



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 298

IN THE MATTER OF ORDER 53 OF THE RULES OF THE SUPREME COURT 1985
AND IN THE MATTER OF A DECISION OF THE DIRECTOR OF SOCIAL
INSURANCE DATED 20 DECEMBER 2021
AND IN THE MATTER OF AN AWARD OF THE CONTRIBUTORY PENSIONS
APPEAL TRIBUNAL DATED 11 JULY 2022

BETWEEN:

DOVE & BUTTERFLY LTD.

Applicant

-and-

THE DIRECTOR OF SOCIAL INSURANCE

First Respondent

- and -

THE MINISTER OF FINANCE

Second Respondent

RULING (COSTS)

Judicial review, application for costs on ex parte application for leave, exceptional circumstances to grant costs against applicant, hopeless claim, persistence by applicant in a hopeless claim having been fully alerted to the hopelessness

Date of Hearing: 1 December 2022, 9 January 2023

Date of Ruling: 13 January 2023

Appearances: Shi-Vaughn Lee, 95 Law Ltd for the Applicant

Eugene Johnston, Attorney General's Chambers for Respondents

RULING of Mussenden J

Introduction

1. The Respondents seek their costs, based on exceptional circumstances, for an unsuccessful application by the Applicant (“**D&B**”) for leave to apply for judicial review against the Director of Social Insurance (the “**Director**”) and the Minister of Finance (the “**Minister**”).

Background

2. The Applicant sought leave to apply for judicial review (the “**Leave Application**”) in respect of a decision by the Director dated 20 December 2021 which denied the Applicant’s application for economic relief pursuant to the Contributories Pensions Temporary Amendment Act 2020 (the “**Director’s Decision**”) on the basis of the Director’s assertion that there was a ‘legal time frame’ to submit suspension notifications to the Director which had expired.
3. The Leave Application was filed by Forensica Legal (“**FL**”) on 5 October 2022 with a cover letter indicating that FL was jointly instructed with Dr. Courtenay Griffiths KC of London, UK. The Leave Application was supported by an affidavit sworn by Shi-Vaughn Lee (“**Lee 1**”) who stated that she was the managing director of D&B, a local Bermudian company. She stated that she was a relatively new entrepreneur, that D&B was the first company that she has run and that she was new to matters such as social insurance obligations.

4. The Court declined to consider the Leave Application on the papers but set the matter down for a hearing 10 November 2022 by way of issuing a Notice of Hearing in Chambers dated 31 October 20 to FL.

10 November 2022 *ex parte* hearing

5. On 10 November 2022 on a Thursday Chambers morning, the matter came on to be heard. Not expecting anyone else to appear, the matter commenced a short time before the listed time. FL did not appear. However, Ms. Shi-Vaughn Lee, who had sworn Lee 1 as set out above, appeared and informed the Court that D&B was intending to change attorneys, that she was an attorney who had a practising certificate and that she intended to come on the record for D&B. However, after a few minutes, Mr. Johnston appeared at the listed time for the Respondents, apparently having received notice from counsel for D&B, who had received an earlier instruction from a court associate to provide notice to the Respondents. I recommenced the hearing bringing Mr. Johnston up to date on what had just transpired.
6. At the same 10 November 2022 hearing, I raised some concerns to Ms. Lee about the Leave Application. First, it had set out that the Director's Decision had already been appealed to the Contributory Pension Appeals Tribunal (the "**Tribunal**") which had already determined the appeal in D&B's favour (the "**Tribunal's Appeal Decision**"). Thus, the first question begged as to why seek judicial review of the Director's Decision when there was a right of appeal to the Tribunal and when that had already been done and determined in D&B's favour. Second, the Leave Application included a Notice of Intention to Appeal to the Supreme Court the Tribunal's Appeal Decision (the "**SC Appeal**"). Thus, the next questions begged as to why the SC Appeal documents were contained in the Leave Application documents and why was D&B appealing a decision I was informed was in their favour. I note here that at the 1 December 2022 hearing, Ms. Lee explained that D&B had filed the SC Appeal in error. Also, after some inquiry about what really was the issue, Ms. Lee clarified that the Director and Minister were not honouring the Tribunal's Appeal Decision. Thus, to my view, which I shared with the parties, the matter appeared to be more

of an enforcement issue of the Tribunal's Appeal Decision rather than a judicial review of the Director's Decision.

7. Mr. Johnston adopted the Court's concerns and then then raised his own additional concerns including as follows: (a) it appeared the Leave Application was out of time; and (b) the Tribunal could not make an Order against the Minister as he was not a party to the Tribunal proceedings, thus questions arise as to how the Minister could be a party to the judicial review proceedings.
8. In any event and bearing in mind the Overriding Objective and the areas of concern having been identified, I adjourned the *ex parte* Leave Application to 1 December 2022 for the principal purpose of allowing the parties to seek an overall resolution to the main issue and hopefully negate the need for the Leave Application.

