



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2022: No. 299

BETWEEN:

COMMISSION OF INQUIRY INTO
HISTORIC LOSSES OF LAND IN BERMUDA

Plaintiff

-and-

LEYONI JUNOS

First Defendant

JUDITH CHAMBERS

Second Defendant

Before: Assistant Justice David Hugh Southey KC
Appearances: Mr. Delroy Duncan KC and Mr. Ryan Hawthorne of Trott & Duncan
Limited for the Plaintiff
The Defendants in Person

Dates of Hearings: 27 & 30 March 2023

Date of Judgment: 31 May 2023

JUDGMENT

SOUTHEY, AJ

1. I previously struck out an action for breach of confidence (‘the action’) brought by the Commission of Inquiry into Historic Land Losses in Bermuda (‘the COI’). My judgment striking out the action is dated 10 February 2023 and was signed on 13 February 2023. It sets out the full reasons for striking out the action. That judgment should be read with this judgment.
2. In my judgment striking out the action, I concluded that there is no doubt that judicial review proceedings can be brought challenging decisions of the COI. The COI is plainly a public authority. That implies it is subject to judicial review. However, the COI did not have jurisdiction to enter into contracts. As a consequence the COI could not bring an action for breach of confidence that relied upon a contract that it argued that it had entered into with the Defendant.
3. I gave the Government of Bermuda an opportunity to apply to be substituted for the COI. The Attorney General issued a summons on 17 February 2023 seeking to be substituted as Plaintiff. On 2 March 2023 the Attorney General sought to withdraw that application. In written submissions the COI has explained that was in part because:
The risk of disclosure was minimised as Mr. Moulder was no longer permitted to participate in his proceedings.
4. In light of my findings, an issue has arisen as to who should pay the costs. There is also an issue as to the basis upon which costs should be taxed.
 - a. The COI’s position is that the COI should be the paying party. There is no reason why costs should be awarded on a standard basis.
 - b. The Defendants argue that the COI has no legal identity and so cannot be liable for costs. Their written submissions sought costs on an indemnity basis. They also sought wasted costs for a number of reasons including an alleged failure to act for clearly identifiable clients.

5. I appreciate the assistance I have received from the parties.

Paying Party

6. As I have already stated, I have found that the COI has a legal identity. The action was struck out because the COI had no power to enter into contracts. The fact that the COI has a legal identity means that it can be a party to litigation such as judicial review. It simply could not bring the action. That means that I cannot see any reason why it cannot be subject to a costs order.

7. It appears to me that arguments of the Defendants are based on a misunderstanding of my ruling. The Defendants argued in writing that:

A ruling has already been made that the former COI cannot bring these proceedings because they have no legal personality.

That is not what I ruled. I ruled that it did have a legal identity but it was not legally able to enter into contracts.

8. Concern was expressed about enforcement of the costs order if the COI refused to pay. I cannot see how it can be open to the COI to argue in the future that it cannot be liable for costs when it has argued that it can be in these proceedings.

Standard Basis

9. Indemnity costs are not awarded routinely. In *St. John's Trust Company (PVT) Ltd v Medlands (PTC) Ltd* [2022] CA (Bda) 18 Civ held that there must be:

... something in the conduct of the action or the circumstances of the case which takes the case out of the norm in a way that justifies an order for indemnity costs.

10. I understood the Defendants arguing in their oral submissions that the proceedings were brought in bad faith. That is said to be demonstrated by the circumstances in which these proceedings were not continued. It is said that the proceedings had a collateral purpose. That was to prevent assistance being provided to Mr Robert Moulder, an applicant in a

judicial review application. Once I had ruled that Mr Moulder would not be heard in his judicial review application, the action was not continued after that ruling.

11. I can see no basis for criticising the conduct of the Plaintiff. If its legal argument is correct (and I have not ruled on this so cannot know that it is not), there was a breach of contract in that provisions requiring the Defendants to treat material confidentially were not complied with. It was open to the Plaintiff to decide whether or not to take action about the breach of contract. It was open to the Plaintiff to conclude that my ruling in the case of Mr Moulder reduced the risk of material being disclosed in breach of contract. It was open to the Plaintiff and/or the Attorney General to conclude that risk of material being disclosed did not justify the costs associated with litigation.

Wasted Costs

12. In *Bhagwan v Commissioner of Police* [2022] CA (Bda) 20 Civ the Court of Appeal held:

11. . . . In Kimathi, Kay JA also explained the threefold test in Bermuda for the imposition of a wasted costs order. Following the formulation from Ridehalgh v Horsefield [1994] Ch 205 (CA) (at pp 232-233), Kay JA postulated the test as follows:

- i. Has the legal representative acted unreasonably or improperly?*
- ii. If so, did such conduct cause the applicant to incur unnecessary costs?*
- iii. If so, is it, in all the circumstances, just to order the legal representative to pay the whole or part of the relevant costs?'*

13. In my opinion there is no basis concluding that the Plaintiff's legal representative acted 'unreasonably or improperly'. I have reached that conclusion for the following reasons:
 - a. As I have already indicated, I did not find that the COI had no legal personality. I cannot see why it could not seek advice and act on that advice. That is essentially what happened.
 - b. The extent to which the Plaintiff was entitled to bring the action was unclear. I expressly stated that I reached my conclusions with 'some hesitation'. That uncertainty means that it cannot be said that it was unreasonable to bring proceedings on behalf of the Plaintiff. No lawyer succeeds with every argument

and it was open to the Plaintiff's lawyers to argue that the COI was entitled to bring the proceedings.

- c. I have already found that there is no basis for arguing that these proceedings were brought in bad faith.

Conclusion

- 14. In light of the matters above, it appears to me that the COI should be liable for the Defendants' costs to be taxed on a standard basis.

Dated this 31st day of May 2023



DAVID HUGH SOUTHEY KC
ASSISTANT JUSTICE