[2014] SC (Bda) 29 Civ (11 April 2014)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: 28

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF THE MUNICIPALITIES ACT 1923

AND IN THE MATTER OF THE MINISTER OF HOME AFFAIRS' DECISION FOR THE GOVERNMENT TO ASSUME TEMPORARY STEWARDSHIP OF THE CORPORATION OF HAMILTON

THE CORPORATION OF HAMILTON

Applicant

-v-

THE MINISTER OF HOME AFFAIRS

Respondent

RULING

(In Chambers)

Date of hearing: April 1, 2014
Date of Judgment: April 11, 2014

Mr. Eugene Johnston, J^2 Chambers, for the Applicant
Mr. Alan Dunch and Ms. Jennifer Haworth, MJM Limited, for the Respondent

Background

1. By Notice of Application dated January 16, 2014, the Applicant ("the Corporation") applied for judicial review of, principally, the decision of the Respondent ("the Minister") to assume temporary stewardship of the Applicant's finances under section 7B(6) of the Municipalities Act 1923 ("the Stewardship Decision"). I granted leave, refusing the Corporation's application for a stay and directing that the costs of the *ex parte* leave application should be in the cause, on January 20, 2014.

2. The reasons for granting leave were communicated to the Corporation's attorneys via the Registrar by email, and stated in material part as follows:

> "*The Applicant seeks leave to challenge the Minister's decision of December 19, 2013 (and three supplementary subsequent decisions) to temporarily take stewardship of the Corporation's infrastructure and services etc. under section 7B(6) of the Municipalities Act 1923.*
>
> *I find that the Application discloses arguable ground for the grant of judicial review.*
>
> *The Applicant also seeks an interim stay of the decision.*
>
> *In my judgment it is very arguably too late to seek an interim stay which would not, as the stay provisions are designed to achieve, simply preserve the status quo before the impugned decision. One month later that status quo has already changed and the decision is in the process of implementation.*
>
> *Further and alternatively the nature of the impugned decision is such that it would be inappropriate for this Court on an ex parte basis to override the judgment of the Minister that the public interest requires the deployment of the stewardship powers save in a very clear and simple case of gross illegality. This is not such a case. The Applicant is at liberty to renew the stay application on an inter partes basis although it may wish to consider instead seeking an expedited hearing on the merits of the application.*
>
> *Leave to seek judicial review is granted on the above basis.*"

3. On February 12, 2014, the Corporation renewed its application for a stay as well as seeking directions for an expedited hearing. I refused the application for an interim stay and gave directions for an expedited hearing, reserving the costs of the stay application. I gave the following short oral reasons for refusing the stay:

> "*For the purposes of the present application, I assume that I have the power to grant a stay. But, this is in my view a classic case where the Court should be reluctant to grant a stay which would have the effect of assuming at the*

interlocutory stage, that the Minister has not only exercised a regulatory power inappropriately; but, also, that the basis of the exercise of that power is groundless. And the Court is not in a position to sensibly reach that conclusion.

That does not mean that the Court has formed any view as to the strength of the Minister's case. The Court has already formed the view that the Corporation has an arguable case. But it has done so within a legal framework within which a judicial review applicant has a very low threshold to meet, to justify the grant of leave. So the mere grant of leave, in and of itself, does not demonstrate that there is a strong probability of success. The relevant test for the grant of leave is simply that there is an arguable case. Something that some might say cannot be laughed out of Court.

And so the stay application is refused."

4. Directions were given with a view to expediting the hearing on the grounds that the Court should decide on the legality of the exercise of a draconian power as soon as possible. The Minister was required to file any evidence by March 14, 2014 in response to the application. There was no suggestion made on behalf of the Minister to the effect that the need for a hearing on the merits might, in the interim, be obviated. On March 4, 2014, a Notice of Hearing was issued for a two day hearing on April 1-2, 2014.

