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 COSTS

(in Chambers)

Date of hearing: September 17, 2014

Date of Ruling: September18, 2014

Mr. Alex Potts, Sedgwick Chudleigh Ltd., for the Appellant ("BEST")

Mr. Ben Adamson, Conyers Dill & Pearman Limited, for the Respondent (the "Minister")

Introductory

1. By Notice of Motion dated April 2, 2014, BEST appealed against the March 12, 2014 decision of the Respondent ("the Minister") dismissing BEST's appeal against four decisions of the Development Applications Board ("the DAB") dated July 17, 2013 and published on July 26, 2013. BEST sought orders quashing both the Minister's decision and the underlying decisions of the DAB.

2. On June 25, 2014, I granted BEST's interim application for a Protective Costs Order on the grounds that the appeal raised issues of public interest[1]. By letter dated June 27, 2014, the Minister's attorneys communicated his concession that the impugned decision was flawed and "*should be retracted*". After BEST's attorneys sought clarification of this offer and raised concerns about the efficacy of resolving the appeal on the basis suggested by letter dated July 1, 2014, the Minister's attorneys by letter dated July 3, 2014 stated most pertinently as follows:

   > "*… we recognise the sense in having the legal issues resolved given that the hearing date* [is] *already in place and the work already done. While our view remains that there is no need for a hearing since the Minister will now reconsider the matter afresh, which will require him to reconsider the legal and factual arguments, we see merit in asking the Court to resolve the legal issues so that all parties can have certainty on the correct legal position. Further, if your legal argument that the SDO is in any event ultra vires, for example,* [is correct,] *this may mean that there is nothing for the Minister to decide*."

3. The Minister's further concession that the legal issues in dispute should be resolved by the Court before the appeal was re-heard was a sensible one because it made no sense whatsoever for the Minister to rehear BEST's appeal on the same legal basis as initially, giving rise to the likelihood of a further appeal covering the very same legal disputes presently before the Court. The parties effectively agreed that the case required a hearing and argument in order for this Court to give reasons for its decision and determine the precise form of relief to be granted, as part and parcel of the hearing of the appeal as a whole.

4. In other words, the parties expressly or impliedly agreed that the various legal questions in controversy (other than the narrow natural justice point conceded by the Minister) should be determined, <u>one way or the other</u>, to facilitate the primary relief it was agreed BEST was entitled to: setting aside the Minister's decision and having the appeal against the Development Application Board ("DAB") decision re-heard. There was no or no explicit suggestion made by the Minister that BEST should abandon

[1] [2014] SC (Bda) 56 Com (25 June 2014).

certain points on the grounds of irrelevance or frivolity, nor indeed that that the costs of the appeal hearing should not be treated as part of the general costs of the appeal.

5. In paragraph 3 of the Judgment dated August 6, 2014[2], I summarised the main issues in controversy as follows:

"

(a) *whether the SDO and/or Bermuda law required an Environmental Impact Assessment ("EIA") to be carried out before the DAB granted planning permission;*

(b) *whether, if (a) was answered in the negative, the SDO was substantively ultra vires or procedurally invalid;*

(c) *whether this Court should quash the DAB's decisions on, inter alia, natural justice grounds, together with the Minister's decision, or whether the matter should be remitted to the Minister to re-hear the appeal against the DAB's decision.*"

6. Mr. Adamson submitted, reading this introductory paragraph very literally and out of the wider context of the Judgment as a whole, that all these points had been resolved in his favour. Having regard to the breadth and depth of the arguments advanced at the main hearing, the issues described in (a) and (b) were clearly defined in simplified and summary form in the introductory segment of the Judgment.

7. I reached the following conclusions in the Judgment:

"*116. I find that under the Development and Planning Act 1974 as read with the Development Plan, there is a discretionary rather than mandatory requirement for conducting an EIA before planning approval is granted for major projects. In respect of major projects likely to have a significant environmental impact, this assessment technique should be deployed as a general rule.*

117.Because at the international treaty level Bermuda has committed to use EIAs, and their use is so widely accepted as to form a general principle of international law, clear statutory language would have been required to justify construing the SDO as excluding the need for an EIA at any stage of the development project. Clearly, the Minister adopted the SDO without first conducting a comprehensive or full EIA. But the conditions upon which "in principle" approvals were granted, in particular the specification of various studies, neither expressly nor by

[2] [2014] SC (Bda) 61 App (6 August 2014).

necessary implication negatived the general statutory duty of the DAB to obtain the best quality information to inform its decisions under the Act as read with the SDO. The DAB and the Minister erred in law by construing the SDO as excluding the option of requiring information in support of the applications to be presented in a manner which was not spelt out in the SDO.

118.I also find that the SDO is valid and is not liable to be set aside on the grounds that either (a) it was substantively ultra vires the Act, or (b) procedurally invalid.

119.The Minister conceded that his decision dismissing BEST's appeal against the decision of the DAB to grant final subdivision approval in each of the four cases was liable to set aside because it was procedurally invalid. The central issue in controversy revolved around the relief the Court would grant ancillary to allowing the appeals against the Minister's decision. He invited the Court to remit the appeals to him to be reheard according to law. BEST invited the Court to quash the DAB decisions as well (based on procedural and substantive unfairness at the DAB level). This would have required the Applicants to submit fresh applications, with the obvious risk that their efforts to preserve the Tucker's Point Resort and related local employment might be undermined.

