The Court of Appeal for Bermuda

CIVIL APPEAL NO 16 of 2016

BETWEEN:

BERMUDA EMISSIONS CONTROL LTD

Appellant

-and-

(1) THE PREMIER OF BERMUDA

(2) SIR ANTHONY EVANS

(3) HON JOHN BARRITT

(4) FIONA LUCK

(5) KUMI BRADSHAW

(6) THE ATTORNEY GENERAL OF BERMUDA

Respondents

Before: **Baker, President**
Bell, JA
Bernard, JA

Appearances: Mr. Eugene Johnston, J2 Chambers, for the Appellant
Mr. Gregory Howard, Attorney General's chambers for the 1st & 6th Respondents
Mr. Jeffrey Elkinson, Conyers Dill & Pearman for the 2nd -5th Respondents

Date of Hearing: **24 November 2016**

Date of Decision: **25 November 2016**

Date of Reasons: **20 December 2016**

REASONS

Commission of Inquiry – whether lawfully appointed – Judicial Review – case management to avoid unnecessary duplication

Baker, President

1. In December 2014 the Auditor General produced a report on the Consolidated Fund of the Government of Bermuda for the financial years ended 31 March 2010, 2011 and 2012 ("the Report"). It contained very worrying conclusions including that millions of dollars had been spent without following the appropriate procedures and approvals. Included in section 3 of the Report are the words:

> "....those matters arising from the audit which are significant enough to warrant the attention of the House of Assembly. Many of the observations point to a general failure to follow the rules (Financial Instructions) established by Government for the safeguarding of pubic assets."

2. On 24 February 2016 the Premier of Bermuda, Hon Michael H. Dunkley, JP, MP appointed a Commission of Inquiry ("the Commission") under section 1A of the Commission of Inquiry Act 1935 ("the Act") to inquire into various matters arising out of The Report and make recommendations.

3. One of the contracts referred to in section 3 of the Report which caused the Auditor General concern was a contract with Bermuda Emissions Control Ltd ("the Appellant") for over $2million. The Commission wished to investigate. The Appellant is apparently anxious not to have its affairs scrutinized by the Commission and on 30 August 2016 sought leave to apply for judicial review claiming inter alia a declaration that the inquiry was unlawful because the Premier unlawfully delegated the power to set the scope of the inquiry to the Commission. On 7 September 2016 the Chief Justice granted the Appellant leave to apply for Judicial Review but refused judicial review on the ground that the inquiry was lawfully constituted. The Appellant has appealed against that decision but, despite the urgency of the matter, did not lodge their notice of appeal until the last day of the six week period permitted by the Rules. On 25 November 2016 we dismissed that appeal and we now give our reasons.

4. There are two ground of appeal. We set them out in full.

> (a) improperly converted the Appellant's permission application into a substantive hearing of one challenged decision only, in violation of the overriding objective found in RSC1A;
>
> (b) misunderstood the nature of the challenge made to the Commission's appointment. Instead of realising that he had to decide whether powers found in section 1 and 1A of the 1935 Act were unlawfully delegated to the Commission itself (contrary to the principle expressed in *Ratnogopal v Attorney General* [1970] AC 974), the learned judge believed he had to decide a wholly different question, namely whether the Commission's appointment was sufficiently clear. If the learned judge had posed the right question, he would have been left with no doubt that the appointment was unlawful.

Ground 1

5. On 30 August 2016 Hellman, J. directed that the application for judicial review be adjourned to a dated to be fixed, with an estimated hearing length of one half day. The hearing took place before the Chief Justice on 2 September 2016 and the essence of Mr. Johnston's complaint is that the Appellant was surprised and disadvantaged by the Chief Justice not giving an opportunity for further submissions, having granted leave to apply for judicial review, before dismissing the substantive application.

6. In England and Wales it is common for the Court to direct a "rolled up" hearing of the application for leave together with the substantive application if leave is granted. This is particularly so if the case is urgent.

Whilst Hellman, J. did not direct a rolled up hearing, there was full argument before the Chief Justice, the underlying facts were not in dispute as it is difficult to see if anything else, other than repetition, could have been said. We cannot see that the Appellant has suffered any prejudice and in any event it has had the opportunity to deploy full argument to us.

