



In The Supreme Court of Bermuda

COMMERCIAL COURT

APPELLATE JURISDICTION

2015: Nos.330 and 392

THE BERMUDA ENVIRONMENTAL SUSTAINABILITY TASKFORCE

Appellant

-AND-

THE MINISTER OF HOME AFFAIRS

(in his capacity as Minister responsible for planning)

Respondent

RULING

(in Chambers)

Date of Ruling: October 27, 2015

Mr. Alex Potts, Sedgwick Chudleigh Limited, for the Appellant (“BEST”)

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

Introductory

1. On October 2, 2015, I directed that BEST’s applications in each appeal for a protective costs order (“PCO”) should be determined on the basis of written submissions the last of which was to be filed on October 12, 2015.
2. The two conjoined appeals relate to:

(1) the Minister's decision of July 14, 2015 dismissing BEST's appeal against the April 6, 2015 decision of the Development Applications Board ("DAB") whereby conditional approval was given to applications by South Basin Limited in relation to:

(a) land reclamation in the South Basin,

(b) the development of the reclaimed land as the America's Cup Bermuda ("ACBDA") Event Village,

(c) development of a Phase 2 Commercial Marine Facility and Marina ("Decision 1"); and

(2) the Minister's decision of September 9, 2015 purporting to re-determine Decision 1 ("Decision 2").

3. The Minister indicated on October 2, 2015 that an open offer had been made to pay the costs of the appeal against Decision 1. This position was formally confirmed in paragraph 36 of the Minister's Written Submissions.

4. Accordingly, the primary substantive issue in controversy is whether a PCO is appropriate in relation to the challenge to Decision 2, although in my judgment the matter must ultimately be looked at in global terms. This is because BEST complains that its appeal against Decision 1 retains vitality since certain relief it seeks remains outstanding in any event.

Applicable legal principles

5. In *Bermuda Environmental Sustainability Taskforce-v-Minister of Home Affairs* [2014] Bda LR 68, in a similar legal context involving the same parties, I held that the following circumstances were relevant to the decision whether or not to grant a PCO:

(a) are the issues raised of public importance and is it in the public interest that they be resolved?

(b) is it fair and reasonable to make a PCO having regard to the financial resources of the parties and the likely costs?

(c) is there a risk that the applicant might discontinue the proceedings if a PCO were not to be made?

6. Neither party invited me to adopt a different approach. The Minister only challenged whether the requirements of (a) had been met in all the circumstances of the present case.

Findings: should a PCO be made?

7. The scope of the controversy can best be defined by quoting the following extract from the Minister's Written Submissions:

"2. The issues for determination are:

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

b. If so, what should be the terms of such a PCO?"

8. Mr. Adamson primarily argued that no public interest in having the challenge to Decision 1 determined by the Court truly existed because the substance of BEST's initial complaint had been conceded and a new decision was subsequently made on the correct legal basis. The challenge to Decision 2 is essentially said to be both academic and legally unmeritorious.
9. The appeal against Decision 1 was based on the following principal grounds:
 - (a) the Minister erred in law in accepting the finding of the Inspector that the reclamation project and end uses project had already been taken by Parliament. This was wrong in law and in fact; and
 - (b) the Minister failed to have adequate regard for deficiencies in the planning applicant's Environmental Impact Assessment and Environmental Impact Study.
10. The relief sought was primarily an Order setting aside the DAB's April 6, 2015 decision or, alternatively, reconsideration by the Minister. At the hearing of October 2, 2015, I indicated that the Court was unlikely to challenge the Minister's judgment that it was in the public interest that the ACBDA Event Village project be completed on schedule. Mr. Potts identified the challenge to the end-uses approval in principle as an aspect of Decision 1 and/or Decision 2 which could still be reversed without overriding that public policy objective.
11. The public importance of the merits or policy-based aspects of the present appeals being fully aired are strengthened rather than weakened by the fact that the national interest in pressing ahead with the development "at all costs" is being advanced in

response to these environmental arguments. Broad consensus that a general course of action is necessary in the public economic or financial interest is a potentially intoxicating force likely to impede rather than promote intellectual and procedural clarity and sound public policy decision-making. In the context of proposed large-scale developments involving environmentally sensitive areas, this is par excellence the type of scenario which cries out for heightened rather than diminished judicial scrutiny.

12. In my judgment the submission that Decision 2 has rendered the appeal against Decision 1 academic is based on a gross over-simplification of the scope of the present appeals. The analytical frame adopted by the Minister in response to the present appeals is entirely understandable and may ultimately be vindicated in practical terms. But this lens fails to distinguish the broad economically-driven public policy objective of making the ACBDA a success from the equally broad environmental public policy considerations of how planning approval for such economically important developments ought properly to be managed under Bermudian planning law.

13. Mr. Potts relied, *inter alia*, on observations of Sir Anthony Clarke MR in *R (ex parte Buglife) -v- Thurrock* [2008] EWCA Civ 1209, delivering the judgment of the Court (which included Kay LJ and Burnton LJ). In approving earlier statements by Waller LJ in *R (Compton) -v- Wiltshire PCT* [2009] 1 WLR 1436, the Master of the Rolls opined as follows:

“17. At [20] Waller LJ expressed the opinion that there should be no difference in principle between the approach to PCOs in cases which raise environmental issues and the approach in cases which raise other serious issues and vice versa. At [21] Waller LJ expressed the view that the two tests of general public importance on the one hand and the public interest in the issue being resolved on the other were difficult to separate. We agree.”

14. It is far from clear whether the Minister was empowered by the legislative scheme to effectively by-pass judicial scrutiny of an appeal brought by a public advocacy body by unilaterally reconsidering his original decision. Appeals such as these are likely to become part of the modern Bermudian planning law landscape. In my judgment it is of considerable public importance to clarify the law in this area, one way or the other.

15. I find that this is an appropriate case for a PCO.

Findings: terms of the Order

16. I take into account the fact that the Minister has agreed to pay BEST's costs of the appeal against Decision 1 up to September 10, 2015 without any cap. However, it appears to me (based on a broad review of the files) that at the end of the day most of the costs will likely have been incurred after September 10, 2015. The actual legal costs for this period are likely to be in the \$75,000 to \$100,000 range. Mr. Adamson rightly submitted that recipients of a PCO ought only to be able to receive a modest costs award.

17. Against this background, and bearing in mind that in late August BEST offered to accept a PCO with a cap of \$50,000 in relation to the original appeal to avoid the necessity for the present application, I find that it is appropriate to make the PCO sought and to impose a cap of \$50,000.

Dated this 27th day of October 2015

IAN RC KAWALEY CJ