120.While BEST's complaints about the fairness of the process before the DAB were justified, it was far from clear that a different decision would have been reached by the DAB had it proceeded more fairly and on a correct view of the law. Moreover, whether or not there should be an EIA and what form it should take are heavily policy-laden questions which the statutory scheme envisages will be resolved by the Minister and not this Court. I accordingly find that BEST's appeals against the DAB decisions should be remitted to the Minister for rehearing, ideally by a person appointed by him under the provisions of section 57(4) of the Act."

8. The most important findings in terms of the principles according to which the rehearing of BEST's appeal would be governed were the findings that the Minister (and the DAB) had a discretion to consider requiring an Environmental Impact Assessment ("EIA") despite the fact that the SDO granted approval in principle without an initial EIA informing that preliminary permission. This conclusion reflected a rejection of BEST's primary arguments as to an EIA being obligatory under Bermuda law, but adopted the following alternative ground of appeal set out in the Notice of Motion:

"*1.1.8 The Minister wrongly concluded that the SDO excluded the possibility of the DAB and/or the Minister deciding and requiring that an Environmental Impact Assessment should be carried out prior to the grant of planning permission by the DAB and/or by the Minister*".

9. Because this pivotal ground of appeal was successful, the further alternative challenge to the substantive validity of the SDO fell away. The question of whether the DAB decision should be set aside as well as the Minister's decision concerned the scope of relief only, and was resolved in favour of the Minister in circumstances where the Court acknowledged the validity of BEST's concerns about the Minister personally re-hearing the appeal.

Findings: relevant legal principles

10. Mr. Potts relied in terms of governing principles upon my own decision in *Binns et al-v-Burrows* [2012] Bda LR 3 where I stated (at pages 3-4):

> "*6.The above authorities suggest that, unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:*
>
> *(a) determine which party has in common sense or "real life" terms succeeded;*
>
> *(b) award the successful party its/his costs; and*
>
> *(c) consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or there is some other compelling reason to depart from the usual rule that costs follow the event.*
>
> *7.The Bermudian legal position, absent a directions order identifying discrete issues for determination at trial, requires reference (in terms of persuasive English authority) to the old pre-CPR principles governing the award of costs. These principles were described as follows by Warren J in Actavis-v-Merck & Co. Inc. [2007] EWHC 1625:*
>
>> *'12… costs at the discretion of the court; follow the event, except where it appears that some other order should be made; the general rule does not cease to apply because the successful party raises issues which he fails on, but where that has caused a significant increase in the length of the proceedings, he may be deprived of the whole or part of his costs; where the successful party raises an issue improperly, he cannot*

only be deprived of his costs but be ordered to pay his opponent's costs."

8.I am fortified in reaching this conclusion by the following passage from the Judicial Committee of the Privy Council decision in Seepersad v. Persad & Anor (Trinidad and Tobago) [2004] UKPC 19 (per Lord Carswell):

'[24] The Court of Appeal gave the appellant only half costs of his appeal and the cross-appeal brought by the respondents against the amount of the award for pain and suffering and loss of amenity. In so ordering it must have treated the assessment of damages under this head as if it were a separate issue on which the appellant had lost, while succeeding on the other issues. In their Lordships' view this was an erroneous approach. The award of costs in Trinidad and Tobago is in the discretion of the court, as is usual in most common law jurisdictions. The general rule which should be observed unless there is sufficient reason to the contrary is that costs will follow the event. Where the party who has been successful overall has failed on one or more issues, particularly where consideration of those issues has occupied a material amount of hearing time or otherwise led to the incurring of significant expense, the court may in its discretion order a reduction in the award of costs to him, either by a separate assessment of costs attributable to that issue or, as is now preferred, making a percentage reduction in the award of costs: see, eg, In re Elgindata (No 2) [1992] 1 WLR 1207. The Court of Appeal's order was predicated upon the proposition that the assessment of damages for pain and suffering and loss of amenity was a separate issue from the assessment of the other heads of damage. This was an incorrect assumption. An issue for these purposes must be something so distinct and separate in itself that the decision of it constitutes an 'event'. The 'event' was the quantum of damages to which the appellant was entitled and he succeeded on his appeal in obtaining a higher award than the judge had given him: even though one head was decreased, another was increased and one which the judge had omitted was added to the total. Their Lordships accordingly consider that the Court of Appeal had insufficient ground for reducing the award of costs made to the appellant and that he should have been awarded full costs in that court, without separating out any element attributable to the cross-appeal, which was only a means of putting in issue the quantum of all the

items of damage in the judge's award." [emphasis added]"

11. Mr. Adamson, submitting primarily that no costs should be awarded after his firm's July 3, 2014 letter as the Minister had succeeded on all issues, relied in the alternative on the Court's power to proportionately reduce costs under the following category of circumstances articulated by Nourse LJ in *In re Elgindata (No 2)* [1992] 1 WLR 1207 at 1214:

