



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 178

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW UNDER ORDER 53
OF THE RULES OF THE SUPREME COURT 1985

BETWEEN:

ROBERT G.G. MOULDER

Applicant

-and-

COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN

BERMUDA

Respondent

Before: Assistant Justice David Hugh Southey KC

Appearances: Mr Robert G. G. Moulder, Applicant in Person and Ms Judith Chambers, McKenzie Friend.
Mr Delroy Duncan QC and Mr. Ryan Hawthorne of Trott and Duncan Limited for the Respondent

Date of Hearing: 13 February 2023

Date of Judgment: Oral judgment on 13 February 2023. Full written reasons provided 8 March 2023.

REASONS FOR JUDGMENT

SOUTHEY, AJ

1. The Applicant has brought judicial review proceedings. I granted leave to apply for judicial review in a judgment dated 5 August 2022. The substantive hearing is listed for 28-29 March 2023.
2. I have before me a summons seeking an order that:
... the Applicant, having failed to comply with paragraph 7 of the Order dated 22 October 2022 ... be barred from filing any further pleadings in the action or participating at the substantive hearing in accordance with paragraph 11 of the Order.
3. Paragraph 7 of the order dated 22 October 2022 stated that:
The Applicant shall file and serve his skeleton argument on or before 4:00 pm on or before 13 December 2022.
4. There is no dispute that the Applicant has failed to file a skeleton argument despite the fact that 2 months have passed. He has failed to apply to the court for a variation of the order dated 22 October 2022. He has even failed to write to the court seeking an extension of the time limit set in paragraph 7 of the order. What he has done is attend a directions hearing listed today. That hearing was intended to enable the parties to confirm readiness for the substantive hearing. Instead it has been used to address the summons. The Applicant filed a skeleton argument today responding to the summons.
5. It should be noted that the order dated 22 October 2022 also required service of a trial bundle by 4pm on 7 February 2023. There has been a failure to comply with that direction and a failure to seek an extension of time for compliance with that direction.

6. Paragraph 11 of the order dated 22 October 2022 stated that:

In the event any party fails to comply with any provision in this Order, that party may be debarred from filing any further pleadings in the action or participating in the substantive hearing.

7. The background to the order dated 22 October 2022 is that the Applicant previously failed to comply with an order issued on 5 August 2022 that was intended to ensure an effective hearing on 18/19 October 2022.

8. On 21 October 2022 I issued a judgment confirming the adjournment of the hearing scheduled for 18/19 October 2022 and ordering indemnity costs against Mr Moulder in relation to the adjournment. In that judgment I stated that:

I accept that as a litigant in person, Mr Moulder may not have understood the purpose of a case management hearing. However, that does not excuse the fact that Mr Moulder appears to have concluded that he could unilaterally ignore the order for service of evidence. If disclosure issues meant a complete affidavit could not have been filed by Mr Moulder, a partial affidavit could have been filed addressing the Respondent's evidence as best as possible. The order to serve evidence remained effective until varied or set aside. [14] ...

Mr Moulder appears to have failed to grasp that he was obliged to conduct himself in a manner intended to ensure that the matter progressed towards trial. [37] ...

It appears to me that had Mr Moulder engaged promptly with matters, it would have been possible for this matter to progress to trial [38] ...

9. It appears to me that that judgment makes it clear that court orders cannot simply be ignored. The fact that indemnity costs were ordered for the failure

to comply with directions also makes that clear. It demonstrates that a failure to comply with directions has consequences. Paragraph 11 of the order dated 22 October 2022 was also intended to make that clear.

10. As already noted, the Applicant filed a skeleton argument today that seeks to respond to the summons.

11. That skeleton argument seeks to justify the failure to comply with the order dated 22 October 2022 by making reference to a summons issued against the Applicant's McKenzie Friend by the Respondent. That summons was served on 7 December 2022. However, the Applicant's McKenzie Friend appears to have filed nothing in response until 16 January 2022. I fail to see how summons against the Applicant's McKenzie Friend justifies 2 months of complete inaction. For example, it fails to justify any attempt to contact the Court and seek additional time. An application for an extension of time would have taken little time.

12. The skeleton also states that:

Both my McKenzie Friend and I are greatly affected by the various injustices that I have been subjected to in both the matter that led to my filing a claim with the Commission of Inquiry and my treatment by the Commission of Inquiry itself. It is my belief that the Former Commissioners are acting in bad faith, and that they deliberately misled the Court in relation to minutes that the Former Commissioners claimed not to be aware of (as accepted by the Court, as shown in the judgment dated 21 October 2022) but do in fact exist. [5]

Having heard oral submissions, I understand that this is a reference to a claim that the Commission of Inquiry has failed to comply with its duty of candour.

13. In my October judgment I held that:

In relation to the minutes, Mr Perinchief [on behalf of the Respondent] states that:

“I am aware of the Commissioners' duty of candour in judicial review proceedings and I can confirm that I am not aware of any minutes of meetings or any other relevant documents that has not been disclosed to Mr. Moulder in these proceedings.”

