In The Supreme Court of Bermuda

COMMERCIAL COURT

APPELLATE JURISDICTION

2014: No. 135

THE BERMUDA ENVIRONMENTAL SUSTAINABILITY TASKFORCE

Appellant

-AND-

THE MINISTER OF HOME AFFAIRS

(in his capacity as Minister responsible for planning)

Respondent

RULING ON APPLICATION FOR PROTECTIVE COSTS ORDER

(in Chambers)

Date of hearing: June 17, 2014

Date of Ruling: June 25, 2014

Mr. Alex Potts, Sedgwick Chudleigh, for the Appellant ("BEST")
Mr. Ben Adamson, Conyers Dill & Pearman Limited, for the Respondent (the "Minister")
Mr. Andrew Martin, MJM Limited, for the Joint Receivers of TPC Management Limited and Tuckers Point Golf, Beach and Tennis Club Ltd., Interested Parties

Introductory

1. BEST appeals by Notice of Originating Motion issued on April 2, 2014 against the Minister's decision dated March 12, 2014, whereby he dismissed BEST's appeal to him against the decision of the Development and Applications Board (the "DAB") granting conditional approval to four planning applications. The grounds of appeal included the following complaints:

    (a) the Minister erred in law in finding, contrary to the recommendation of the Independent Inspector, that an Environmental Impact Assessment ("EIA") was not required before the final planning approval application;

    (b) the Minister contravened the rules of natural justice by meeting with the Interested Parties in BEST's absence while the appeal was pending;

    (c) the Minister took into an account an irrelevant consideration, namely the representation by the Interested Parties that if the planning applications were refused, there would be "*a detrimental effect to the Tucker's Point Club*…".

2. The present interlocutory application, by Summons dated May 30, 2014, sought, *inter alia*, an interim stay of the DAB decisions and specific discovery. I made an Order in the course of the hearing directing that the Minister file a supplementary Affidavit, while the Interested Parties undertook to give disclosure of a redacted version of notes of certain meeting with the Minister. That obviated any need to order specific discovery at this juncture, without prejudice to BEST's right to re-apply, should the need arise. However, the primary relief sought under the interlocutory Summons was an Order that:

    "*1. There be a Protective Costs Order made in favour of BEST, pursuant to sections 12 and 18 of the Supreme Court Act 1905, RSC Order 1A, rule 1, RSC Order 62, rules 2(4), 3(2), and/or 3(3), section 61(2) of the Development and Planning Act 1974, and/or the inherent jurisdiction of the Court.*"

3. Although there is no known precedent for this Court granting a Protective Costs Order (a "PCO"), it was common ground that a PCO could validly be granted, based on the Court's flexible statutory discretion to deal with costs and guided by persuasive English case law grounded in a comparable civil procedural regime. Controversy turned on how the principles developed by the English courts should be applied to the facts of the present case. On the one hand, BEST's counsel contended that the English guidelines should be applied with a light touch, with precedence being given to the need to do justice on the facts of the present case. On the other hand the Minister, supported by the Interested Parties, contended that the principles applicable to the

making of a PCO developed by the English courts ought not to be departed from without good cause.

4. In 'big picture' terms, the dispute turned on whether BEST, an environmental non-governmental organization with admittedly limited funds and no private interest at stake, ought in the public interest to be protected from the usual costs consequences of pursuing its appeal, in the event that it failed, and if so, on what terms.

Findings: principles governing the granting of Protective Costs Orders

5. The most authoritative guideline principles were articulated by Lord Phillips MR (as he then was) on behalf of the English Court of Appeal in *R (Corner House)-v-Trade and Industry Secretary* [2005] 1 WLR 2600; [2005] EWCA Civ 192. The following guidance was given in that case:

> "*74. We would therefore restate the governing principles in these terms:*
>
> *(1) A protective costs order may be made at any stage of the proceedings, on such conditions as the court thinks fit, provided that the court is satisfied that:*
>
> *i) The issues raised are of general public importance;*
>
> *ii) The public interest requires that those issues should be resolved;*
>
> *iii) The applicant has no private interest in the outcome of the case;*
>
> *iv) Having regard to the financial resources of the applicant and the respondent(s) and to the amount of costs that are likely to be involved it is fair and just to make the order;*
>
> *v) If the order is not made the applicant will probably discontinue the proceedings and will be acting reasonably in so doing.*
>
> *(2) If those acting for the applicant are doing so pro bono this will be likely to enhance the merits of the application for a PCO.*
>
> *(3) It is for the court, in its discretion, to decide whether it is fair and just to make the order in the light of the considerations set out above.*"

6. Mr. Potts pointed out that before setting out these guiding principles, Lord Phillips made the following qualifying remarks:

"*70. The important difference here is that there is a public interest in the elucidation of public law by the higher courts in addition to the interests of the individual parties. One should not therefore necessarily expect identical principles to govern the incidence of costs in public law cases, much less the "arterial hardening" of guidance into rule which the majority of the High Court of Australia eschewed in the Oshlack case 193 CLR 72.*"

7. The need for a flexible approach as regards the terms of a PCO was also emphasised by Lord Phillips, after the guiding principles for deciding whether to grant such an order had been distilled in paragraph 74 of his *Corner House* judgment:

> *"[75] A PCO can take a number of different forms and the choice of the form of the order is an important aspect of the discretion exercised by the judge. In the present judgment we have noted: (i) a case where the claimants' lawyers were acting pro bono, and the effect of the PCO was to prescribe in advance that there would be no order as to costs in the substantive proceedings whatever the outcome (the Refugee Legal Centre case); (ii) a case where the claimants were expecting to have their reasonable costs reimbursed in full if they won, but sought an order capping (at £ 25,000) their maximum liability for costs if they lost (R (on the application of Campaign for Nuclear Disarmament) v Prime Minister [2003] CP Rep 28); (iii) a case similar to (ii) except that the claimants sought an order to the effect that there would be no order as to costs if they lost (Ex p CPAG); and (iv) the present case where the claimants are bringing the proceedings with the benefit of a CFA, which is otherwise identical to (iii).*
>
> *[76] There is of course room for considerable variation, depending on what is appropriate and fair in each of the rare cases in which the question may arise. It is likely that a cost-capping order for the claimants' costs will be required in all cases other than (i) above, and the principles underlying the court's judgment in King Telegraph Group Ltd [2004] EMLR 429 at [101]-[102] will always be applicable. We would re-phrase that guidance in these terms in the present context:*
>
> > *(i) When making any PCO where the applicant is seeking an order for costs in its favour if it wins, the court should prescribe by way of a capping order a total amount of the recoverable costs which will be inclusive, so far as a CFA-funded party is concerned, of any additional liability.*
> >
> > *(ii) The purpose of the PCO will be to limit or extinguish the liability of the applicant if it loses, and as a balancing factor the liability of the defendant for the applicant's costs if the defendant loses will thus be restricted to a reasonably modest amount. The applicant should expect*

the capping order to restrict it to solicitors' fees and a fee for a single advocate of junior counsel status that are no more than modest.

(iii) The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made. The beneficiary of a PCO must not expect the capping order that will accompany the PCO to permit anything other than modest representation, and must arrange its legal representation (when its lawyers are not willing to act pro bono) accordingly."

8. These cautionary remarks about the need to avoid an inflexible approach when considering whether or not to grant a PCO and, if so, on what terms, are merely reflective of the approach courts invariably adopt with respect to costs generally. Unsurprisingly, BEST's counsel was able to identify an abundance of highly persuasive post-*Corner House dicta* which reinforced the flexibility theme. In *R (Compton)-v-Wiltshire PCT* [2009] 1 WLR1436; [2008] EWCA Civ 749, Waller LJ stated: "*The paragraphs in Corner House are not, in my view, to be read as statutory provisions, nor to be read in an over-restrictive way.*" Although this was merely a majority view, the Court of Appeal unanimously endorsed the Waller LJ position in *Morgan and Baker -v- Hinton Organics (Wessex) Ltd and CAJE*[2009] EWCA Civ 107 (at paragraph 40)[1].

