



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 179

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL
REVIEW AND IN THE MATTER OF THE COMMISSIONS OF INQUIRY ACT 1935**

BETWEEN:

LEYONI JUNOS

Applicant

-and-

**(1) THE PREMIER OF BERMUDA E. DAVID. G. BURT
(2) COMMISSION OF INQUIRY INTO HISTORIC LOSSES OF LAND IN**

BERMUDA

Respondents

Before: Assistant Justice David Hugh Southey KC
Appearances: The Applicant in Person
Ms. Lauren Sadler-Best for the First Respondent
Mr. Delroy Duncan KC and Mr. Ryan Hawthorne of Trott & Duncan
Limited for the Second Respondent

Date of Hearing: 30 March 2023

Date of Judgment: 31 May 2023

JUDGMENT

SOUTHEY, AJ

1. On 5 August 2022 I refused leave to apply for judicial review. The judgment refusing leave should be read with this judgment. As a consequence, I will not repeat that judgment.
2. On 5 August 2022 I indicated that any argument regarding costs would be heard on 21 October 2022.
3. Ms Junos did not attend the hearing on 21 October 2022. I accepted and still accept that Ms Junos may not have been given notice of the hearing on 21 October 2022. I adjourned the matter to enable her to attend. That enabled me to hear oral submissions from the parties. I am grateful to the parties for their submissions.

Procedural History

4. These judicial review proceedings were issued on 13 June 2022.
5. On 15 June 2022 an e-mail was sent to the parties expressing a provisional view I had reached that proceedings in this matter should be stayed pending the resolution of another judicial review challenge to the Commission of Inquiry ('the Davis and Piper matter'). I invited any party who objected to file written submissions setting out its objections.
6. The Commission of Inquiry objected to my proposed course of action and in written submissions it sought the stay of the Davis and Piper and:
An inter-partes hearing for leave in the Moulder and Junos Applications.
I then indicated that I was willing to have this matter listed on 1 July 2022 to enable oral submissions to be heard regarding directions.
7. Attorneys for the Commission of Inquiry e-mailed on 21 June 2022 indicating that they sought a hearing on 1 July 2022.

8. Having heard argument on 1 July 2022, I provisionally determined that a leave hearing should take place on 15 July 2022. However, as it was unclear whether Ms Junos had had notice of the hearing on 1 July 2022, I indicated that any party could seek a hearing on 5 July 2022.
9. A further hearing took place on 5 July at which I maintained the listing on 15 July 2022. Having taken account of submissions made on behalf of the Commission of Inquiry (among others) regarding timetabling, I directed that any skeleton arguments should be served by 11 July 2022.
10. The Commission of Inquiry recalls that I expressed the view that I would be assisted by a skeleton argument. I have no note of that but it appears likely that I said something similar.
11. The leave hearing took place on 15 July 2022. It should be noted that my judgment records that a skeleton argument was filed on behalf of the Commission. That reflected the fact that I had issued a direction for skeleton arguments. However:

During the leave hearing, the Commission of Inquiry was clear that it would not supplement the skeleton argument and participate further. It was noted that the hearing was formally ex parte and that the 2nd affidavit of Ms Junos had been filed the day before the hearing, which limited the ability of the Commission to engage with it. [11]
12. As noted above, leave was refused in a judgment delivered on 5 August 2022.

Law

13. In *Corporation of Hamilton v The Ombudsman of Bermuda* [2014] Bda LR 15, Hellman J stated that:

[I]t is well recognized that an application for leave to apply for judicial review is a circumstance in which costs will not generally follow the event. See the judgment of the Court of Appeal of England and Wales in R (Mount Cook Land Ltd) v Westminster City Council [2004] GP Rep 12; [2003] EWCA Civ 1346.

Although this was a case under the Civil Procedure Rules ("CPR"), Auld LJ noted at para 48 that the procedure under the CPR:

" ... replaced the practice under RSC, Order 53 [which was analogous to the Bermuda RSC, Order 53] of an ex parte application for leave to move for judicial review, normally made on paper, but which could also be made orally at an ex parte hearing. A respondent, if notified of the application ("ex parte on notice"), could make representations on paper and/or, if he chose to attend and was allowed by the court to participate in a permission hearing, orally. If a respondent successfully resisted the grant of permission at an oral hearing, the court had power to award him costs against the applicant, but it was sparing in its exercise of it. Given that practice, renewed oral applications for permission were normally heard ex parte and were, in any event, short. Applicants, on the whole, were able to seek relief without fear, if permission was refused, of being saddled with the respondent's costs at that stage."