5. On or about March 13, 2014, the Minister revoked the Stewardship Decision. On March 14, 2014 his attorneys invited the Corporation to withdraw its application for judicial review and the Court was notified of this request the same day. By Summons dated March 28, 2014, the Minister applied for dismissal of the present proceedings on the grounds that the application was now academic.

6. The Corporation resisted that application.

Findings: legal principles governing the adjudication of public law issues which are academic in the sense that they do not relate to any continuing dispute

7. Mr. Dunch presented a wide array of authorities in support of his submission that the present judicial review proceedings ought to be dismissed, because there was no longer any dispute between the parties. These researches were necessary and helpful, because the Bermudian courts do not appear to have considered this topic in any depth before.

8. Counsel firstly referred the Court to extracts from the leading practitioner's text, Michael Fordham QC, '*Judicial Review Handbook*', Sixth Edition. Paragraph 4.6 reads as follows:

> "*Courts do not like holding moots. One of the great values of public law is in clarifying and guiding, prospectively. But even that function is recognised as a function which arises out of deciding a specific dispute requiring resolution. In general judges need persuading that it is right to entertain a judicial review challenge where the issues are, or have become, academic or hypothetical. Sometimes, it will be in the public interest to grasp the nettle, rather than leave the uncertainties for yet further litigation in the future.*"

9. *Fordham* then goes on to give examples of when the underlying merits may be irrelevant to the need for the Court to determine an issue or issues:

   (a) test cases, where the decision-maker would benefit from guidance for the future and the application before the court would be an appropriate vehicle for such guidance (paragraph 4.63);

   (b) cases where the court's views on the merits should be expressed in the public interest (paragraph 4.6.4);

   (c) matters which, although they are "academic", require determination because they deal with points of "general importance": *Deuss-v-Attorney General for Bermuda* [2009] UKPC 38, [2010] 1 ALL ER 1059, at [11] (paragraph 4.6.5).

10. Mr. Dunch relied upon the following *dictum* of Lord Slynn in *R-v-Secretary of State for the Home Department, ex parte Salem*, [1999] 2 All ER 42 at 47 to demonstrate why the Corporation was no longer entitled to pursue the present proceedings:

> "*The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.*"

11. Silber J followed this decision in *R (on the application of Zoolife International Ltd)-v- Secretary of State for the Environment* [2007] EWHC 2995 (Admin), where he stated:

> "*[36] In my view, these statements show clearly that academic issues cannot and should not be determined by courts unless there are exceptional circumstances such as where two conditions are satisfied in the type of application now before the court. The first condition is in the words of Lord Slynn in* ***Salem*** *(supra) that "a large number of similar cases exist or anticipated" or at least other similar cases exist or are anticipated and the second condition is that the decision in the academic case will not be fact-sensitive. If the courts entertained academic disputes in the type of application now before the court but which did not satisfy each of these two conditions, the consequence would be a regrettable waste of valuable court time and the incurring by one or more parties of unnecessary costs.*"

12. The same *dictum* of Lord Slynn was more recently still applied by Paterson J in *R (on the application of YA)-v-Secretary of State for the Home Department* [2013] EWHC 3229 (Admin) at paragraph [36]. Perhaps the most apposite judicial pronouncements referred to by Mr. Dunch, having regard to the way in which the Minister came to file his Summons to Dismiss, were the following observations of Schiemann J in *R-v-Horseferry Road Magistrates* [1995] Env. L.R. 104 at 112:

> "*Applicants should bear in mind that judicial review is a discretionary remedy. This court will not grant it when it can no longer achieve anything useful….It is therefore advisable for applicants when they are given a hearing date to consider carefully whether or not it is sensible, in the light of intervening events and the passage of time, to continue to pursue the request for relief. If it is not, then whatever may have been the merits at the time of the application for leave, an attempt should be made to come to terms with the respondent and to discontinue the proceedings.*"

