr Moulder did nothing until he e-mailed the Commission's attorneys on 4 October 2022 (after the deadline for the service of evidence passed). The e-mail stated:

> *"As mentioned during the hearing re. Constitutional applications 206 of 2022 (which, as you know, was withdrawn and not dismissed) on 21st September, I will be seeking a stay of the above proceedings and intend to do so at the hearing scheduled for 7th October.*
>
> *I have not yet filed an Affidavit in response to that filed by Mr Perinchief, but intend to file an affidavit in support of the stay as soon as possible - and am hopeful given all the circumstances, including the Notices of Appeal that have been filed, you will not oppose this request for a stay.*
>
> *In the meantime:*
>
> *1. I am asking to be provided with a copy of the 4th August letter to Judge Southey that you referred to during the handing down of judgments on 5th August.*
>
> *2. In his affidavit, at paragraph 12, Mr. Perinchief refers to my having given evidence before the COI on 26 January 2021, 4 February 2021 and 23 March 2021 and exhibits transcripts from those dates. However, in the COI Report (at page 421, but page 439 of the Perinchief exhibit) there is an additional date shown of 11th March 2021. I am therefore requesting a copy of the transcript and recording from this date.*

3. I am also requesting the actual recordings of all hearings, as I would like to check these against the transcripts ..."

13. I have set out the terms of this e-mail in full as they appear to me to be important. I accept submissions made on behalf of the Commission of Inquiry that:
    a. This e-mail appears to be seeking a stay because of pending appeals. I have reached that conclusion because it references the hearing regarding the Constitutional Motion and the notice of appeal.
    b. It appears that it was assumed by Mr Moulder that there was no need to serve evidence in light of the application for a stay. I say that because the issue of the outstanding deadline to serve evidence was not addressed.
    c. Reference is made to the transcript of 11 March 2021 but it is not suggested that this justified a stay.

14. The directions provided for a case management hearing on 7 October 2022. Mr Moulder argues that I essentially indicated that I would consider whether there were any problems with the matter with the trial of this matter proceeding. As a consequence, it was open to him to raise the stay applications and his concerns about inadequate disclosure at that hearing. I accept that as a litigant in person, Mr Moulder may not have understood the purpose of a case management hearing. However, that does not excuse the fact that Mr Moulder appears to have concluded that he could unilaterally ignore the order for service of evidence. If disclosure issues meant a complete affidavit could not have been filed by Mr Moulder, a partial affidavit could have been filed addressing the Respondent's evidence as best as possible. The order to serve evidence remained effective until varied or set aside.

15. On the date of the case management hearing, an affidavit was filed by Mr Moulder. This affidavit was filed almost immediately before the hearing so that the Respondent had no opportunity to instruct its counsel regarding it. No formal application for a stay or for disclosure was lodged.

16. The affidavit filed by Mr Moulder states, among other matters, that:

    a. The Respondent had filed evidence accompanied by exhibits numbering 1061 pages.
    b. The exhibits had included the transcripts of the hearings when Mr Moulder had given evidence. That had been surprising as Mr Moulder had previously been denied the records maintained by the Respondent in relation to his case.
    c. There was a missing transcript. That had been raised with counsel to the Commission on 4 October 2022.
    d. Notice of appeals have been filed in relation to related matters.
    e. As a consequence of these matters, the Applicant had not been able to complete his affidavit.

    It should be noted that the points made (save for the one about the missing transcript) could have apparently been made soon after the service of the Respondent's evidence. However, they were not.

17. Orally at the case management hearing Mr Moulder made it clear that if the stay application was refused, he would not be in a position to file bundles or a skeleton argument (at least in time to enable the Respondent to have a fair opportunity to prepare for a substantive hearing).

18. Having heard the parties I concluded that the hearing scheduled for 17 October 2022 could not proceed. In essence that was because I could not fairly determine the merits of a stay application without having a response to the argument that there had been a failure to disclose full transcripts. I was also concerned that the failure of the Applicant to progress matters would make it impractical for matters to proceed to trial.

