Neutral Citation Number: [2023] CA (Bda) 11 Civ

Case No: Civ/2022/07

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. MRS. JUSTICE SUBAIR WILLIAMS
CASE NUMBER 2020: No. 469

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 07/06/2023

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
JUSTICE OF APPEAL GEOFFREY BELL

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Between:

THE INFORMATION COMMISSIONER

Appellant

-and-

THE ATTORNEY-GENERAL

Respondent

Ms Monica Carss-Frisk KC instructed by Mr Warren Bank, Cox Hallett Wilkinson, for the Appellant
Mr Paul Harshaw, Canterbury Law Limited, for the Respondent

RULING ON COSTS

BELL JA:

Introduction

1. On 24 March 2023 this Court delivered judgment on the appeal taken by the Information Commissioner ("the Commissioner") against the decision of Subair Williams J dated 25 January 2022, in which the judge had quashed the decision of the Commissioner to issue two summonses against the Attorney-General ("the A-G"), arising from her refusal to produce documents which had been the subject of a request made by a Royal Gazette reporter to the Commissioner, who had sought the documents in question pursuant to the provisions of the Public Access to Information Act 2010 ("the PATI Act"). The documents concerned a settlement which had been reached between the Ministry of Health and the Brown-Darrell Clinic and Bermuda Healthcare Services, involving the payment of a total of $600,000, where the settlement documents (which the Royal Gazette reporter had sought) were said to have been created in or obtained by the A-G's chambers. In our judgment we indicated that we would consider the question of costs, if sought, following the receipt of written submissions to be provided within 14 days. The Commissioner provided written submissions on 5 April 2023, in which she sought costs on the standard basis for leading and local counsel, and the A-G's chambers provided written submissions on 10 April 2023, in which it asked that the Court make no order as to costs.

Submissions

2. As the A-G's submissions pointed out, any order for the payment of costs on this appeal will essentially amount to an order for the re-allocation of budgeted funds within the Consolidated Fund, since each party is funded from that fund. And the A-G argued that in the court below, the judge had made a costs order on a nisi basis, awarding the A-G her costs of the action on a standard basis, and the Commissioner had not sought to be heard. The A-G submitted that the Commissioner should not now be allowed to use her inaction in the court below to support a positive application to this Court. This submission is misconceived. The failure of the Commissioner to apply to the judge not to make a costs order (with the result that the order nisi became absolute) was a recognition of the principle, that, absent good reason to the contrary, costs should follow the event ("the Ordinary Rule"). The Commissioner's submissions contend that the A-G "sought and obtained" a costs order in the court below. Since those submissions were filed before those of the A-G, one would have expected that statement to have been refuted if it were indeed inaccurate. But more significantly, the A-G was said by the Commissioner to have prepared a bill of costs with a view to taxation in the court below. That statement was not denied in the A-G's written submissions. The A-G plainly intended to take the benefit of the order. But the "event" has now changed in that the A-G has lost the appeal. What the Commissioner relies on in seeking her costs here and below is not her failure to contest the order nisi but the Ordinary Rule. It is the A-G who having received, and sought to take the benefit of, the costs order made pursuant to the Ordinary Rule, now seeks to adopt the entirely inconsistent position that such an order should not be made, when the event has changed.

3. The A-G further argued that it was plainly in the public interest that the true construction of the PATI Act should be known to all. And in relation to costs the A-G relied on three Bermuda cases as well as authority from the United Kingdom.

4. In *Benevides v The Attorney General and the Corporation of Hamilton* [2014] Bda LR 61, Hellman J made no order as to costs as between the first defendant and the plaintiffs. But he did so because the first defendant had accepted such an order. As between the second defendant and the plaintiffs he took the view that costs should follow the event, and so ordered. So this case affords little assistance to the A-G.

5. In *Minister of Home Affairs v Bermuda Industrial Union* [2016] Bda LR 32, Kawaley CJ indicated his strong provisional view that no order as to costs should be made. That case concerned a labour dispute, where the judge was clearly influenced by the fact that there was an unusually strong public interest in the parties making an effective and sustainable fresh start to the delicate and difficult negotiations which then lay ahead. Presumably the judge's provisional view remained unchanged, but one can readily see that the nature of the case before him justified a departure from the usual rule that costs should follow the event.

6. Finally was the case of *Tucker v The Public Services Commission* [2020] CA (Bda) Civ 13, a case on costs decided in this Court. The case had started life as a judicial review case, but because the applicant had secured a senior position within Government before the conclusion of the case, she limited her claim to one of damages. The Court's provisional view was that the respondents should have their costs, but that an application for a different order as to costs could nevertheless be made. And it was. For the appellant it was argued that the *Biowatch / Barbosa* principle should be applied[1]. This argument was not accepted by the Court. Next, it was suggested that the general public interest principle applied, and this argument too was rejected. While the appropriate course for the appellant to have followed was to make an application for a protective costs order, the Court held that there was no basis upon which such an order could properly have been made, since the complaints made by the appellant were of an 'essentially personal nature'. In relation to the last argument, the dual-party principle in costs, the Court took the view that some amelioration was appropriate, and each of the respondents should have one half of its costs. So the case is not authority for making no order as to costs in the circumstances of the case before us.

7. There are cases in which the Court will decline to order costs in favour of a successful litigant because of the public interest in the issue which the Court had addressed. This is classically the case when the making of a costs order may inhibit the raising by private individuals of matters of true public interest. No such considerations arise here where the parties are both public bodies. There is no good reason to decline to order that costs shall follow the event - an order which the A-G would, no doubt, have sought had she succeeded on the appeal.

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[1] The combination of *Biowatch Trust v Registrar of Genetic Resources and others* [2009] 5 LRC 445, and *Minister of Home Affairs and Attorney-General v Barbosa (Costs)* [2017] Bda 32

8. For the Commissioner it was argued that the operation of the ordinary rule is not affected by the fact that both parties are public authorities funded out of the Consolidated Fund. While that is the case, the Commissioner's office is an independent office, and its funding is allocated by the Legislature. The funding of the office impacts the Commissioner's ability to meet her mandate set out in the PATI Act.

Finding

9. For my part, I am not persuaded that the fact that both parties' costs ultimately come from the Consolidated Fund should affect any order that this Court might make, and that is particularly the case where the A-G was apparently fully prepared to secure and enforce an order for costs against the Commissioner in the court below. And there is no doubt but that in "real life" terms the Commissioner succeeded in the proceedings before this Court, and accordingly, following the authority of *First Atlantic Commerce Ltd v Bank of Bermuda* [2009] Bda LR 18, I would agree that the Commissioner should have her costs, to be taxed on the standard basis if not agreed, both in this Court and in the court below, and I would so order. I would also certify that the appearance at the hearing of Ms Monica Carrs-Frisk KC was proper in the circumstances and would certify the case as being fit for two counsel.

KAY JA:

10. I agree.

CLARKE P:

11. I, also, agree.