13. The Minister's counsel also relied, in terms of general principle, on the following observation by Lord Bridge in *Ainsbury-v-Millington* [1987] 1 All ER 929 at 930:

> "*It has always been a fundamental feature of our judicial system that the courts decide disputes between the parties before them they do not pronounce on abstract questions of law where there is no dispute to be resolved.*"

14. Counsel then pointed out that this statement of general principle had been expressly approved by Scott Baker LJ in *Fletcher-v- NHS Pensions Agency* [2006] EWCA Civ 516 at [19]. The general policy presumption against considering academic points has

also been reaffirmed by Scott Baker JA on behalf of the Court of Appeal for Bermuda in *Director of Land Valuation-v-Banks* [2013] Bda LR 47, a case to which I referred in the course of argument. The conclusions reached by the Court of Appeal, on an issue which was not strictly before them, implicitly disapprove of the more generous approach I took at first instance[1] to furnishing an 'advisory' opinion:

> "9. *The law is set out in the speech of Lord Slynn of Hadley with which the other members of the House agreed in R v Secretary of State for the Home Department ex-parte Salem [1999] 1 AC 450 at 456G…*
>
> *10. Lord Pannick QC on behalf of Mr Banks submits that is not one of those rare cases in which the Court should embark on considering an issue that is academic between the parties. Judgments are most helpful if they determine 10 live issues. The meaning of section 5 of the Land Valuation Act should not be determined in a factual vacuum; particular facts in a particular case are required. There is no evidence to suggest that many other cases are pending or anticipated, either on the same facts or otherwise.*
>
> *11. The Chief Justice concluded that section 5(1) of the Act does not apply to high-end residential properties such as that owned by Mr Banks but only to units supporting a main dwelling house used for some business or commercial purpose and that is the matter Mr Small submits should be reconsidered by this Court. However, Lord Pannick points out, that if the Court does decide to hear the appeal that is moot it should look at the meaning of the whole of section 5 including section 5(2) and not just section 20 5(1).*
>
> *12. Mr Small's argument is that this is a very important point; 758 other properties could be affected. The Chief Justice's decision is of high persuasive authority and, he submits, if it is wrong, as he contends it is, it should not be allowed to stand. A new five year list will begin on 1 January 2014 and a lot of tax turns on the result. That is why the Chief Justice allowed the point to be argued as a matter of public interest and this Court should do likewise.*
>
> *13. In my judgment the facts are likely to differ from case to case and I am not persuaded that there are other identical cases or similar cases in the pipeline or that there is any other pressing reason why this court should consider and rule on the point.*"

15. Mr. Johnston did not seek to challenge the assertion that the principles summarised above fell to be applied. Rather, he sought to contend that, having regard to the facts of the present case, the Corporation was entitled to pursue its judicial review application.

[1] *Director Land Valuation-v-Banks* [2012] Bda LR 45. It appears from paragraph 3 of the judgment that I directed the determination of two academic issues in the public interest at an interlocutory hearing, without the benefit of full argument on the circumstances in which the jurisdiction to entertain such points is customarily exercised. In *Banks*, the decision-maker himself contended that judicial guidance would be of assistance to him in relation to the valuation of numerous other, similar, properties.

16. Accordingly, I accept and adopt the cogent submissions of Mr. Dunch as to the content of the legal principles which govern the exercise by this Court of its discretion to adjudicate a judicial review application when one party contends that the underlying dispute has fallen away.

Findings: should the Corporation's application adjudicated or dismissed?

Has the underlying dispute been resolved?

17. I find that the central controversy between the parties, the validity of the Stewardship Decision, has been resolved through the Minister's decision to revoke the decision on March 13, 2014. This was an 'active' dispute when leave was granted, but it is no longer active. A fundamental element of the present application was the contention that the Stewardship Decision, a decision with continuing legal effects, was unlawful and should be quashed. It is no longer possible for this Court to quash the decision because the decision-maker has himself revoked it.