1 December 2022 *ex parte* hearing

9. At the hearing on 1 December 2022, the same Ms. Lee, now of 95 Law Ltd ("**95 Law**") appeared on the record for D&B, 95 Law having just come into existence since the 10 November 2022 hearing. A notice of change of attorney was filed on 18 November 2022. Ms. Lee informed the Court that: (a) D&B had filed the SC Appeal papers in error; (b) a settlement was not reached by the parties; and (c) she intended to proceed with the Leave Application.
10. The Court noted that 95 Law had filed a Third Affidavit of Ms. Lee sworn 1 December 2022 ("**Lee 3**") which exhibited a Second Affidavit of Ms. Lee sworn 29 November 2022 ("**Lee 2**"). Lee 3 prayed for the Court to grant the Leave Application for public interest reasons. Lee 2 in general contained privileged information of communication between counsel for the parties and between a Respondent and his counsel. I later struck out Lee 2 as inadmissible on Mr. Johnston's application and Ms. Lee conceded that it should be struck out.
11. Ms. Lee then proceeded with D&B's Leave Application despite the areas of concern that had been identified by the Court and Mr. Johnston at the 10 November 2022 hearing.

Having heard submissions from both counsel, I refused the Leave Application on the basis that there was an appeal process from the Director's Decision, that the Director's Decision had already been appealed to the Tribunal and it had already issued the Tribunal's Appeal Decision.

Costs Application

Respondents' Submissions

12. At the same hearing on 1 December 2022, Mr. Johnson made an immediate application for costs against D&B. He submitted that on a judicial review leave application matter, as a general rule costs would not be granted. However, he argued that costs could be awarded in exceptional circumstances which existed in the present case including that D&B's application for leave was hopeless and it had persisted with its application despite being cautioned of the hopelessness by both the Court and himself. Further, he argued that D&B had abused the process of the Court by filing Lee 2 which was inadmissible and was struck out and that the Leave Application was really about forcing a settlement. He suggested that on that basis alone, indemnity costs would also be appropriate but he was not making that application. Mr. Johnston relied on the cases of: (a) *Mount Cook Land Ltd and Another v Westminster City Council* [2003] EWCA Civ 1346 (Court of Appeal) which comprised Auld LJ, Clarke LJ and Parker LJJ; and (b) *The Corporation of Hamilton v The Ombudsman for Bermuda* [2014] SC (Bda) 1 Civ where Hellman J cited *Mount Cook* noting that the Civil Procedure Rules replaced the practice under Rules of the Supreme Court Order 53 (Applications for Judicial Review) which was analogous to the Bermuda RSC, Order 53.
13. I adjourned the costs application hearing in order to give Ms. Lee time to file written submissions by 15 December 2022 and for Mr. Johnston to reply shortly thereafter. Ms. Lee's submissions were filed on 9 January 2023 shortly before the hearing with Ms. Lee stating that she had no real reason for the delay in filing the submissions. I take this opportunity to note that counsel have a duty to the Court to comply with the directions in

respect of the filing of submissions or complying with directions generally. The Court does not issue directions for them to be so flippantly ignored by counsel.

Applicant's Submissions

14. At the resumed hearing on 9 January 2023, Ms. Lee submitted that no order for costs should be made against D&B as the 10 November 2022 hearing and the 1 December 2022 hearing were *ex parte*.
15. Ms. Lee submitted that Mr. Johnston had as early as 10 October 2022 requested sight of the Leave Application documents for the purpose of giving advice or seeking instructions from the Respondents. She argued that this was ostensibly to see if the judicial review proceedings could be disposed of by way of an amicable resolution. It was on that basis that on 10 October 2022 she provided the documents to Mr. Johnston, who had noted in his request that such provision was not a requirement. Thus, providing the documents to Mr. Johnston in no way required or asked the Respondents to do anything other than to consider an amicable resolution. Ms. Lee also argued that in relation to the attempts at settlement, Mr. Johnston failed to reply to her several requests and proposals.
16. Ms. Lee submitted that D&B had not intended for counsel for the Respondents to be present at the *ex parte* hearings which was the result of the direction by the court associate for the Respondents to be given notice and/or Mr. Johnston's own efforts to attend. Further, she argued that D&B through its counsel had sought unsuccessfully to find out what was the position of the Respondents in respect of the *ex parte* Leave Application. Had the information been provided in advance then D&B might have taken a different course of action. Additionally, Ms. Lee argued that Mr. Johnston appeared with submissions and case authorities that had not been shared with her in advance, in effect ambushing her at the *ex parte* Leave Application.
17. Ms. Lee submitted that on 24 October 2022 Mr. Johnston inquired of D&B' counsel as to whether leave had been granted for judicial review. He had asked if counsel for the D&B would be willing to invite him to any hearing for leave stating "You will know that at the

leave stage there are no costs consequences if Respondents are not involved; and very specific costs rules apply when Respondents are.” Ms. Lee argued that that statement is a fatal blow to the Respondents’ cost application.