19. On 10 October 2022 an originating summons was filed in accordance with directions. This sought:

    a. A stay of the matter until the appeal in linked matters has been determined.
    b. The disclosure of transcripts and video of the hearing which it is said was not disclosed with the Respondent's evidence.
    c. Videos of the hearings for which transcripts have been provided for.

d. Minutes of all meetings at which the Applicant's case was discussed.

20. In response to that summons I have received two affidavits filed on behalf of the Commission. The first was filed on 14 October; it was sworn by Mr Hawthorne. On 17 October I received an affidavit sworn by the Hon. Wayne N. M. Perinchief, a member of the Commission of Inquiry.

21. Mr Hawthorne's affidavit states that inquiries were being made in order to determine whether there is a missing transcript. That affidavit did not deal with the request for videos of the hearings for which transcripts are provided. It also fails to engage with the application for minutes of meetings.

22. Mr Moulder filed an affidavit in response to the affidavit of Mr Hawthorne.

23. Mr Perinchief responded to the affidavit of Mr Moulder. He stated, among other matters, that:

    a. The transcripts of hearings that had been exhibited to the Commission of Inquiry's evidence were those where Mr Moulder had given evidence. The first time that Mr. Moulder requested the 11 March 2021 hearing transcript was by email to the Commission of Inquiry's attorneys on 4 October 2022. The 11 March 2021 hearing was to establish standing for certain individuals and representatives of companies that had been served with adverse notices in relation to Mr. Moulder's case before the Commission of Inquiry. The transcripts had now been provided.
    b. No basis has been identified for suggesting that the transcripts are inaccurate. However, video and audio recordings are available and would be emailed to Mr. Moulder by the Commission of Inquiry's attorneys on 17 October 2022.

24. Mr Moulder filed a fifth affidavit in response. It stated, among other matters, that he had only discovered that he was said to have attended a hearing on 11 March 2021 on 3 October 2022. That was what prevented him submitting an affidavit before 7 October 2021.

25. On 18 October 2022 I heard argument regarding matters that arose from the summons issued on 10 October 2022. I delivered two *ex tempore* oral judgments. The first dealt with discovery and the second dealt with the application for a stay. I will not repeat my full reasoning but instead highlight key aspects of those judgments.

26. In relation to discovery, it appeared to me that all of the material sought by Mr Moulder was provided within a week of the request with the exception of the minutes of meetings. This material was served without any concession that Mr Moulder was entitled to it.

27. In relation to the minutes, Mr Perinchief states that:

> *"I am aware of the Commissioners' duty of candour in judicial review proceedings and I can confirm that I am not aware of any minutes of meetings or any other relevant documents that has not been disclosed to Mr. Moulder in these proceedings."*

28. I concluded that there was no basis for ordering disclosure in light of this statement.

29. In relation to the application for a stay, I essentially concluded that the matters raised in appeals against earlier judgments I had delivered regarding the Commission's decisions did not overlap sufficiently to justify the lengthy delay that might result from a stay. As Mr Moulder himself submitted, justice delayed is justice denied. There was a potential value in the Court of Appeal considering all of my judgments regarding the work of the Commission of Inquiry.

Submissions of the parties

30. I have read carefully the written submissions of the parties and listened to their oral submissions. I have taken account of those submissions.

31. Mr Duncan KC and Mr Hawthorne for the Commission of Inquiry argue that the Applicant flouted the orders of the court and left the Court with no alternative to adjourn. He also argues that the stay application was flawed and the disclosure application was misconceived.

32. Mr Moulder argues that the substantive hearing was adjourned because the Commission of Inquiry had failed to comply with its disclosure obligations. The subsequent disclosure of a transcript of the hearing of 11 March 2021 and of video and audio recordings showed that there was merit in his applications.

Law

33. Order 62/3(3) of the Rules of the Supreme Court 1985 (GN 470/1985) provides that:

> *"If the Court in the exercise of its discretion sees fit to make any order as to the costs of any proceedings, the Court shall order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs.."*

34. In *Godwin v The Registrar General* [2017] SC (Bda) 75 Civ (22 September 2017) Simmons J held:

> *"Costs may be ordered on an indemnity basis if they are incurred as a result of the unreasonable conduct of the opposing party*" [58].

35. It appears that one basis for the awarding of costs on an indemnity basis is the flouting of court orders (e.g. *Goodwin* at [60] and *James Douglas v Vernon Trott* [2012] Bda LR 65 at [37]).

Conclusions

36. It appears to me the starting point when considering the issues raised is the Order (which I issued on 5 August 2022). This imposed a series of directions that were intended to ensure an effective hearing on 18/19 October 2022. Although a case management hearing was scheduled, that was primarily intended to facilitate the matter proceeding to trial. It was not intended to give the parties an opportunity to derail progress towards trial.

37. Mr Moulder appears to have failed to grasp that he was obliged to conduct himself in a manner intended to ensure that the matter progressed towards trial. I highlight the following matters:

a. Mr Moulder's failure to make a prompt and formal application for an adjournment after he had decided by at least 21 September 2022 (the date when the Constitutional Motion was withdrawn) that he wished to seek an adjournment.
b. Mr Moulder's failure to address the direction requiring the service of evidence by 3 October 2022 until after that deadline passed. As noted above, there was no attempt to serve as much evidence as possible and/or apply for an extension of time for the service until after the deadline had passed.
c. Mr Moulder's failure to make it clear in his e-mail dated 4 October 2022 that perceived failures of the Commission to disclose material justified him seeking an adjournment. Had that been made clear, the Commission might well have sought to provide full disclosure.
d. Mr Moulder's service of evidence seeking a stay and/or additional material so shortly before the case management hearing that the Commission of Inquiry had no opportunity to respond on that date.
e. Mr Moulder's failure to anticipate that his application for a stay might fail so that he needed to ensure that continue to prepare for the hearing on 18/19 October 2022 so that it could effective if the application for a stay failed.

38. It appears to me that had Mr Moulder engaged promptly with matters, it would have been possible for this matter to progress to trial, because:
    a. A prompt application for a stay based on the appeal would have resulted in a prompt rejection of the application. I have already refused a stay and an application for a stay would not have been stronger if it had been made earlier. The rejection of the application would have made it clear that there was a need to progress matters.
    b. More importantly, the service of as much evidence as possible in accordance with the directions would have potentially made it possible to facilitate the trial of this matter. Had Mr Moulder's evidence been served in accordance with directions as far as possible, it would have made it easier to progress to trial. The reality was that the failure to serve evidence meant that I had little alternative but to adjourn.
    c. Further, had it been made clear on 3 October that Mr Moulder sought further disclosure to enable the matter to proceed to trial, there is every prospect that either

that material could have been provided or I would have ruled on 7 October as to whether disclosure should be ordered. Much of the disclosure sought was provided when a formal request was made for it. I was able to rule that further disclosure was not required once I had a response from the Commission of Inquiry. It was the late service on 7 October 2022 of Mr Moulder's affidavit seeking a stay and disclosure that prevented the Commission of Inquiry engaging with it at the hearing on that date.

39. In light of the matters above it appears to me that it is clear that Mr Moulder's failure to appreciate the importance of progressing this matter to trial caused its adjournment. In light of that it appears to me that I should order that the costs incurred by the Respondent as a consequence of the adjournment of the hearing on 17/18 October 2022 should be paid by the Applicant. Mr Moulder has argued that these costs cannot be high. That may be correct (although I express no view regarding this). However, it is a matter to be determined at taxation if the costs are not agreed.

40. It also appears to me that I should order the costs of the stay application. That application failed and there is no reason why costs should not follow the event.

41. The issue of the costs of the disclosure application is more complex. There is obviously an argument that Mr Moulder achieved significant success by obtaining disclosure of the transcripts of the evidence and video/audio recordings of hearings. Indeed, Mr Duncan KC accepted on behalf of the Commission of Inquiry that the material now disclosed was all of the material covered by ground 1 of the judicial review. The basic rule is that success should result in an award of costs. However, I have concluded that I should order that Mr Moulder should pay the costs of his application disclosure. I have reached that conclusion for the following reasons:

    a. The application for disclosure was not entirely successful. The aspects of the application that I was required to rule on failed.
    b. The material that was disclosed, was disclosed promptly without intervention from the Court. That suggests that the application was not necessary.

c. The position of the Commission of Inquiry was that it was not legally obliged to disclose any material. For example, Mr Perinchief states that:

> *"To be clear, the Commissioners do not consider the 11 March 2021 hearing to be relevant to any issue that is before the Court in these proceedings. We have taken the decision to disclose the transcripts to prevent a further waste of the Court's time on irrelevant issues."* [10]

I heard argument in relation to the outstanding disclosure and it demonstrated that Mr Moulder was operating under a fundamental misunderstanding. He believed that disclosure was justified because material related to his case. In my opinion, relevance of the material to the grounds sought must be demonstrated before disclosure is ordered. As already noted the grounds sought are narrow. The mere fact that material relates to Mr Moulder is not a basis for ordering disclosure.

d. I have been troubled by the fact that application for disclosure of the transcript for 11 March 2021 appears to have been caused by the fact that the Commission of Inquiry stated that Mr Moulder 'appeared before the COI on … 11th March, 2021'. That was inaccurate. However, it appears to me that it not justify an award of costs or no order for costs for 2 reasons:

    i. As already noted, I am still unclear why it was said that the transcript was relevant.

    ii. More importantly, I have already noted how there is every reason to believe that a prompt request for this material would have resulted in its disclosure without an application.

It appears to me that these matters demonstrate that an application to the court for disclosure was unnecessary.

42. Having consider whether costs should be ordered, I need to consider whether these should be taxed on an indemnity basis. I have concluded that they should be awarded in relation to the adjournment but not in relation to other matters. I have reached that conclusion for the following reasons:

    a. I have to consider whether the conduct of the Applicant was unreasonable (*Godwin*).

b. Mr Moulder has represented himself. Obviously being a litigant in person cannot completely excuse to a failure to comply with directions (*James Douglas v Vernon Trott* [2012] Bda LR 65). However, it does appear to me that I can and should take account of the fact that a litigant in person cannot be expected to have the same detailed knowledge of the legal process as a lawyer. It appears to me that I need to consider whether Mr Moulder has behaved unreasonably by the standards of a litigant in person.

c. I have already set out above how it appears to me that Mr Moulder's failure to appreciate the importance of progressing this matter to trial caused its adjournment. It appears to me that it is a basic requirement of all litigants (whether represented or not) that they progress matters to trial. The failure to appreciate that caused adjournment and was unreasonable. I do not accept that the case management hearing is an answer:

    i. The case management hearing was plainly intended to facilitate progress towards a trial.

    ii. Filing evidence very shortly before the case management hearing completely undermined the ability of the Court to progress matters towards trial.

d. The current *White Book* (notes to rule 44.3) states that the weakness of a legal argument is not, without more, justification for an order for costs to be assessed on the indemnity basis. That appears to me to be consistent with common sense as arguments are often weak. As a consequence, I have placed no weight on the weakness of the applications made by Mr Moulder.

e. Once the matter was adjourned the applications made may have been weak but they were not unreasonable. They were pursued in accordance with directions. They had a basis in law. I can see no basis for awarding indemnity costs.

43. In light of the matters above, I have concluded that the Applicant should pay the Respondent's costs resulting from the adjourned hearing and the applications for a stay and disclosure. The costs of the adjourned hearing should be taxed (if necessary) on an indemnity basis.

Dated this 21st day of October 2022

DAVID HUGH SOUTHEY KC

ASSISTANT JUSTICE