In The Supreme Court of Bermuda

CIVIL (APPELLATE) JURISDICTION

2016: No. 255

IN THE MATTER OF SECTION 16 OF THE BERMUDA BAR ACT 1974

AND IN THE MATTER OF ORDER 55 OF THE RULES OF THE SUPREME COURT, 1985

AND IN THE MATTER OF WALKERS (BERMUDA) LIMITED

BETWEEN:

WALKERS (BERMUDA) LIMITED

Appellant

-v-

BERMUDA BAR COUNCIL

Respondent

RULING ON COSTS

(in Chambers)

Costs-successful appeal against decision of a regulatory body-whether costs should follow the event-rules governing proceedings involving regulatory bodies

Date of hearing: February 9, 2017
Date of Ruling: February 20, 2017

Mr Kevin Taylor, Taylors, for the Appellant
Mr Delroy Duncan, Trott & Duncan Limited, for the Respondent

Background

1. The Appellant appealed against the refusal of the Respondent on June 10, 2016 to grant the Appellant a Certificate of Recognition (as a "professional company") under section 16 of the Bermuda Bar Act 1974 ("the 1974 Act"). The Appellant's application was refused on the grounds that the terms upon which the Appellant proposed to operate in Bermuda (in relationship with an international law firm ("Walkers Global")) would entail a contravention of section 114 of the Companies Act 1981 ("the 1981 Act"), which requires local companies to be owned and controlled by Bermudians. At the time of the relevant application, 100% of the Appellant's shares were owned by Bermudians. At the time of the appeal, the Appellant's shares were 99% owned by a Bermudian lawyer and 1% owned by lawyer with a local Permanent Residence Certificate.

2. The central ground of the appeal was essentially that the Respondent erred in law in finding that the basis on which the Appellant proposes to operate as a professional corporation is unlawful by virtue of contravening the Bermudian control provisions of section 114 of the 1981 Act. The Respondent's Skeleton Argument made it clear that the only objection to the Appellant being granted a section 16C Certificate was the contention that its issuance was prohibited on public policy grounds. Apart from this pivotal consideration, the Bermuda Bar Council accepted that the Appellant met the express requirements under section 1B for the grant of a Certificate under section 16C of the Act.

3. On January 12, 2017 I delivered a Judgment in favour of the Appellant which concluded in the following terms:

> "*54.For the above reasons the appeal is allowed on the grounds that the proposed arrangements regulating the proposed operation of the Appellant as a professional corporation under the Bermuda Bar Act are not contrary to section 114 of the Companies Act and/or public policy.*
>
> *55.I will hear counsel, if required, on the terms of the final Order and as to costs although there is no obvious reason why costs ought not to follow the event.*"

4. The Respondent did not accept that costs should follow the event. On the day of the hearing of the Appellant's application for costs, English persuasive authorities were filed supporting a novel proposition in Bermudian law terms that special costs rules applied to proceedings involving regulatory bodies. As Mr Taylor had not been afforded an adequate opportunity to respond to these authorities, I heard initial oral argument and reserved judgment on terms that he could file supplementary written submissions on the law within 14 days and that Mr Duncan could reply, if desired, within seven days thereafter.

5. It was obvious that if costs fell to be assessed under Order 62 of this Court's Rules then the costs of the appeal should be awarded to the Appellant. The only serious controversy was whether those principles were displaced because of the regulatory context which triggered the application of special rule that no order should be made as to costs unless the Respondent could be shown to have acted improperly in making its decision. At the end of oral argument, I suggested that the pivotal question might well be whether the authorities relied upon by the Respondent did not apply to the present appeal because this appeal was governed in the ordinary way by this Court's Rules.

6. Having reserved judgment and further considered the matter, I modified my initial directions with a view to saving costs by inviting the Respondent to file further submissions within 14 days of February 9, 2017 explaining on what legal basis it is open to this Court to conclude that Order 62 rule 3(3) of the Rules (the starting assumption that costs follow the event) did not govern the present appeal having regard to the fact that:

    (a) section 13(3) of the Bermuda Bar Act 1974 expressly provides that the practice and procedure for appeals under the section shall be as prescribed by "*rules of court*";

    (b) the statutory definition in section 4(2) of the Interpretation Act 1951 of the term "*rules of court*" embraces this Court's Rules;

    (c) Order 62 rule 2 provides that Order 62 applies to the proceedings specified in Order 1 rule 2(1)-(2);

    (d) Order 1 rule 2(1) states that, subject to Order 1 rule 2, the Rules apply to "*all proceedings in the Supreme Court*";

(e) Order 1 rule 2(2) lists the proceedings to which other rules apply without including any proceedings under the Bermuda Bar Act 1974[1].

The Respondent's authorities

City of Bradford Metropolitan District Council-v-Eric Wilson Booth 2000WL 571211

7. This was a High Court decision with the judgment delivered by Lord Bingham (LCJ, as he then was). It concerned the costs jurisdiction under section 64 of the Magistrates' Courts Act 1980 (UK) which empowered the summary courts to "*make such order as to costs…as it thinks just*". Mr Booth succeeded in the Magistrates' Court in setting aside the Council's decision to revoke his vehicle license and was awarded his costs of the proceedings. The Council appealed the costs ruling alone. Lord Bingham made the following crucial finding as to the correct approach to the award of costs in such circumstances:

> "*26.4 Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances both (1) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and(ii) the need to encourage public authorities to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged.*"

8. Mr Duncan convincingly submitted that 'financial prejudice' in this context clearly contemplated something more than the ordinary burden of legal costs which would be suffered in every case where the successful citizen had privately retained legal representation. This submission was supported by the observations Stanley Burnton LJ in *R (Perinpanathan)-v-City of Westminster Magistrates' Court* [2010] 1 WLR 1508 (at paragraph 41).

[1] By email dated February 16, 2017, the Respondent's counsel simply invited the Court, in the event that the original submissions were rejected, to exercise its genera discretion to make no order as to costs having regard to the circumstances in which the Bermuda Bar Council opposed the appeal.

Baxendale-Walker-v-Law Society [2008] 1 WLR 426

9. This case concerned the approach to the costs of the hearing of disciplinary charges before the Solicitors Disciplinary Tribunal. The Court of Appeal judgment was delivered by Sir Igor Judge, P, and for present purposes reached the following key findings:

> "*39. In our judgment Jackson J was right to equate the responsibilities of responsibilities of the institute in Gorlov's case [2001] ACD 393 with the regulatory actions of the licensing authority in Booth's case [2000] COD 338. As Bolton's case [1994] 1 WLR 512 demonstrates, identical, or virtually identical, considerations apply when the Law Society is advancing the public interest and ensuring that cases of possible professional misconduct are properly investigated and, if appropriate, made the subject of formal complaint before the tribunal…One crucial factor which should inform the tribunal's costs decision is that proceedings is that the proceedings were brought by the Law Society in exercise of its regulatory responsibility, in the public interest and the maintenance of proper professional standards. For the Law Society to be exposed to the risk of an adverse costs order simply because properly brought proceedings were unsuccessful might have a chilling effect on the exercise of its regulatory obligations, to the public disadvantage*…."

10. Mr Duncan submitted that the same public policy principles applied in the present context where the Bermuda Bar Council had reasonably made a decision on public policy grounds and defended it having obtained advice from leading counsel. This was an attractive argument even if it had far greater obvious merit in the parallel context of proceedings before a disciplinary tribunal to which this Court's usual costs rules clearly did not actually apply.

R (Perinpanathan)-v-City of Westminster Magistrates' Court [2010] 1 WLR 1508

11. This was a case involving the successful challenge in the Magistrates' Court to the seizure of more than £150,000 in cash by the Police under the Proceeds of Crime Act. The claimant sought judicial review of the award of no order as to costs. The Divisional Court and the Court of Appeal upheld this decision. Stanley Burnton LJ summarised the principles established by the English authorities as follows:

> "*40. I derive the following propositions from the authorities to which I have referred:*

(1) As a result of the decision of the Court of Appeal in Baxendale-Walker, the principle in the City of Bradford case is binding on this Court. Quite apart from authority, however, for the reasons given by Lord Bingham LCJ I would respectfully endorse its application in licensing proceedings in the magistrates' court and the Crown Court.

(2) For the same reasons, the principle is applicable to disciplinary proceedings before tribunals at first instance brought by public authorities acting in the public interest: Baxendale-Walker.

(3) Whether the principle should be applied in other contexts will depend on the substantive legislative framework and the applicable procedural provisions.

(4) The principle does not apply in proceedings to which the CPR apply.

(5) Where the principle applies, and the party opposing the order sought by the public authority has been successful, in relation to costs the starting point and default position is that no order should be made.

(6) A successful private party to proceedings to which the principle applies may nonetheless be awarded all or part of his costs if the conduct of the public authority in question justifies it.

(7) Other facts relevant to the exercise of the discretion conferred by the applicable procedural rules may also justify an order for costs. It would not be sensible to try exhaustively to define such matters, and I do not propose to do so."

12. This passage strongly suggests that the special regulatory costs rule only applies to first instance and intermediate appeals but not, in any event, to Supreme Court (in the old English sense[2]) proceedings governed by the ordinary Supreme Court Rules. In a similar vein, Lord Neuberger MR (as he then was) in his concurring judgment opined as follows:

> "*73. So far as principle is concerned, the judgement of this court in Baxendale-Walker's case [2008] 1 WLR 426 has given strong support to the notion that Lord Bingham's three principles should apply where a regulatory body is reasonably carrying out its functions in court proceedings, at least where the rules of that court contain no presumption or principle that costs follow the event. The effect of the reasoning is that, just because a disciplinary body's functions have to be carried out before a tribunal with a power to order costs, it does not follow that there is a presumption that the tribunal ought to order the disciplinary body to pay the costs if it is unsuccessful, and that, when deciding what order to make, the tribunal should approach the question by reference to Lord Bingham's three principles. It is hard to see why a different approach should apply to a regulatory or similar body carrying out*

[2] It my understanding that since the establishment of the United Kingdom Supreme Court, the old Supreme Court Act 1981 was restyled as the 'Senior' Courts Act.

its functions before a court – unless the rules of that court have any presumptive principle inconsistent with those principles, such as CPR 44.3(2)(a). Indeed, given that section 64 applies in this case, as it did in Booth's case [2000] COD 338, it seems to me that this case can be said to be, if anything, a stronger one for applying Lord Bingham's principles than in Baxendale-Walker's case [2008] 1 WLR 426."

13. Lord Neuberger clearly (or at least apparently) considered it was significant that the costs discretion in *Peripanathan* was found in a broad statutory provision rather than in a rule of court containing a presumption that costs should follow the event. Maurice Kay LJ (now a member of the Court of Appeal for Bermuda) agreed with both judgments.

Preliminary view of persuasive effect of case law suggesting a special costs regime for regulatory proceedings

14. The cases cited are clearly highly persuasive and should be followed by this Court in analogous circumstances. It seems clear that the principles enunciated would apply to proceedings before disciplinary tribunals under the Bermuda Act and, in principle, a myriad of other statutory regulatory tribunals as well. It is far less clear that the principles apply to the costs appeals before this Court in circumstances where this Court's usual costs rules have not been displaced by some alternative statutory costs regime.

The governing statutory provisions on costs

15. The present appeal was brought under section 16E of the 1974 Act which provides as follows:

"*16E(1) Any barrister or company aggrieved by a decision of the Council to refuse an application for a certificate of recognition, or to suspend or revoke a certificate of recognition, may appeal to the Supreme Court against that decision within one month of being notified of it.*

(2)Section 13, and any rules referred to in that section that apply to an appeal by a barrister in relation to a practising certificate, apply, with any necessary modifications, to an appeal under this section by a barrister or a company in relation to a certificate of recognition."

16. The substantive costs power is accordingly found in the following provisions of section 13 of the 1974 Act:

"(2)*Upon hearing any appeal under subsection (1), the Supreme Court may make such order, including an order for costs, as it thinks just.*

(3)The practice and procedure to be followed in relation to applications and appeals under this section shall be as prescribed by rules of court."

17. The term "*rules of court*" is not defined in any special way by the 1974 Act and section 13(3) does not explicitly contemplate the making of special rules to govern appeals to which section 13 applies. Section 41 of the Employment Act 2000, to which I referred in the course of the hearing, only marginally suggests that special rules of court are contemplated to govern appeals under that Act, but it does so by reference to the general rule-making power under the Supreme Court Act 1905:

> "*(4) Section 62 of the Supreme Court Act 1905 shall be deemed to extend to the making of rules under that section to regulate the practice and procedure on an appeal under this section.*"

18. Mr Taylor convincingly argued that section 13(3) should simply be read as a reference to this Court's Rules. Indeed the title to the present appeal assumed that Order 55 governed the appeal in the absence of any other tailor-made rules of court. This would be consistent with the established approach of this Court to statutory appeals. For instance, in *Nigel Clarke-v-Minister of Home Affairs* [2016] SC (Bda) 55 App (11 May 2016), I held:

> "*59. The right of appeal to this Court is governed by the following provisions of the Act:*
>
> > *'**Right to appeal decision to the Supreme Court***
> > *13G Where a person is aggrieved by a decision of the Immigration Appeal Tribunal, he may lodge an appeal with the Supreme Court within 21 days from the date of the decision of the Immigration Appeal Tribunal.'*
>
> *60. This Court's powers in relation to hearing such appeals are not dealt with by the Act at all. Order 55 of this Court's Rules applies, subject to exceptions which are not material, to "every appeal which by or under any enactment lies to the Supreme Court from any court, tribunal or person" (Order 55 rule 1(1)).*"

19. This straightforward reading of section 13(3) of the 1974 Act for which Mr Taylor contended is also consistent with the natural and ordinary meaning of the term "*rules of court*" in the context of a statutory provision governing appeals to this Court. Section 4 of the Interpretation Act 1951 provides:

> "*(2) In every Act and statutory instrument-…'rules of court', in relation to any court, means rules made by the public authority having for the time*

being power to make rules or orders regulating the practice and procedure of that court."

20. If section 13(2) of the Bermuda Bar Act 1974 (a) empowers this Court to make orders with respect to the costs of the present appeal, and section 13 (3) provides that the Rules of this Court shall govern the "*practice and procedure*" of this appeal, it is difficult to see how Parliament can be viewed as having intended through the enactment of section 13 to dis-apply the normal costs rules of Order 62.

Does Order 62 of the Rules apply to appeals governed by section 13 of the Bermuda Bar Act 1974?

21. Order 62 itself speaks to the scope of its application:

> "***62/2 Application***
> *(1)In addition to the civil proceedings to which this Order applies by virtue of Order 1, rule 2(1) and (2), this Order applies to any criminal proceedings in the Court in respect of which costs are awarded.*
>
> *(2)This Order shall have effect, with such modifications as may be necessary, where by virtue of any Act the costs of any proceedings before an arbitrator or umpire or before a tribunal or other body constituted by or under any Act, not being proceedings in the Court, are taxable in the Court.*
>
> *[blank]*
>
> *(3)The costs of and incidental to proceedings in the Supreme Court (including any criminal proceedings to which this Order applies) shall be in the discretion of the Court, and that discretion shall be exercised subject to and in accordance with this Order.*" [Emphasis added]

22. Order 62 by its terms applies to all proceedings to which the Rules generally apply. Order 55 contains no special costs jurisdiction for appeals to which that Order applies (save for creating an exceptional power to order security for the costs of an appeal: Order 55 rule 7(6)).

23. Order 1 rule 2 provides:

> "(1) *Subject to the following provisions of this rule, these Rules shall have effect in relation to all proceedings in the Supreme Court.*
>
> *(2)These Rules shall not have effect in relation to proceedings of the kinds specified in the first column of the following Table (being proceedings in*

respect of which rules may be made under enactments specified in the second column of that Table):—..."

24. The Table in Order 1 rule 2(2) excludes civil appeals to which the Civil Appeals Act 1971 applies, because separate rules have in fact been made under that Act. Order 55 rule 1(2) itself states that Order 55 does not apply to "*(b) an appeal under the Civil Appeals Act 1971*". Appeals under the Bermuda Bar are not excluded.

25. So when section 13 was extended to appeals under section 16E with effect from October 19, 2009, Parliament knew or must be deemed to have known that this Court's Rules would govern section 16E appeals unless either:

    (a) provision was made in section 16E itself for the enactment of separate rules to govern appeals under that section; or

    (b) section 13 was amended in terms which made it clear that special rules made under section 13 would apply to appeals under that section, rather than this Court's general Rules.

26. Mr Duncan was unable to challenge this analysis. It is ultimately clear that Order 62 and its presumption that costs follow the event applies to appeals governed by section 13 of the 1974 Act so that the special principles applicable to regulatory proceedings do not apply to the present appeal. The position would of course appear to be otherwise in relation to proceedings before disciplinary tribunals and other 'proceedings' before Bar Council. These arguments will potentially be of substantial financial and regulatory benefit to the Respondent in the future in these parallel contexts.

Conclusion

27. It is of course open to this Court to make no order as to costs as Mr Duncan submitted. But I am unable to accept that the mere fact that the Respondent felt compelled to oppose the present application for legitimate regulatory purposes is, for the purposes of deciding how to exercise this discretion, sufficient to displace the presumption that costs should follow the event. The Respondent's own authorities undermine this contention by demonstrating the need to apply a special rule in the *bona fide* regulatory action context where the ordinary costs rules do not apply. The successful Appellant is granted its costs (including the costs of the present application)[3] to be taxed if not agreed.

[3] The Respondent strictly has the right to be heard in this respect.

28. Whether or not the long-term benefits of refraining from enforcing this Order in the interests of collegial relations within a comparatively small Bar outweigh the short-term benefits of enforcement is a matter the Appellant's principals would be wise to at least consider. It is sometimes if not always the case, as Bob Marley has lyrically opined, that "*wisdom is better than silver and gold, to the prince*…"

Dated this 20th day of February 2017 _____

IAN RC KAWALEY CJ