18. Ms. Lee submitted that after the first hearing on 10 November 2022 Mr. Johnston never provided her with the substantive basis for his objections. However, further efforts were made to settle the matter which included Mr. Johnston requesting a settlement proposal which she did provide. Although promising to reply to her, Mr. Johnston did not reply before the 1 December 2022 hearing about the settlement proposal or any objections.
19. Ms. Lee submitted that in any event counsel for the Respondents was not required at either hearing because the Court was bound to reach its decision without hearing from Mr. Johnston. She pointed out that the Court declined to deal with the matter on the papers but set the matter for a hearing. Further, the Court expressed its own concerns about the merits of the Leave Application. Thus, Mr. Johnston’s involvement was unnecessary.
20. Ms. Lee submitted that the Applicant was entitled to renew its application for leave once the Court had refused the *ex parte* Leave Application. Thus, the Court should not have entertained a costs application until the Applicant’s position on a renewal application was known.
21. Ms. Lee submitted that the only reason the Applicant filed the judicial review application was because the Respondents failed to participate in the initial proceedings before the Tribunal and failed to comply with the Tribunal’s Appeal Decision. Thus, the Leave Application was a genuine and bona fide attempt to give effect to the Tribunal’s Appeal Decision.
22. Ms. Lee also submitted that as D&B was not able to have a costs order in their favour at the Tribunal where it was successful, then it would be unfair to punish D&B at this stage with a costs order against it.

Respondents' Reply Submissions

23. In reply, Mr. Johnston argued that the Leave Application was always hopeless regardless of any settlement discussions. In essence, since the 10 November 2022 hearing, once D&B were cautioned about the hopelessness of their case, there was nothing that he could have said or done that would have assisted D&B to better their case.

Case Law on Costs at the Leave Stage

24. In *Mount Cook* the Court of Appeal considered the circumstances in which a court, on an oral application for permission to claim judicial review, may award costs to the defendant who had attended and who had successfully resisted such an application. Auld LJ set out the approach to be taken as follows [at 76]: (1) a defendant who attends and successfully resists the grant of permission at a renewal hearing should not generally recover from the claimant his costs of and occasioned by doing so; (2) a court should only depart from the general guidance if he considers there are exceptional circumstances; (3) a court considering costs at the permission stage should be allowed a broad discretion at whether, on the facts of the case, there are exceptional circumstances justifying an award of costs against an unsuccessful claimant; and (5) to (7) set out in full as follows:

“5) Exceptional circumstances may consist in the presence of one or more of the features in the following non-exhaustive list:

(a) the hopelessness of the claim;

(b) the persistence in it by the claimant after having being alerted to facts and/or of the law demonstrating the hopelessness;

(c) the extent to which the court considers the claimant, in the pursuit of his application, has sought to abuse the process of judicial review for collateral ends – a relevant consideration as to costs at the permission stage, as well as when considering discretionary refusal of relief at the stage of substantive hearing, if there is one; and

(d) whether, as a result of the deployment of the full argument and documentary evidence by both sides at the hearing of a contested application, the unsuccessful

applicant has had, in effect, the advantage of an early substantive hearing of the claim.

6) A relevant factor for a court, when considering the exercise of its discretion on the grounds of exceptional circumstances, may be the extent to which the unsuccessful claimant has substantial resources which it has used to pursue the unfounded claim and which are available to meet an order for costs.

7) The Court of Appeal should be slow to interfere with the broad discretion of the court below in its identification of factors constituting exceptional circumstances and in the exercise of its discretion whether to award costs against an unsuccessful claimant.”

25. In the *Corporation of Hamilton case*, Hellman J set out that the leave application was *ex parte* on notice where the Court indicated to the Ombudsman that it would be assisted by her active participation in the hearing for leave. He found that there were two exceptional circumstances as follows: First, the applicant had sought a stay of the Ombudsman’s investigation and the publication of her report pending the outcome of the judicial review proceedings. The Ombudsman was under a constitutional duty to place her special report before the legislature with all deliberate speed. Thus, in resisting the application, the Ombudsman was entitled, as she did, to take any point fairly available to her.

