Neutral Citation Number: [2025] CA (Bda) 1 Civ

Civil Appeals No. 40 and 41 of 2022 and No. 36 of 2023

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
BEFORE THE HON. ASSISTANT JUSTICE SOUTHEY
CASE NUMBER 2022: No. 89

Before:

THE PRESIDENT, THE RT HON SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL, THE HON SIR ANTHONY SMELLIE
and
JUSTICE OF APPEAL, THE HON IAN KAWALEY

- -

CIVIL APPEAL No. 40 of 2022

BETWEEN:

LEYONI JUNOS

1st Applicant

-and-

(1) THE PREMIER OF BERMUDA
(2) COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondents

CIVIL APPEAL No. 41 of 2022

BETWEEN:

MYRON ADWIN PIPER

2nd Applicant

-and-

(1) THE PREMIER OF BERMUDA
(2) COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondents

CIVIL APPEAL No. 36 of 2023

BETWEEN:

ROBERT GEORGE GREEN MOULDER

3rd Applicant

-and-

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN BERMUDA

Respondent

The Appellants appeared as Litigants in Person
Mr Ryan Hawthorne, of Trott & Duncan Limited, for the Commission of Inquiry
Ms Lauren Sadler-Best of the Attorney General's Chambers, for the Premier of Bermuda

Decided on the papers
Date of Ruling: 31 January 2025

- - - - - - - - - - - - - - - - - - - -

RULING ON APPLICATION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL

SIR CHRISTOPHER CLARKE P

1. This is our ruling on the Applicants' application for leave to appeal to the Judicial Committee of the Privy Council against the decision of the Court of Appeal in the case of *Raymond Davis and Myron Piper v The Premier and the Commission of Inquiry into Historic Losses of Land in Bermuda* [2024] CA (Bda) Civ dated 11 October 2024 (the "**Judgment**"[1]). This ruling followed an earlier judgment of February 22 2024 to which Messrs Piper, Davis, Moulder and Junos were all parties as was the Commission and the Premier: [2024] CA (Bda) 6 Civ

2. The parties to the case which is sought to be appealed were Mr Davis and Mr Piper. Neither Ms Junos nor Mr Moulder were parties thereto. Accordingly, neither of them should be given leave to appeal on any of the grounds set out in the Notice of Motion. As to those grounds, which are relevant only in relation to Mr Piper, the only applicant with standing to apply for leave ("the Appellant"), the position is as follows.

3. Section 2 of the Appeals Act 1911 ("the 1911 Act")) provides that an appeal from the Court of Appeal for Bermuda to His Majesty in Council, lies:

[1] Relating to Civil Appeals Nos 39, 40, 41 and 41A of 2022.

"(a) as of right, from any final judgment of the Court, where the matter in dispute on the appeal amounts to or is of the value of $12,000 or upwards or where the appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of $12,000 or upward; or

(b) as of right, from the final determination of the Court of an appeal from any final determination of any application or question by the Supreme Court under section 15 of the Constitution;

(c) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if in the opinion of the Court, the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to His Majesty in Council for decision."

4. The Appellant has no appeal as of right. The intended appeal does not involve any sums of money but a question as to whether the Commission of Inquiry was *ultra vires* section I of the Commissions of Inquiry Act 1935, and whether the Commission misinterpreted that Act. Nor does the appeal involve a final determination of an appeal from a final determination of an application or question by the Supreme Court under section 15 of the Constitution.

5. In relation to the question as to whether the appeal "*ought to be submitted to His Majesty in Council for decision*" because the question involved in the appeal is one of great general or public importance, or otherwise, the question has been considered in Bermuda in a number of cases In *Imran Siddiqui v Athene Holdings* BM 2019 CA 17 [52] it was held that leave should not be granted "*where there is, on proper analysis, no genuine dispute as to the applicable principles of law*." In other words, leave should not be granted where there is a "*dispute as to the applicability of settled principles of law to the facts of the case in dispute*." The Court at [54] cited dicta from the case of *Renaissance Ventures Ltd v Comodo Holdings* [2018] ECSC J1008-3 as follows, "*Where however, the real question on the proposed appeal is <u>the way this Court has applied settled and clear law to the particular facts of the case</u>, or whether a Judicial discretion was properly exercised, leave will ordinarily not be granted on this ground. In such a case, the question on the proposed appeal may be of great importance to the aggrieved applicant, <u>but it would not for that reason alone be a question of great general or public importance</u>*." [emphasis added]

6. It is necessary to consider the grounds of appeal against that background

Ground 1

7. The first of the grounds of appeal (expressed as "Points of Law raised in the Public Interest" is:

> **<u>Ground 1</u>**: "*Whether the Commission of Inquiry was ultra vires Section 1(1) of the Commissions of Inquiry Act 1935 – the decision of the Court being against the weight of the evidence."*