I concluded that there was no basis for ordering disclosure in light of this statement. ([27] – [28])

14. I understand the Applicant argues that the statement of Mr Perinchief that I quoted in my judgment is misleading. The Applicant points to the affidavit he has filed in support of the application for judicial review. As far as I can see this affidavit does not expressly allege that the statement of Mr Perinchief is misleading. However, I accept that it takes issue with what Mr Perinchief has said. What it does not do is justify in any way the failure to comply with the order requiring the filing of a skeleton argument. What should have happened is that a skeleton argument should have been filed explaining the relevance of the factual disputes. Should it be claimed that further material needed to be disclosed, an application could have been made for that. At the very least an application should have been made seeking further time. As I pointed out in my previous judgment, court orders cannot simply be ignored.
15. Orally the Applicant argued that both he and his McKenzie Friend suffer from post-traumatic stress disorder. However, I have seen no medical evidence of that. I have now seen both the Applicant and his McKenzie Friend in court on a number of occasions. They clearly can engage with the court. I have seen nothing that suggests an excuse for failing to comply with the directions. I recognise that not all disabilities may be apparent. However, I do need some evidential basis for concluding that there is good reason for the delay in this case. It should be noted that the Applicant was able to file a coherent skeleton argument in response to the summons I have determined today.

16. The skeleton argument filed on behalf of the Applicant states:

The hearing is over a month away, and no detriment has been caused by my inability to file and serve the documents ordered.

I do not accept that is correct for 4 reasons:

- a. Considerable court time has been expended dealing with the consequences of the Applicant failing to comply with directions. For example, there has been a need to hold 2 lengthy hearings.
- b. The Commission has had to file pleadings dealing with that failure. This judgment has been prompted by a summons.
- c. I accept the point made by Mr Duncan KC on behalf of the Commission. That is that his schedule has been planned around the directions. There is unfairness in imposing an unexpected deadline on a party.
- d. Most importantly, a repeated failure to comply with directions undermines respect for orders of the Court. In this case there has been a repeated failure to take any account of the deadlines set in orders. That has already caused one substantive hearing to be lost.

17. Order 1A of the Rules of the Supreme Court states, among other matters, that:

(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.

(2) Dealing with a case justly includes, so far as is practicable—

...

(b) saving expense; ...

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

These matters point towards me preventing the Applicant participating further. His failure to comply with orders is causing a disproportionate share of the court's resources to be devoted to this case. It has already caused significant delay. It has resulted in unfairness to the Respondent.

18. In *Re Jokai Tea Holdings* [1992] 1 WLR 1196 Sir Nicholas Browne-Wilkinson VC held as follows:

In my judgment, in cases in which the court has to decide what are the consequences of a failure to comply with an "unless order", the relevant question is whether such failure is intentional and contumelious. The court should not be astute to find excuses for such failure since obedience to orders of the court is the foundation on which its authority is founded. But if a party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey is due to extraneous circumstances, such failure to obey is not to be treated as contumelious and therefore does not disentitle the litigant to rights which he would otherwise have enjoyed. [Emphasis added]

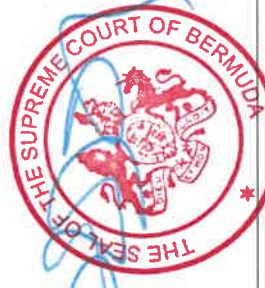
19. I accept as pointed out by the Applicant that the order dated 22 October 2022 is not technically an 'unless' order as it does not provide for consequences to automatically follow non-compliance. However, the order plainly warns of the consequences of non-compliance. The previous judgment makes it clear that it is unacceptable to simply ignore orders. As a consequence, it appears to me that I should proceed on the basis that compliance with court orders is fundamentally important. It is how courts ensure that there is fairness and that time and resources are not wasted. The matters I have set out above demonstrate that I have found no good reason for non-compliance.

20. The Applicant has referred me to *Bean v Caisey* [2021] SC (Bda) 88 Com (16 November 2021). However, it appears to me that it does not assist. It was essentially decided on its facts and establishes no new principles. It also is different to this case as it was not a case where a hearing date had already been lost as a consequence of a failure to comply with directions.

21. The matter that has caused me greatest concern is that as things stand I will need to still determine the outstanding application. That will be without the assistance of the Applicant. That is something that is not entirely satisfactory. The overriding objective set out in order 1A of the Rules of the Supreme Court suggests that is a matter that I have to take into account. However, it appears to me that prohibiting the Applicant participating in the substantive determination of these proceedings is the only way forward. I agree with the submission of Mr Duncan KC that the Applicant will simply be able to ignore orders if the Court ignores what has happened in this case. I have no faith in the Applicant's willingness to comply with orders. It is striking that he took no steps to comply when faced with the summons. There must come a point where the Court says enough is enough. I am reassured by the fact that the Commission will be represented by a professional advocate who will be subject to duties to assist the court. That will provide some protection for the Applicant.

22. In light of the matters above, I make the order sought and order that:
... *the Applicant be barred from filing any further pleadings in the action or participating at the substantive hearing in accordance with paragraph 11 of the Order.*

Dated this 8th day of March 2023



DAVID HUGH SOUTHEY
ASSISTANT JUSTICE