26. Second, the first ground of the leave application was filed neither promptly nor within six months from the date when the ground first arose. That ground challenged the lawfulness of the Ombudsman’s investigation and was the only ground capable of supporting a stay application. The delay point offered the Ombudsman the opportunity to deal a ‘knock-out’ blow to the first ground. Thus, it was therefore in the interest of the Overriding Objective and efficient case management that the delay point was resolved at the earliest opportunity. Had the delay point not been resolved at the leave application then it would have formed the basis of a successful application to set aside the grant of leave or been dealt with as a preliminary issue at the full hearing of the application for judicial review. Hellman J concluded that the applicant should pay the Ombudsman her costs of and occasioned by several hearings insofar as they related to the leave application.

Analysis

27. In my view I should grant the application for costs in favour of the Respondents, but for the period after the completion of the hearing of 10 November 2022 for several reasons. First, the two hearings were indeed *ex parte* hearings. At the 10 November 2022 hearing, Ms. Lee was not yet on the record and she had indicated that there would be a change of attorneys when she would come on the record for D&B. That hearing was not a substantive hearing on the Leave Application. Rather, it became a case management hearing as the Court highlighted its areas of concern and clarified the factual matrix and what was the object of the judicial review. It was also an opportunity for Mr. Johnston to set out the basis of his concerns. The cumulative effect was that Ms. Lee was fully apprised of the concerns and could consider them before the next hearing. Also, the parties were afforded the opportunity to seek a settlement.
28. In my view, at that stage, there was the exceptional circumstance that the matter was hopeless. To that point, the matter was hopeless from the start and never changed. However, I am not prepared to grant costs for the period up to and including the hearing on 10 November 2022 because rather than it being a substantive hearing, it had become a case management hearing albeit 95 Law was not yet on the Record and there was the prospect that D&B would not proceed further in the litigation, having been alerted to the concerns.
29. Second, by the time of the 1 December 2022 hearing, 95 Law was on the record for D&B. In my view, there were classic exceptional circumstances in play as set out by Auld LJ in *Mount Cook*. The Leave Application remained hopeless on the basis that there was an appeal process available to D&B and it had already been followed and the Tribunal had rendered the Tribunal Appeal Decision. Further, like the monarch butterfly's irresistible attraction to the milkweed plant, Ms. Lee persisted in the Leave Application, despite being earlier fully alerted to the facts and law demonstrating its hopelessness. Had Ms. Lee appeared at the 1 December 2022 hearing and informed the Court that she was not

proceeding with the Leave Application then I would have not granted costs against D&B. Once she persisted with the hopeless Leave Application, then she placed D&B in the exceptional circumstances territory.

30. Third, I reject Ms. Lee's contention that since the Court had already determined that the Leave Application was hopeless there was no need for Mr. Johnston to attend. In my view, similar to the view of Hellman J in *Corporation of Hamilton* when he relied on the delay point, Mr. Johnston was alert to the delay point and it was an opportunity to deliver a knock-out blow to the application as well in the interest of the Overriding Objective and efficient case management that the delay point be resolved at the earliest opportunity.
31. Fourth, I reject Ms. Lee's submissions about Mr. Johnston having the Leave Application papers only for the purpose of considering an amicable solution. It appears to me that Mr. Johnston had the intention of appearing at the Leave Application as he had asked to be invited. Further, Mr. Johnston takes his instructions from his own clients, not from the understanding of Ms. Lee. He also made it clear that generally there were no costs consequences if the Respondents are not involved but there could be such in specific cases. Therefore, following the general rule, I will not grant costs for the period up and including the 10 November 2022 hearing as stated. But upon completion of that hearing date, Ms. Lee was fully alerted to the concerns of the Court and Mr. Johnston. In my view, failing to heed those concerns and persistence in the Leave Application by D&B is a proper basis for the award of costs against D&B. I am reminded of a quote by Mark Twain "*You can't reason someone out of something that they weren't reasoned into in the first place.*"
32. Fifth, I reject Ms. Lee's submission that costs should not be granted in this matter because the Tribunal did not have the jurisdiction to award D&B costs at the Tribunal stage when they were in fact the successful party there. She stressed that D&B should not be put in a worse position that they were when the Tribunal found in their favour. I also reject Ms. Lee's submission that it would be unjust and oppressive for the Court to effectively punish D&B for trying to enforce the Tribunal's judgment which the Respondents fully disregarded. In my view, the Tribunal matter and the Leave Application are separate species. In litigation matters in Court, there is always the risk of a costs order. Further, the

purpose of a costs order is not to punish a losing party, but it is to enable a successful party to recover the costs of the proceedings from another party.

Conclusion

33. In light of the hopelessness of the Leave Application and D&B's persistence in pursuing the hopeless case after the hearing of 10 November 2022, in my view, D&B should pay the Respondents their costs, including the costs application, on a standard basis to be taxed if not agreed for the period after 10 November 2022.

Dated 13 January 2023



**HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT**