In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013 No: 415

BETWEEN:-

THE CORPORATION OF HAMILTON

Applicant

-and-

THE OMBUDSMAN FOR BERMUDA

Respondent

COSTS RULING

(In Chambers)

Date of hearing: 18th December 2013
Date of ruling: 8th January 2014

Mr Eugene Johnston and Mrs Dawn Johnston, J2 Chambers, for the Applicant
Mr Alex Potts, Sedgwick Chudleigh, for the Respondent

Introduction

1. The Respondent seeks an order that the Applicant pay her costs of these proceedings on an indemnity basis. The Applicant contends that it should not pay her any costs at all.

Background

2. It will be helpful to set out a brief chronology. On 8th November 2013 the Applicant filed an application for leave to apply for judicial review of a number of decisions made by the Respondent with respect to her investigation into the Applicant's affairs. The Respondent had announced that she intended to prepare a report of her findings ("the Report"). The relief sought by the Applicant included a stay of the Respondent's investigation and the publication of her Report pending the outcome of the judicial review proceedings.

3. The application was filed under cover of a letter from the Applicant's attorneys that sought an early oral hearing. The letter, which was expressed to be copied to the Respondent, stated:

> "*We would like to inform the Ombudsman of these proceedings being commenced, and extend to her the invitation of making representations at the leave-hearing itself.*"

4. On 12th November 2013 the Court listed the leave application for hearing on the following day, 13th November 2013. The Respondent contends that it was not until 12th November 2013 that she was served with a copy of the leave application and supporting affidavits.

5. On 13th November 2013 the matter came on for hearing. The Respondent, who appeared in person, was unrepresented as the attorney whom she had previously instructed to advise her with respect to the investigation was engaged in a six week trial and therefore unavailable. I adjourned the matter to 18th November 2013 to give the Respondent the opportunity to arrange for legal representation and gave the Applicant leave to amend its application.

6. On 18th November 2013 the amended leave application came back before me. Earlier that day, the Respondent's attorneys had filed a memorandum of appearance. But neither the attorney who had hitherto acted for the Respondent nor anyone else from his firm appeared. Thus the Respondent, who was again unrepresented, appeared in person. She indicated that an attorney from that firm was flying back from Hong Kong and would be available to appear on the leave application the following week. However I was unavailable to hear the leave application then as I was due to preside over a five day trial.

7. I canvassed the way forward with the parties. I took the view of my own motion that, as a stay of the publication of the Report was an important part of the relief that the Applicant sought, the Report ought not to be published, or its contents disseminated to third parties other than those potentially subject in the Report to comment, until the leave application had been determined. The time estimate for the leave application was half a day.

8. I indicated that I was prepared to hear the leave application forthwith, or alternatively adjourn it subject to an order on those terms to a date to be fixed. However I stated that I would accept an undertaking from the Respondent in lieu of an order.

9. The Respondent was not willing to give an undertaking without the opportunity to discuss it with her attorneys. Caught between Scylla and Charybdis, she stated that she did wish to be represented on the hearing of the leave application. I therefore adjourned the leave application to be heard on an expedited basis, and made an order prohibiting publication etc of the Report in the terms indicated above ("the interim injunction"). The order provided that the Respondent could apply to discharge this prohibition on 48 hours' notice.

10. I left it to the parties to agree a timetable for the filing of any further evidence, as much would depend on the availability of the Respondent's counsel.

11. On 26th November 2013 the Respondent's current attorneys filed a memorandum of appearance together with a summons applying to discharge the interim injunction ("the application to discharge"). They had not appreciated that another firm was already acting for the Respondent, but upon realising this on 27th November 2013 they filed a notice of change of attorney.

12. On 5th December 2013 the application to discharge came on before me. I indicated that first I wished to hear submissions on the first ground of the leave application, namely that the Respondent's decision to commence the investigation was unlawful. This was the ground on which I had relied as justifying an interim injunction. After hearing oral argument, which lasted for half a day, I dismissed the first ground due to the Applicant's delay in seeking leave to judicially review the Respondent's decision. I found that the first ground was nevertheless arguable. But I indicated that if I had given leave I would not have been minded to impose a stay or injunction prohibiting the publication etc of the Report.

13. The balance of the leave application was adjourned to a date to be fixed, with a time estimate of a further half day. As I was satisfied that, if leave were granted with respect to the remaining grounds, they would not justify an order staying or restraining the publication etc of the Report, I discharged the interim injunction. Thus the interim injunction was discharged because the relevant part of the leave application had been determined, and for no other reason.

14. On 18th December 2013 the balance of the leave application came on for hearing. The Report had by now been published and included findings highly critical of the Applicant. In those circumstances the Applicant did not wish to proceed with the leave application, pending a review of possible grounds on which leave to apply for judicial review of the Report itself might be sought. I was not prepared to adjourn the leave application further and dismissed it, although without any determination of the merits of the remaining grounds.

15. The bulk of the hearing was concerned with detailed submissions as to costs. It is the issues raised on these submissions that now fall to be determined.

Issues

16. There are three issues arising:

    (1) Should the Respondent be awarded her costs of the leave application?

    (2) Should the Respondent be awarded her costs of the application to discharge?

    (3) If the Respondent is awarded any costs, should this be on a standard or alternatively an indemnity basis?

Should the Respondent be awarded her costs of the leave application?

17. The Respondent successfully resisted the leave application, including the application for a stay. The general principle is that costs follow the event. See Rules of the Supreme Court 1985 ("RSC") 62/3(3):

> "*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.*"

18. However it is well recognized that an application for leave to apply for judicial review is a circumstance in which costs will not generally follow the event. See the judgment of the Court of Appeal of England and Wales in R (Mount Cook Land Ltd) v Westminster City Council [2004] CP Rep 12; [2003] EWCA Civ 1346. Although this was a case under the Civil Procedure Rules ("CPR"), Auld LJ noted at para 48 that the procedure under the CPR:

> "*... replaced the practice under RSC, Order 53 [which was analogous to the Bermuda RSC, Order 53] of an ex parte application for leave to move for judicial review, normally*

made on paper, but which could also be made orally at an ex parte hearing. A respondent, if notified of the application ("ex parte on notice"), could make representations on paper and/or, if he chose to attend and was allowed by the court to participate in a permission hearing, orally. If a respondent successfully resisted the grant of permission at an oral hearing, the court had power to award him costs against the applicant, but it was sparing in its exercise of it. Given that practice, renewed oral applications for permission were normally heard ex parte and were, in any event, short. Applicants, on the whole, were able to seek relief without fear, if permission was refused, of being saddled with the respondent's costs at that stage."

19. Under the CPR, a Practice Direction provides that where there is an oral hearing at the permission stage, neither the defendant nor any interested party need attend unless the court directs otherwise, but that if they do attend, the court will not generally make an order for costs against the claimant. Auld LJ stated at para 76(2) of the Mount Cook case that this was "*in conformity with the long-established practice of the courts in judicial review*". He continued:

"(3) *A court, in considering an award against an unsuccessful claimant of the defendant's and/or any other interested party's costs at a permission hearing, should only depart from the general guidance in the Practice Direction if he considers there are exceptional circumstances for doing so.*

(4) A court considering costs at the permission stage should be allowed a broad discretion as to whether, on the facts of the case, there are exceptional circumstances justifying the award of costs against an unsuccessful claimant."

20. Auld LJ then set out a non-exhaustive list of exceptional circumstances, none of which, notwithstanding the Respondent's skilful submissions to the contrary, are applicable in the instant case. He added:

"*A relevant factor for a court, when considering the exercise of its discretion on the grounds of exceptional circumstances, may be the extent to which the unsuccessful claimant has substantial resources which it has used to pursue the unfounded claim and which are available to meet an order for costs.*"

21. In my judgment those observations are equally applicable, *mutatis mutandis*, to an application for leave under Order 53 of the Bermuda RSC.

22. In this context, I was referred to two local decisions on costs. In Perinchief v Public Service Commission [2009] Bda LR 11, where a leave application was dealt with on what was described as an *inter partes* basis, Bell J made an order *nisi* at para 35 that the unsuccessful applicant should pay the respondent's costs on the principle that costs should follow the event. The applicant was given leave to apply for the matter of costs to be argued within 14 days, following which the order *nisi* would become absolute. Bell J expressed the view *obiter* that the costs position would no doubt have been the same if leave had been granted *ex parte* and then set aside on an *inter partes* basis: in either case leave to issue judicial review proceedings would have been refused. The costs order was upheld by the Court of Appeal, as reported at [2009] Bda LR 56.

23. In Davis v Minister of Economy, Trade and Industry [2012] Bda LR 58 leave was granted *ex parte* then set aside on an *inter partes* basis. Kawaley CJ indicated at para 48 that unless any party applied within 21 days to be heard as to costs, he would make no order as to costs, a course which he described as "*exceptional*".