8. Section 1 of the Commissions of Inquiry Act 1935 ("the 1935 Act") provides as follows:

> "***Governor may appoint commissioners of inquiry into matters of public nature***
>
> *1. (1) The Governor may, whenever he considers it advisable, issue a commission appointing one or more commissioners and authorizing them, or any quorum of them therein mentioned, to inquire into the conduct of any civil servant, the conduct or management of any department of the public service or into any matter in which an inquiry would in the opinion of the Governor be for the public welfare.*
>
> *(2) Each such commission shall specify the subject of inquiry, and may, in the discretion of the Governor, if there is more than one commissioner, direct which commissioner shall be chairman, and direct where and when such inquiry shall be made, and the report thereof rendered, and prescribe how such commission shall be executed, and may direct whether the inquiry shall or shall not be held in public.*
>
> *(3) In the absence of a direction to the contrary, the inquiry shall be held in public, but the commissioners shall nevertheless be entitled to exclude any person or persons for the preservation of order, for the due conduct of the inquiry, or for any other reason*."

9. Section 2 of the 1935 Act gives the Premier the authority to issue Commission of Inquiry.

10. In our view we properly interpreted the Terms of Reference in accordance with well-established principles in *Ratnagopal v Attorney General* [1970] AC 194 (Judgment at [62]-[63], [65]-[67]; *Berthel v Douglas* [1995] 1 WLR 794 (Judgment at [67]); *R (Mario Hoffman) v Commission of Inquiry and Governor of Turks and Caicos Islands* [2012] UKSC 17 (Judgment at [68]-[69]); and *Bermuda Emissions* (Judgment at [67]).

11. In the light of those principles the President said:

> "*73. I am entirely satisfied that the establishment of the COI was not ultra vires the Premier on the basis contended for, namely that the Terms of Reference for the Inquiry left it to the COI, themselves, to determine what they should inquire into (or on any other basis). The terms create some difficulty in interpretation but that does not mean that the COI was purportedly given some sort of free rein to decide what to investigate (and what not to investigate) such that the COI was really the party which would determine what it would inquire into. Nor was it irrational or unreasonable to establish a Commission on those Terms."*

12. In our judgment this ground does not cross the necessary threshold. The dispute is not as to the relevant principles of law but as to their applicability.

Ground 2

13. The second ground is as follows:

> **<u>Ground 2</u>**: "*Whether the Commission of Inquiry had any authority to confer standing on a claimant – or compel them to give evidence – who had been formally notified that their claim was outside the Terms of Reference of the Commission*."

This issue was not raised in the Form 86A in the Davis/Piper claim; was not the subject of argument before Southey AJ; was not a ground on which Mr. Piper got an enlargement of time to appeal (see 22 February 2024 Judgment at [57(b)]); and was not an issue that was before the Court of Appeal.

Ground 3

14. The third ground is as follows

> **<u>Ground 3</u>**: "*Whether the Court of Appeal should have issued the judgment of 11 October 2024 without having all relevant evidence and all appeals before the Court – having previously undertaken to hear all parties together in the same session*."

15. Ms Junos' complaint is that she was not before the Court of Appeal at the hearing of the Davis/Piper case in June 2024. As to that, the decision to separate Ms. Junos' appeal from the Davis/Piper appeals was taken by Acting Justice of Appeal Alexandra Wheatly by order dated 24 April 2024 (the "24 April 2024 Order"). The 24 April 2024 Order was made following Ms. Junos' non-compliance with an earlier Order dated 15 March 2024 (the "15 March 2024 Order") and non-attendance at the hearing on 24 April 2024 resulting in Wheatley AJA having no indication whatsoever as to whether Ms. Junos' appeal would be ready for the June session.

16. The background to Ms Junos position is complicated. At [45] of the judgment of 22 February 2024 we set out the position as follows:

> *45. On 16 September 2022, Ms Junos filed with the Court of Appeal a notice of appeal from the judgments of 5 August 2022. In that notice she expressed dissatisfaction with the decisions of that date in Case 29 of 2021 (Davis/Piper) and Case 179 of 2022 (Junos); contended that the appointment of the Commission was ultra vires section 1 (1) of the Act; and said that, in relation to the Davis/Piper judgment the judge had erred in law when failing to find that the appointment of the Commission was ultra vires section 1 (1) of the Act, and that the Commission had misdirected itself in relation to the interpretation of the Terms of Reference and erred in finding that any misdirection with regard to the Terms of Reference applied to Mr Davis alone*."