14. The Commission of Inquiry argues that *Corporation of Hamilton* should not be followed. Reference is made to earlier judgments in *Perinchief v Public Services Commission* [2009] Bda LR 11 and [2009] Bda LR 56. It appears to me that I should follow *Corporation of Hamilton*. In particular:

- a. The *Corporation of Hamilton* judgment is the most recent judgment. It was based on consideration of relevant and authoritative English case law that had reviewed long established English practice. In light of the fact that the English practice pre-dated the Civil Procedure Rules,
- b. *Perinchief* did not review the English practice when determining costs. Indeed it is unclear what arguments were advanced about costs
- c. It appears to me that there is good reason for the practice adopted in England. The leave stage protects public authorities from unmeritorious judicial reviews. It is unclear why Plaintiff's should pay for that protection. Public authorities generally need not participate in leave hearings if they are concerned about costs.

15. I should add that I have become aware of the judgment in *Dove and Butterfly Ltd v The Director of Social Insurance* [2023] SC (Bda) 4 Civ 13 in which *Corporation of Hamilton* was followed. That reinforces the conclusions I have reached in the paragraph above.

Argument of the Commission in Support of its Argument for Costs

16. The 2nd Respondent argues that their participation in the leave hearing was mandatory as there was an order to file a skeleton argument. It is also argued that this is a case where exceptional circumstances justify an award of costs.

Mandatory Attendance

17. It appears to me that at no stage did I require the participation of the Commission of Inquiry. To the contrary, it was the Commission of Inquiry that was pushing for an inter-parties hearing to determine the issue of leave. Consistent with that, the Commission of Inquiry declined to play a full role in the leave hearing.

18. During the hearing regarding costs, the Commission of Inquiry made reference to correspondence in another judicial review claim. I am doubtful that I can take account of that correspondence as the Applicant was not a party to it. However, in any event it appears to me that the correspondence does not assist the Commission of Inquiry's arguments. Although early correspondence might suggest that the Court required the Commission of Inquiry to attend the leave hearing, the last communication from the Court dated 28 February 2022 stated that:

The Court does have the power to hear from the Respondents and that is consistent with practice in England before the Civil Procedure Rules. The Court would also be assisted from hearing from all parties. However, it is ultimately for the Respondents to decide whether they wish to be heard.

This is a clear indication that participation by the Commission of Inquiry was voluntary. Consistent with this it ultimately decided that it did not wish to attend.

Exceptional Circumstances

19. As already noted, the Commission of Inquiry argues that there are exceptional circumstances that justify an award of costs:
- a. Firstly, the Commission argues that the delay in bringing the proceedings amounted to an exceptional circumstance. It cites *Corporation of Hamilton* as an example of that. The Applicant argues that *Corporation of Hamilton* can be distinguished as this application was within the 6 month outer limit for judicial review.
 - b. Secondly, weight is placed on the fact that there was also a lack of standing. The Applicant points to the fact that I found that she had standing in relation to some matters.
 - c. Thirdly, the hopelessness of the leave application is said to justify an order for costs. The Applicant argues that I made no finding that all matters were hopeless.
 - d. Fourthly, it is argued that it is relevant that the Applicant was formerly employed by the Commission of Inquiry.
 - e. Fifthly, it is argued that it is relevant that the Applicant was seeking protective costs.
 - f. Finally, the Commission of Inquiry argues it was directed to file a skeleton argument at the leave hearing, which is unusual.
20. It appears to me that the approach in *Corporation of Hamilton* means that the Court should be cautious about awarding costs when leave is refused. The mere fact that leave is refused is no reason for awarding costs. That is despite the fact that the refusal of leave demonstrates that there is no good reason for the application for judicial review to be heard. There needs to be something out of the ordinary.
21. It appears to me that there is nothing out of the ordinary:
- a. This was a weak application for judicial review but that is not unusual when leave is refused. The application had a number of procedural flaws but that is also not unusual. It appears to me that this application for judicial review was not so poor that costs should be awarded. For costs to be awarded, the application for judicial review would need to be exceptionally poor.

- b. It is true that the Applicant was employed by the Commission of Inquiry. But that does not prevent her bringing an application for judicial review. She still enjoys a right of access to the Court. I am not sure how this is relevant.
- c. The Applicant made an application for a protective costs order that was rejected. However, it appears to me that does not change matters. The rule in relation to costs at leave applies despite the fact that an applicant will have advanced arguments that were rejected. The rejection of the application for a protective costs order was simply the rejection of a further argument.
- d. I have addressed above the issue of my directions. I have concluded that there was no obligation to participate at the leave stage. As a consequence, it appears to me that there was no obligation to file a skeleton argument.

Conclusion

22. In light of the matters above, I make no order for costs.

Dated this 31st day of May 2023

The seal of the Supreme Court of Bermuda is circular, featuring a central coat of arms with a shield, a crown, and a banner. The text "THE SEAL OF THE SUPREME COURT OF BERMUDA" is inscribed around the perimeter of the seal.
DAVID HUGH SOUTHWELL KC
ASSISTANT JUSTICE