24. In neither case was there any argument as to costs, nor was the Court referred to the English line of authority represented by the Mount Cook case. Moreover, with respect to the Perinchief case, it is not clear to me that the costs position on a leave application should necessarily be the same as the costs position on an application to set aside. The Court may refuse leave irrespective of whether the Respondent participates at the hearing, but once the Court has given leave it will not set it aside unless the Respondent successfully applies for it to do so. Whether this is a distinction without a material difference is an argument for another day. But it is an important argument as its resolution will have costs implications for respondents seeking to resist the grant of leave in judicial review proceedings.

25. In the present case the leave application was *ex parte* on notice and the Court indicated to the Respondent that it would be assisted by her active participation in the hearing for leave, as indeed it was. Whereas I do not

accept the Respondent's submission that the serious nature of the allegation of "*grand conspiracy*" made by the Applicant was an exceptional circumstance, there were two circumstances of the application which were exceptional.

26. First, the Applicant sought a stay of the Respondent's investigation and the publication of her Report pending the outcome of the judicial review proceedings. The Respondent was under a constitutional duty to place her special report before the legislature with all deliberate speed. I accept that consistent with this duty the Respondent could reasonably conclude that it was necessary for her to resist the imposition of a stay rather than await the outcome of the leave application then apply to set aside a stay if one were granted. This is because the latter course risked delay in the publication of the Report pending the listing and determination of the application to set aside. In resisting the application for a stay the Respondent was entitled, as she did, to take any point fairly available to her.

27. Secondly, the first ground of the leave application was filed neither promptly nor within six months from the date when the ground first arose. This ground challenged the lawfulness of the Respondent's investigation root and branch and was the only ground reasonably capable of supporting a stay application. The delay point offered the Respondent the opportunity to deal a "knock out" blow to the first ground. It was therefore in the interests of the Overriding Objective and efficient case management that the delay point was resolved at the earliest opportunity.

28. Had the delay point not been resolved at the leave application, I anticipate that it would have either formed the basis for a successful application to set aside the grant of leave with respect to the first ground or alternatively would have been dealt with as a preliminary issue at the full hearing of the application for judicial review. I accept that the Respondent's submissions were not confined to the leave point: insofar as they ranged beyond it, they were not covered by this particular exceptional circumstance.

29. I conclude that the Applicant should pay the Respondent her costs of and occasioned by the hearings on 13th November, 5th December and 18th December 2013 insofar as they relate to the leave application and am satisfied that the Applicant has sufficient resources from which to do so. I make no order as to the costs of the hearing on 18th November 2013, as the reason why the leave application was not heard on that date was because the Respondent was not ready to proceed.

30. I also award the Respondent the costs of the memorandum of appearance filed by her original attorneys. However she must bear the costs of (i) the notice of change of attorney, as it was not the Applicant's fault that her original attorneys were unable to represent her, and (ii) the memorandum of appearance filed by her current attorneys, as this was filed in error.

Should the Respondent be awarded her costs of the application to discharge?

31. The case management injunction was discharged without reference to the application to discharge. However the Respondent submits that she should nevertheless be awarded the costs of the application to discharge because: (i) it was well founded in that the case management injunction should never have been made; and (ii) in any event it was necessary for her to issue the application to discharge in order to bring the matter promptly back before the Court, the Applicant having failed to progress the leave application. The exceptional circumstances justifying the order for costs in respect of the leave application are relied on, *mutatis mutandis*, as justifying an order for costs in respect of the application to discharge.

32. RSC 53/3(10) provides that where leave to apply for judicial review is granted, the Court may stay the proceedings to which the application relates or grant such interim relief as could be granted in an action begun by writ. However the RSC are silent about the Court's jurisdiction to grant interim relief prior to the determination of the leave application.

33. The situation is addressed in the commentary to Volume 1 of the 1999 edition of The White Book at 53/14/51:

"*It would be very strange, and most unsatisfactory, if the person or body whose decision is sought to be reviewed could pre-empt the matter by implementing the decision before a leave application could be heard.*

Often the problem is overcome by the government department, local authority or other body concerned agreeing to defer the implementation of the decision to enable the applicant to make an expedited application for leave to move for judicial review, and, if leave is refused at first instance, to renew it before the Court of Appeal. In most, if not all, cases where such an agreement is not forthcoming, the solution will be for the court to grant an appropriate form of interlocutory injunction: ..."

34. That the court has inherent jurisdiction to make an injunction prior to the determination of a leave application is not in doubt. Eg in M v Home Office [1994] 1 AC 377, HL, the applicant, a citizen of Zaire, sought leave for judicial review of a decision by the Secretary of State to refuse his application for political asylum in the United Kingdom. Before his leave application could be determined he was removed from the jurisdiction. On being informed of his removal Garland J made an ex parte order requiring the Secretary of State forthwith to procure the applicant's return to the jurisdiction and to ensure his safety pending such return. The Secretary of State chose not to comply with the order and the applicant issued committal proceedings against him. The committal proceedings were dismissed at first instance on the erroneous ground that the Crown was immune from injunctions but upheld on appeal.