17. In the same judgment (unappealed) we determined that Ms Junos needed leave to appeal (which she had not sought) from the decision of the Supreme Court of 5 August 2022 in Case No 179 of 2022. We gave her leave to appeal *"but only in respect of her application for leave to seek judicial review on the grounds that the*

appointment of the Commission was ultra vires section 1 or that the Commission acted ultra vires section 6 of the Act." We also said that Ms Junos had no right or entitlement to appeal the Davis/Piper cases to which she was not a party.

18. In the same judgment we considered time estimates at [86] in the following terms:

> "…*As to that, the appeals that need to be heard together are the Davis/Piper appeals and the Commission's appeal. I would add the Junos appeal to that list because it does not seem to me that it raises additional considerations to those that are in issue in the other three appeals. They all concern the basic question of whether the Commission was ultra vires or the Commissioners acted in an ultra vires manner*…"

As is apparent there was no undertaking to have Ms Junos' appeal heard with that of Messrs Davis and Piper. In the events which happened that could not take place.

19. It is wholly unclear what is the "relevant evidence" that Ms Junos could produce. The section 1 question was a question of construction to which evidence would have been irrelevant. Neither Mr Piper nor Mr Davis identified any evidence that should have been but was not before the Court. If some evidence was admissible it would have to be produced and the Commission given the opportunity to respond, neither of which happened.

Ground 4

20. Ground 4 is as follows:

> **<u>Ground 4</u>**: "*Whether the Court of Appeal acted with apparent bias and/or contempt – and thereby prejudiced the Appellants' appeals – when it deliberately and consciously ignored an application made jointly by the Appellants to have a Review of a previous judgment that governed how the appeals would proceed – which application needed to be addressed before hearing the appeals that became the subject of the 11 October judgment*."

21. Ms Junos filed, on 15 May 2024, a Notice of Motion for Review of the judgment of February 22 2024. The Court of Appeal did not immediately address that Notice, which was itself defective, (nor did Ms Junos follow up on it until after the judgment of 11 October 2024 was handed down). The Notice of Motion was in fact heard by the Court on 11-12 November 2024 and the Court has reserved judgment, which will, in due course, provide further detail of the complicated sequence of events. Two of the members of the November Court were invited to recuse themselves for apparent bias and declined to do so for reasons which will appear in the judgment. It is unclear how the review would have impacted on how the Davis/Piper appeal would proceed. In any event, the matter complained of is not one for the Privy Council to address and this ground is not appealable on any basis set out in the 1911 Act.

Ground 5

22. This ground is as follows:

<u>Ground 5</u>: "*Whether the Court can issue Orders which commit the parties to a course of action during the 21-day appeal period, and whether this violates due process and natural justice*

23. This appears to be a complaint that directions were given by Assistant Justice Wheatley on 15 March 2024, which was within the 21-day time limit to appeal the 22 February 2024 judgment. In fact, the 21-day period had expired by 15 March. But in any event this ground, which relates only to Ms Junos and Mr Moulder, is out of time; is an issue of Bermuda procedure (it is unclear why it is said that a directions hearing could not take place before the end of the 21-day period) and is not appealable on any of the grounds set out in the 1911 Act.

Ground 6

24. This ground is as follows:

> **Ground 6** Whether the current procedure (as practiced in Bermuda) of applying for leave to appeal a refusal of leave to apply for judicial review is lawful, and/or whether it offends natural justice and current practice in the UK.

25. This ground does not arise out of the judgment of October 10 2024. The decision of the Court of Appeal that leave was required to appeal from a refusal of leave to apply for judicial review was reached in the February 2024 decision and an appeal from that decision is out of time Section 3 of the Appeal Act 191 Provides:

> *3 Applications to the Court for leave to appeal shall be made by motion or petition within twenty-one days after the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.*"

26. Lastly there seems to us no basis upon which leave should be given under the "*or otherwise*" limb. The threshold, as this Court found in *HKSB v Newocean Energy* [2021] CA (Bda (21 Civ), is a high one. There must be "*truly exceptional circumstances to justify this court in granting leave*" [17][2] and none of the grounds put forward rises to that level. If, the "great general or public importance" requirement is not met (and it is not) "*it cannot be right that leave should be granted on the basis of the "or otherwise*" limb: *Siddiqui v Athene* [60].

27. For all these reasons we decline to grant any of the applicants leave to appeal to the Privy Council

SMELLIE JA

28. I agree.

KAWALEY JA

29. I also agree.

---

[2]. At [17], citing and following dictum from Baker P. delivered on behalf of this Court in *Sturgeon Asia Central Balanced Fund Ltd v Capital Partner Securities Co Ltd* Civil Appeal No 14 of 2017.