18. Mr. Johnston submitted that the Stewardship Decision and the related Budgetary Decision were both still live issues. This argument lacked coherence. The argument appeared to be that the Council of the Corporation should be entitled to pursue its attempts to have the main decision quashed so that budgetary decisions made by the Corporation's management in consultation with the Minister during the stewardship period could be invalidated. Since the Corporation also complains about the approval of a different budget (by the Minister) through new Financial Instructions, it seems improbable that any interim expenditure made by the Corporation's Council with the Minister's approval would be invalidated were the present application to both proceed and succeed. Any interim interference with the Corporation's budgetary processes has most likely been rendered moot by the subsequent Financial Instructions. Declaratory relief would be the most likely remedy granted since the Stewardship Decision has already been revoked.

19. As a matter of substance and practicality, the real dispute which formed the basis of the present judicial review application has become academic since leave was granted.

Is there a discrete issue of statutory interpretation which can still be resolved?

20. Section 7B(6) of the Municipalities Act 1923, enacted with effect from October 15, 2013, provides as follows:

> "*Where, due to the poor state of any of a Corporation's infrastructure or service (as a result of force majeure, maladministration, disrepair or lack of funding), the Minister believes that it is in the public interest for the Government to temporarily assume stewardship of a Corporation's infrastructure, function or service, in order to repair or maintain it, those particular items may, with the approval of Cabinet, be temporarily removed from the stewardship of the Corporation.*"

21. It is difficult to imagine a statutory provision the interpretation of which is more likely to be shaped by the facts of the particular situation in which the statutory power is exercised. The Corporation's case is, in essence, that the statute has no application to the facts of the present case. Only the Corporation's evidence is presently before the Court. There is no discrete question of statutory interpretation which can conveniently be decided without regard to the facts.

Is there a compelling public interest in the legality of the Minister's decision being determined and declared?

22. Mr. Johnston's most attractive point was the argument that the public had a right to know whether the Stewardship Decision was lawful. Supplementary to this contention was the argument that the public had a right to know whether the problems relied upon by the Minister as forming a basis for the decision had all been fixed.

23. The Corporation and its senior executives do have a legitimate interest in seeking to vindicate their conduct in the management of the Corporation's affairs, which has been under serious attack. The relevant executives are human beings, not cardboard cut-out characters. Moreover, legal questions about the way in which a public organization has been managed reflect not just on its leadership, but on the organization as well. Nevertheless, public law proceedings, not unlike private law proceedings, do not confer an absolute right on an applicant who has filed an arguable claim to have his day in court at trial. The respondent is entitled, and in most cases empowered, to revoke the impugned decision, and to side-step the vagaries of having the validity of the decision adjudicated by the court. In most cases where this occurs, the applicant can claim a victory of sorts, and seek to be compensated in costs.

24. Because all the material upon which a sensible decision would be based is not presently before this Court, and the case has not yet been fully argued, the present case does not appear to me to fall within the exceptional range of circumstances where the public interest nevertheless requires the Court to render a decision. In addition, it is not even common ground that the formal guidance of the Court is required.

25. *Deuss-v-Attorney General for Bermuda* [2009] UKPC 38 (referenced in the text authority the Minister's counsel placed before the Court) was perhaps the first local case in which the topic of academic points raised in judicial review proceedings was considered. It adds nothing in terms of principle to the authorities to which counsel directly referred. It is useful in illustrating that academic points are only properly decided in exceptional circumstances. The point was seemingly only explicitly identified at the Judicial Committee of the Privy Council level. Lord Phillips (delivering the Board's judgment or advice) firstly stated as follows:

> "*6.The appellant commenced proceedings in Bermuda for judicial review of the issue of the provisional warrant, seeking among other relief an order that the provisional warrant be quashed. The originating documentation has not been included in the Record of Proceedings. Miss Montgomery QC, who appeared on the judicial review proceedings and before their Lordships explained that the*