> "*(iii) The general rule does not cease to apply simply because the successful party raises issues or makes allegations on which he fails, but where that has caused a significant increase in the length or costs of proceedings he may be deprived of the whole or a part of his costs.*" [emphasis added]

12. BEST's counsel relied upon one additional authority which I considered to be of particular relevance to the present case. In *Munjaz-v-Mersey Care NHS Trust* [2004] QB 395 at 439-410, Hale LJ (as she then was, giving the judgment of the English Court of Appeal within a costs framework within which issue-based costs orders are expressly provided for) held:

> "*89. We do not consider that an issue-based approach, in the sense of an approach based upon which arguments succeeded and which arguments failed, is appropriate in a case such as this. Fundamental human rights and the liberty of the subject are involved….there is a public interest in these issues beyond those of the individual parties. It would be wrong to discourage any party from raising any proper and reasonable argument even if it ultimately failed.*"

13. I reject the contention, advanced by Mr. Adamson, that these observations have no relevance beyond the narrow confines of the facts of the case in which they arose where failed arguments were simply not punished with the usual adverse costs consequences.

14. Finally, it was not disputed that this Court may summarily assess costs or, as illustrated by Hellman J's decision of *Corporation of Hamilton-v- Ombudsman for Bermuda* [2014] Bda LR 1 at paragraph 53, make an interim costs order. As regards summary assessment, Order 62 rule 7 of this Court's Rules provides:

> "(5)*Where the court orders a party to pay costs to another party (other than fixed costs) it may make a summary assessment of the costs, unless any rule, practice direction or other enactment provides otherwise.*
>
> *(6)Where the court makes a summary assessment under paragraph (4), the costs so assessed shall be payable forthwith, unless the court orders otherwise.*"

Findings: merits of costs application

15. I find that the Appellant, BEST, has unarguably succeeded in its appeal in real world terms. I reject entirely the argument advanced on behalf of the Minister that the hearing which took place after the Minister's concession that his decision should, in effect, be regarded as a freestanding hearing wholly divorced from the appeal itself. The parties agreed that the hearing was necessary to determine not just the scope of the relief BEST was entitled to. But, more importantly, the hearing was sensibly regarded by the Minister as necessary to ensure the efficacy of the re-hearing he contended for.
16. Mr. Adamson was correct that many of the issues in dispute were resolved in the Minister's favour. BEST did not succeed in establishing a mandatory obligation to conduct an EIA. BEST did not succeed in compelling the Interested Parties to go back to the DAB. But the Minister can hardly contend that BEST spent a disproportionate amount of time on issues which he agreed the Court had to resolve to make the rehearing before him which he contended for a meaningful process. Category (iii) of the *Elgindata* case does not apply to the circumstances of the present case.

17. Further and in any event, I find that having regard to the public interest in having the issues which were determined decided, it would be wrong to displace the usual costs rule that a successful appellant should have its costs merely because some of its grounds of appeal did not succeed.

18. BEST is awarded its costs of the appeal in full, subject to the $75,000 cap imposed by the Protective Costs Order of June 25, 2014 (the "PCO").

19. Mr. Adamson submitted without much elaboration that taxation was required and the Court should not exercise its jurisdiction to summarily assess costs. I was minded to accept this submission until Mr. Potts revealed that he had invited the Minister to agree costs, based on a fairly detailed schedule, and had received no response by way of open correspondence. This was inconsistent with the obligation to assist the Court to achieve the overriding objective.

20. Further, the failure by the Minister's attorneys to agree costs and their insistence upon taxation risked impeding BEST's ability to effectively participate in a scheduled rehearing before the Minister on October 2, 2014. Its legal advisers are looking to the costs award for reimbursement of their fees, and there is a limit to how much work lawyers can reasonably be expected to pursue without recompense.

21. In this case, as Mr. Potts pointed out, there is very limited scope for the Registrar to substantially discount BEST's recoverable fees beneath the cap of $75,000. The PCO has already determined that $75,000 would be a reasonable amount for it to be paid, on the assumption that its actual costs would be significantly more than that, in

consideration of being protected from the risk of an adverse costs order. In all the circumstances, in the exercise of my discretion, I find that justice requires that this Court summarily assess costs to avoid a situation in which the costs of taxation are disproportionate to the amounts (if any) in dispute, and to ensure that payment of sums that are obviously due is not unfairly delayed.

Costs awarded

22. The Schedule of costs submitted, which I accept is reasonable in general terms, reveals that the actual legal costs (excluding the present costs application) are marginally in excess of $100,000. It is impossible to exclude the possibility that on taxation, some deductions might be made. But having regard to the complexity of the issues which formed the subject of the present appeal, and the thoroughness of the Appellant's preparation of its case, both looked at in global terms, taxing off significantly more than 25% of the total costs claimed could never be justified.

23. Erring very generously in favour of the Minister in this estimation process, I summarily assess the Plaintiff's costs of its successful appeal at $70,000, and order that this sum should be paid on or before September 30, 2014.

Dated this 18th day of September __________________________

IAN RC KAWALEY CJ