35. Lord Woolf, giving the leading judgment, stated at 423 C – F:

"*What has been said so far does not mean that Garland J. was necessarily in order in granting the injunction. The injunction was granted before he had given the applicant leave to apply for judicial review. However, in a case of real urgency, which this was, the fact that leave had not been granted is a mere technicality. It would be undesirable if, in the situation with which Garland J. was faced, he had been compelled to grant leave because he regarded the case as an appropriate one for an interim injunction. In the case of civil proceedings, there is recognition of the jurisdiction of the court to grant interim injunctions before the issue of a writ, etc. (see Ord. 29, r. 1(3)) and in an appropriate*

case there should be taken to be a similar jurisdiction to grant interim injunctions now under Order 53. The position is accurately set out in note 53/1-14/24 to The Supreme Court Practice 1993 where it is stated that:

> *'Where the case is so urgent as to justify it, [the judge] could grant an interlocutory injunction or other interim relief pending the hearing of the application for leave to move for judicial review. But, if the judge has refused leave to move for judicial review he is functus officio and has no jurisdiction to grant any form of interim relief. The application for an interlocutory injunction or other interim relief could, however, be renewed before the Court of Appeal along with the renewal of the application for leave to move for judicial review.'*

There having been jurisdiction for Garland J. to make the order which he did, it cannot be suggested that it was inappropriate for him to have made the order."

36. In R v The Commissioners of Inland Revenue 1996 WL 1090299, HC, Buxton J indicated how in practical terms the court would seek to exercise its jurisdiction to grant *ex parte* relief in support of an intended application for judicial review as set out and explained in M v Home Office. The *ex parte* relief with which the judge was concerned took the form of an injunction regulating the conduct of a search of the applicant accountants' offices that was being carried out by the respondent Commissioners at the time when the relief was sought and granted. The learned judge stated:

"*The judge, unless he is satisfied that the application is clearly unfounded, will try very hard to preserve the status quo and the interests of both parties until the matter can be properly heard on both sides.*"

37. The facts of the instant case were different to the facts in the cases mentioned above, but the principles informing the making of the case management injunction were the same. The Respondent sought an adjournment of the leave application, including the application for a stay, until she had had an opportunity to instruct counsel. But she was unwilling to offer an undertaking not to publish the Report until the leave application had been determined. That would have given her the opportunity to publish the Report before the Applicant had the opportunity to argue that its publication should be stayed.

38. There was a real risk that publication would cause irreparable harm to the Applicant, at least from the perspective of the incumbent administration, in that under section 7B(6) of the recently amended Municipalities Act 1923, a finding of maladministration by the Respondent would have provided a ground for the Government to temporarily assume stewardship of the Applicant's financial administration. Indeed the Court takes judicial notice that that is exactly what happened when, after the case management injunction was discharged, the Report was published.

39. In the circumstances there was a clear and urgent need for an injunction to preserve the status quo pending the determination of the leave application. I am therefore satisfied that the injunction was properly made.

40. In her skeleton argument on the leave application the Respondent submitted that the Court had no jurisdiction to make an order restraining her future conduct. The Respondent did not pursue this bold submission on the costs application, although she has reserved the right to do so in a future action.

41. On 26th November 2013 the Respondent's counsel sent a letter by email to the Applicant's counsel enclosing a draft of the application to set aside. The letter and covering email stated that the summons was being filed that day. The letter also asked the Applicant's counsel to confirm what the current status was with respect to the listing of the application for judicial review, mentioned the Respondent's counsel's availability, and indicated a willingness to discuss dates. This was the first time that the Respondent had raised these issues with the Applicant.

42. The Respondent therefore made no real attempt to agree with the Applicant a date for the hearing of the leave application until after she had decided to issue the application to set aside and notified the Applicant of that decision. I say no real attempt rather than no attempt at all as I accept that the Respondent's counsel had tried calling the Applicant's counsel on both 25th November and earlier on 26th November, and had left a voice message. The leave application may have been one of the matters which he wished to discuss.

43. Be that as it may, in the circumstances I do not accept that it was necessary for the Respondent to issue the application to set aside in order to have these proceedings brought back before the court in a timely manner. As the Respondent should have been aware, the Applicant could not have the leave application listed until it had been supplied with her convenient dates. It is therefore surprising that she should complain that the Applicant did not progress the leave application more expeditiously.

44. In the circumstances, I make no order as to the costs of the application to set aside. However the only aspect of the Respondent's costs of that application which cannot in the alternative be claimed as her costs of the leave application is likely to be the cost of preparing and issuing the summons.

If the Respondent is awarded any costs, should this be on a standard or alternatively an indemnity basis?

45. RSC 62/3(4) provides that there may be circumstances in which "*it appears to the Court to be appropriate to order costs to be taxed on the indemnity basis*". The matter is one for the Court's discretion. As Christopher Clarke J stated in Balmoral Group Limited v Borealis (UK) Limited [2006] EWHC 2531 (Comm) at para 1, summarising the judgment of Tomlinson J in Three Rivers District Council v The Governor and Company of the Bank of England [2006] 5 Costs LR 714; [2006] EWHC 2531 (Comm):

> "*The discretion is a wide one to be determined in the light of all the circumstances of the case. To award costs against an unsuccessful party on an indemnity scale is a departure from the norm. There must, therefore, be something — whether it be the conduct of the claimant or the circumstances of the case — which takes the case outside the norm.*"

46. Although this was a case under the CPR, these observations are in my judgment equally applicable to cases falling under the RSC.

47. As to what it is that takes a case outside the norm, Evans JA, giving the judgment of the Court of Appeal, stated in American Patriot Insurance Agency Inc v Mutual Holdings (Bermuda) Ltd [2012] Bda LR 23 at para 29:

"*Both 'the way the litigation has been conducted' and the 'underlying nature of the claim' (per Kawaley J in Lisa SA v Leamington and Avicola at para 6) may be relevant in determining whether or not the circumstances are such as to make an indemnity costs order just.*"

48. The Respondent seeks an order for indemnity costs under both these heads. Although her application was developed at length, I shall deal with it quite briefly.

49. The way the Applicant has conducted the litigation does not justify an order for indemnity costs. In so finding, I have regard to the fact that the application was not made *ex parte* but *ex parte* on notice; the Respondent attended every hearing; at all material times the Respondent was or had the opportunity to be legally represented; the Applicant intended from the outset that the Respondent should be represented at the leave application; and no legal argument took place until the Respondent was thus represented. I do not accept that the Applicant was in breach of any obligation of full and frank disclosure and fair presentation, or that it failed to co-operate reasonably with the Respondent.

50. Neither does the underlying nature of the claim justify an order for indemnity costs. The Applicant's allegation that the Respondent was party to a "*grand conspiracy*" with the Government was admittedly without evidential foundation and ought not to have been made, although I accept that the Applicant sincerely believed in its truth. As the serious nature of the claim was not an exceptional circumstance justifying an order for costs in favour of the Respondent, it can hardly justify an order for indemnity costs. Moreover, it formed but a part of the first ground of the leave application: the remainder of the first ground turned on questions of statutory construction and was, as I have ruled previously, properly arguable.

51. Although the first ground was defeated on grounds of delay, its defeat was not a foregone conclusion and the Applicant explained the reason for a substantial part of the delay, albeit that reason did not justify an extension of time in which to bring the leave application, namely that it was not until the

Municipalities Amendment Act 2013 received its assent that the Applicant appreciated the potentially damaging effect of a finding of maladministration. In all the circumstances I am satisfied that the leave application was brought in good faith and reject the Respondent's allegation that its true purpose was simply to cause disruption and delay without regard to its underlying merits.

52. I therefore rule that the costs awarded to the Respondent should be on the standard basis, to be taxed if not agreed. Although the Respondent invited me to make a summary assessment of her costs, any dispute as to quantum might be quite lengthy and is better resolved on taxation.

53. In the alternative to a summary assessment, the Respondent has asked me to make an interim award on account of costs. I am prepared in my inherent jurisdiction to do so. The Applicant must pay the Respondent two thirds of the amount of costs claimed, on the basis that if on taxation she is found to be entitled to a lesser sum she must refund the difference. Payment must be made forthwith upon the Respondent supplying the Applicant with the appropriate amount supported by a schedule of costs.

Summary

54. The issues arising on the Respondent's application for costs are resolved thus:

(1) The Respondent is awarded her costs of the leave application to the extent allowed at paras 29 – 30 above.

(2) The Respondent must bear her own costs of the application to discharge.

(3) The costs awarded to the Respondent are on a standard basis, to be taxed if not agreed. The Applicant is to make an interim payment to the Respondent of two thirds of the amount of costs claimed upon the terms set out at para 53 above.

55. I should not conclude this judgment without recording my thanks to counsel, Eugene Johnston for the Applicant and Alex Potts for the Respondent, for whose able submissions I am indebted.

Dated this 8th day of January, 2014 _____

Hellman J