9. I am guided by these judicial pronouncements and reject any suggestion that the *Corner House* guidelines must be applied in a rigid and/or inflexible way. However, I accept entirely that the guidelines provide an appropriate framework within which to analyse the question of whether or not a PCO should be made.

Findings: circumstances relevant to the discretion to make a PCO

Are the issues raised of public importance and is it in the public interest that they be resolved?

10. The Minister and the Interested Parties both hotly contested the notion that the BEST appeal raised any issues of public importance. Mr. Adamson submitted that while the making of a Special Development Order ("SDO") by Parliament in this case[2] may well have been of public importance, the implementation of the SDO (which was all the appeal related to) was an entirely different matter. BEST could not launch a collateral attack on the SDO itself. Accordingly, it was argued in the Minister's Skeleton Argument:

[1] The panel included Sir Maurice Kay LJ, recently appointed to the Court of Appeal for Bermuda.

[2] Tucker's Point Resort Residential Development (Hamilton and St. George's Parishes) Special Development Order 2011, BR 20/2011.

"*(12) BEST's challenge, shorn of its internationalist pretensions, is a typical planning challenge. The arguments are the entirely ordinary and typical arguments of all public challenges-did the Minister hear both sides and if not should it be remitted.*"

11. Mr. Martin submitted that the issues raised by the appeal raised neither questions of law of public importance, nor questions which it was important to be resolved in the wider public interest, being of relevance only to this particular SDO. As to the first limb of this argument, he submitted in paragraph 13 the Interested Parties' Skeleton Argument:

> "*(i)…The legal issues in this case do not concern 'environmental matters' within the meaning of the Aarhus Convention (per Hayward 1 at para 9). On the very special facts of this case, where a Special Development Order has been enacted by the Minister, exercising his statutory powers under the Development and Planning Act 1974, and has granted planning permission in principle, the legal issue is whether the DAB (or the Minister) has an obligation under Bermuda law to require an Environmental Impact Assessment study to be performed, prior to the registration of the approved plan of subdivision in accordance with the SDO. This is an extremely narrow point, and not one which engages the considerations of public general importance.*"

12. It appeared to me to be common ground that the present appeal will require this Court to interpret the SDO and to determine what level of environmental assessment is required at the stage of the planning decision to approve registration of a sub-division of the land in question. Paragraph 4 of the SDO provides as follows:

> "***Planning permission to subdivide land, draft subdivision approval and all other lands***
>
> *4. (1) Subject to the conditions specified in subparagraph (2), planning permission for the draft plan of subdivision is granted by this Order for the subdivision.*
>
> *(2) The conditions referred to in subparagraph (1) are as follows—*
>
> *(a) an application for planning permission based on a final plan of subdivision on an area by area (8 areas) basis, shall be submitted for approval by the Development Applications Board;*
>
> *(b) all site services and utilities required shall be placed underground and trenching shall be limited to no greater than 3 foot depths;*
>
> *(c) all sewage treatment requirements for the residential lots to be created shall generally be met using the existing Tucker's Point Club sewage treatment facility with cesspits and septic tanks not permitted. If in any case, connections to the sewage system are infeasible, a three-chambered semi-septic tank system may be permitted;*

(d) *land zoned woodland reserve and nature reserve at Paynter's Hill (Site 2,6.59 acres), land zoned coastal reserve on Harrington Sound Road (Site 6, 0.945 acres), and the lake known as Mangrove Lake in Hamilton Parish (Site 10, 18.70 acres), shall be created as part of a final subdivision and voluntarily conveyed to the Bermuda Government for conservation management purposes, prior to final approval for housing on any lot created by this Order;*

(e) *at the final plan of subdivision application stage, it must be fully demonstrated that all infrastructure required for development of the proposed lots, including roadways, water provision, and sewage can appropriately be provided in a suitable manner, particularly for lots proposed in sensitive environmental areas;*

(f) *in the case of the more sensitive environmental areas, the relevant supporting studies as outlined in paragraph 3(3) may be required at the subdivision stage to appropriately inform the exact lot lines, sizes and configurations, as well as to appropriately locate and size the intended building envelopes and access routes. Such supporting studies must be provided with the application for final subdivision; and full topographic details and all lots and roadways proposed will be required at the final plan of subdivision application stage, along with cut/fill/retention details.*" [emphasis added]

13. It is also common ground that the Independent Inspector appointed by the Minister to advise him on BEST's appeal against the DAB decision recommended that BEST's appeal should be granted and that a full EIA was required at the present planning phase of implementing the SDO. The Minister's decision rejected that recommendation. This factor alone suggests the need for heightened scrutiny of the legal validity of the impugned decision. In this regard, I reject the submission that any public interest which may have existed in relation to the enactment of the SDO evaporated once it became law. I also reject as overly simplistic the submission that no environmental and/or planning issues are raised by the appeal with implications for other cases.

14. I express no view at this interlocutory stage as to whether or not Mr. Martin was right to contend that it was premature to require an EIA at the sub-division stage, bearing in mind that final planning approval still had to be sought. However, this seems to me to be an important issue which will fall to be determined on the present appeal, and which is of potential import both for future SDOs, and for other significant sub-division applications which are pursued on a staged basis. It appears to me to be desirable for future cases to ascertain, if possible, whether the scheme of the 1974 Act generally and/or the SDO suggests that different levels of environmental scrutiny are permissible at different stages of any elongated planning process.

15. In addition, the natural justice point cannot simply be dismissed as solely of relevance to the peculiar facts of the present case. It is institutionally problematic for a Minister who may be politically responsible for multiple portfolios to be required to simultaneously discharge both political functions and quasi-judicial planning functions. What rules should govern contact between developers and the individual who holds the Planning portfolio at the Ministerial level, while an appeal by a public interest objector is pending, and how those rules impact on the fairness of a planning appeal, are questions of general public interest.

16. Another point of general public interest is whether or not it is right that the impact of refusing the applications on the financial standing of private companies is an irrelevant consideration to a planning decision. However this issue may be resolved, it is important in present economic times in particular (when there is considerable political pressure on Government to be seen to be supporting development projects) for there to be legal clarity as to whether such commercial concerns may or may not be taken into account for the purposes of planning decisions.

17. I find, for the purposes of the present application for a PCO, that the following issues of general public importance are raised by BEST's appeal:

    (a) irrespective of the merits of BEST's appeal, does the mere fact that an SDO has been enacted by Parliament materially impact on the right of bodies such as BEST, and/or this Court, to scrutinise the implementation of the SDO through the prescribed planning process?

    (b) as a matter of construction of the SDO and under the scheme of the Act, is it lawfully open to the DAB and/or Minister to disregard the need for an EIA at one stage of the planning process on the grounds that the issue can more conveniently be addressed at a later stage in the process?

    (c) how 'judicial' must a Minister be when a planning appeal is pending before him. Is it contrary to the rules of natural justice for him, wearing another Ministerial hat, to have a private meeting with Interested Parties to discuss what are considered by him to be matters wholly unrelated to the pending planning appeal?

    (d) what impact, if any, do international environmental legal obligations and/or instruments such as the Environment Charter for the UK have on the interpretation to be placed on the relevant provisions of the SDO, as they relate to the relevant sub-division application?

    (e) To what extent is it permissible in the context of adjudicating a planning application to take into account the negative impact of dealing with the application in a particular way on a private developer?

18. It is clearly in the public interest that these issues be determined by the Court with a view to providing guidance for future planning cases with a public interest dimension

to them, and also with a view to reducing the need for similar appeals by objectors like BEST in the future.

Having regard to the financial resources of the parties, and the likely costs, is it fair and reasonable to make a PCO?