> *object of the proceedings was not to prevent the appellant's extradition or trial in the Netherlands but to vindicate his case that his arrest was unlawful. In these circumstances their Lordships find it surprising that the respondents do not appear to have resisted the appellant's application for judicial review on the ground that the issues that he sought to raise were academic.*" *[emphasis added]*

26. This observation suggests that it is not enough for a judicial review applicant to seek to vindicate the legality of his own conduct; practical relief must also be sought. However, the Judicial Committee decided to determine the appeal in any event for the following reasons, which essentially vindicate the failure of the respondents (and the lower courts) to take the "academic" point:

> "11. As will become apparent, this submission raises an issue of some difficulty as to the manner in which the statutory definition of an "extradition crime" operates in relation to a British possession. This issue is said to be one of general importance, insofar as the extradition regime under the 1870 Act, as adapted by the 1989 Act, remains in force in relation to some British Colonies. Nonetheless it seems that this is the first occasion, nearly 140 years after the 1870 Act was passed, that the central issue has arisen for judicial determination. In these circumstances their Lordships decided that it was appropriate to entertain the appeal, albeit that it was academic." [emphasis added]

27. So not only was the Judicial Committee electing to determine a point which had already been fully argued at two lower court levels. The point was considered to be of general importance beyond Bermuda, and was a point which had been undecided for nearly 140 years. Obviously, each case turns on its own facts and what the public interest requires in terms of adjudication of points which are or have become academic cannot be determined through mechanically following judicial precedents. Having regard to the factual and legal matrix of the present case, however, I find that no sufficient basis exists for displacing the starting assumption that an academic point ought not to be decided by this Court.

Conclusion: the Corporation's judicial review application should be dismissed

28. The Corporation's judicial review application must be dismissed. The section 7B(6) point has not yet been fully argued, and cannot (likely) be fully argued because all the evidence is not before the Court. It is not a statute of general application. While the issues raised are of significant public interest (both in political, public policy and legal terms), in my judgment it would be an improper exercise of this Court's discretionary case management powers for this Court to:

    (a) decline to dismiss the present proceedings; and either

    (b) proceed to determine the Corporation's application without the Minister's full participation; or

(c) compel the Minister to defend the validity of a decision he has already revoked.

Costs

29. Mr. Dunch sought to distinguish the present case from the normal instance of a decision-maker reversing a decision in the face of judicial review proceedings, based on the inherently temporary character of the Stewardship Decision. He argued that the Corporation should have anticipated that the decision was temporary in nature and might at any time be revoked. This argument seeks to construe the relevant statutory power based on a retrospective view of what happened in this particular case, and is rejected for two main reasons.

30. Firstly, it was expressly contemplated that this Court would be in a position to adjudicate the Corporation's application while the decision was still operative (directions were ordered to enable that to happen). Secondly, I find that the powers conferred by section 7B(6) of the Act are far too momentous to be regarded as, in effect, immune from judicial review, because merely "temporary" stewardship powers are involved.

31. Analysing the course of the present proceedings in a straightforward way, the Minister elected to revoke the Stewardship Decision rather than contest its legality before this Court. Apprised of this significant development, the Corporation ought to have agreed to discontinue the present proceedings, but failed to do. The Minister was thus compelled to apply for their dismissal.

32. Accordingly, I make the following orders in relation to costs (in each case, to be taxed if not agreed on the standard basis):

(1) the Corporation is entitled to the costs of the action up to and including March 13, 2014 when the Minister invited it to discontinue the proceedings;

(2) the Minister is entitled to the costs of its Summons to Dismiss;

(3) unless either party applies by letter to the Registrar to be heard in relation to the reserved costs of the Corporation's unsuccessful interim stay application, those costs shall be awarded to the Minister in any event[2].

Dated this 11th day of April, 2014 _____
IAN R.C. KAWALEY CJ

[2] Counsel were not afforded an opportunity to address the Court on this aspect of the costs of the judicial review application.