19. The Respondent is the Crown and the Interested Parties are Joint Receivers of companies in receivership who are apparently funded by HSBC Bank Bermuda. Complaint was made that the estimate of $150,000 for the Appellant's costs was excessive, even taking into account a reduced hourly rate. While the estimate cannot easily be discredited, this Court is bound to have regard to the notorious fact that Bermuda's public finances are not as rosy as they once were. The Interested Parties are themselves financially distressed. From their secured creditor's point of view, the development was admitted by Mr. Potts to be a loss mitigation exercise.

20. The other parties to the appeal quite obviously have the resources to be able to meet any adverse costs made against them in favour of BEST, and the converse is plainly not true of BEST itself. But due regard must also be had for the fact that this is not an ordinary obviously profitable proposed development, but one being promoted by companies in receivership at a time when public finances are themselves distressed. It is fair and reasonable to grant a PCO, but a cost-capping Order is also obviously required, bearing in mind that BEST's attorneys are not engaged on a purely *pro bono* basis.

21. Fairness in all the circumstances of the present case looked at in the round also requires, in my judgment, that BEST ought not to be able to recover more than $75,000 by way of costs if they succeed. I reach this finding accepting that their actual costs might be significantly more than that, but the other parties to the appeal are being deprived of the right to make any recovery at all from BEST, should the appeal be dismissed. The Minister's suggestion that costs should be capped at $25,000 fell far short of the reasonableness mark.

22. Looked at globally, rather than seeking to analyse the reasonableness of each estimated item of time, the figure of $150,000 advanced by BEST's counsel was simply too high to fall within the boundaries of "*a reasonably modest amount*", as contemplated by Lord Phillips in *Corner House* (at paragraph [76]) .

23. On the other hand, to the extent that the estimate includes the not insignificant element of making a novel application for a PCO, my strong provisional view is that BEST ought to be awarded the costs of the present interlocutory application (as they relate to the PCO and excluding costs attributable to specific discovery and the stay, in any event.

Is there a risk that BEST might discontinue the proceedings if a PCO is not made?

24. I find that it is sufficient for this element of the guideline principles that BEST has demonstrated a risk that it might discontinue the proceedings is a PCO were not to be made. An obvious factor which supports this finding is the exposure to paying the costs of both the Respondent Minister and the Interested Parties if the appeal is lost.

This consideration was given considerable emphasis by Sullivan LJ in *R(Garner)-v-Elmbridge Borough Council et al* [2010]EWCA Civ 1006 (at paragraph 32).

25. In addition, and ignoring the import of the Aarhus Convention, which protects the right of access to justice in environmental cases but the application of which to Bermuda is subject to dispute, I take into account for present purposes and in making a PCO generally the constitutional right of access to the Court under section 6(8) of the Bermuda Constitution.

26. In all the circumstances of the present case, I reject the submission that the application should be refused merely because Mr. Hayward has not deposed in unequivocal terms that the appeal would "probably" be discontinued if the present application were to be refused, in literal *Corner House* terms.

Summary: application for a PCO

27. I find for the above reasons that BEST is entitled to a Protective Costs Order.

Findings: application for a stay

28. I am not satisfied that on the facts of the present case any formal stay of the Minister's decision pending the determination of the appeal is required. I accept the Interested Parties' account, which was advanced by Mr. Martin, to the effect that no potentially environmentally injurious steps will be taken by them before the determination of the appeal. The stay application is refused.

Conclusion

29. BEST's application for a PCO succeeds. In the event that its appeal is dismissed, it shall be protected from any adverse costs order. In the event that its appeal succeeds, BEST's costs shall be capped at $75,000.

30. BEST's application for an interim stay pending appeal is refused, with liberty to BEST to renew it should cogent grounds for so doing subsequently emerge.

31. I will hear counsel, if required, on the terms of the Order required to give effect to the present Ruling and as to the costs of the present application, in which the Appellant BEST achieved substantial success. My provisional view is that BEST ought to be awarded the costs of the present application, to be taxed if not agreed, in any event.

Dated this 25th day of June, 2014_____

IAN R.C. KAWALEY CJ