7. The Chief Justice, in giving judgment, observed that adjourning for a full hearing at a later date would cast a shadow over the functioning of the Commission for a protracted period, and the point was a short legal one which all parties had come adequately prepared to argue fully. He described his decision as a case management one. His decision was dictated by two matters, not wasting costs and letting the Commission get on with its work. In our judgment the Chief Justice was not only within the ambit of his discretion, it was the correct case management decision.

Ground 2

8. The Premier, in appointing the Commission, was exercising the power conferred on him by section 1A of the Commission of Inquiry Act 1935. Only the Premier or the Governor may appoint a Commission of Inquiry. The opening words of the appointment are:-

> "To inquire into the following matters which are, in my opinion for the public welfare.
>
> Having regard to the Report of the Auditor General on the Consolidated Fund of the Government of Bermuda for the financial years ending 31 March in 2010, 2011, and 2012, and with regard to any matters arising under Section 3 of the Report to – "

There then follow nine numbered paragraphs, the first of which is under the heading: Scope of Inquiry

1. Inquire into any potential violation of law or regulations, including the Civil Service Conditions of Employment and Code of Conduct, Financial Institutions and Ministerial Code of Conduct, by any person or entity, which the Commission considers significant and determine how such violations arose.

Paragraphs 2 to 6 are under the heading Preferences to Other Agencies and it is unnecessary to set them out. Paragraphs 7 and 8 are under the heading Recommendations for the Future and again these are not relevant to the issue in the present appeal.

Paragraph 9 is under the heading : Any Other Matter. It reads:

9. Consider any other matter which the Commission considers relevant to any of the foregoing.

The appointment concludes with various directions to the Commission, the relevant one being to submit findings and recommendations to the Premier within 20 weeks or such longer power as the Premier directs.

9. Before the Chief Justice it was argued that the opening words of the appointment were a mere preamble and did not form part of the terms of reference, which were limited to the directions in paragraphs 1 to 9. This argument was firmly rejected by the Chief Justice and has not been pursued before us.

10. The Premier's enabling power is to be found in section 1A of the 1935 Act which provides:

(1) The (Premier) may, whenever he considers it advisable, issue a Commission appointing one or more Commissioners and authorising them, or any quorum of them therein mentioned, to inquire into the conduct of any civil servant. The conduct or management of any

> department of the public service or into any matter in which an inquiry would in the opinion of the (Premier) be for the public welfare.
>
> (2) Each such commission shall specify the subject of inquiry, and may, in the discretion of the (Premier), if there is more than one Commissioner, direct which Commissioner shall be chairman, and direct where and when such inquiry shall be made, and the report thereof rendered, and prescribe how such commission shall be extended, and may direct whether the inquiry should or should not be held in public.

11. The Premier plainly had the section in mind when drafting the appointment as he refers specifically to the public welfare criterion. The thrust of Mr. Johnston's argument is that the Premier improperly delegated his powers under the Act to the Commission. He relied on *Ratnagopal v Attorney General* [1970] AC 974. In that case section 2 of the Commissions of Inquiry Act of Ceylon empowered the Governor-General to appoint by warrant a commissioner to inquire into matters in respect of which an inquiry would "in the opinion of the Governor-General" be in the interests of public welfare. The Governor-General by warrant appointed a Commissioner to inquire into and report on whether there had been abuse in connection with certain tenders made to or contracts entered into by contractors between 1 June 1957 and 31 July 1965. The warrant empowered the Commissioner to inquire into and report whether during the period in question any abuses occurred in relation to such tenders and such contracts as the Commissioner should in his absolute discretion deem to be, by reason of their implications, financial or otherwise, on the Government, of sufficient importance in the public welfare to warrant an inquiry and report. It was held that in the terms of the Act, the scope of the inquiry should be limited by the Governor-General. Since it was left to the

Commissioner to decide what tenders and what contract should be inquired into, the scope of the inquiry was left entirely to him. The power of selection was entirely his; the ambit of the inquiry was delegated to him. Accordingly, his appointment in terms of the warrant was *ultra vires* the Act and his appointment could not stand.

12. Lord Guest, giving the judgment of the Board, pointed out at 981G that when the appointment of the Commissioner is examined it is found that the scope of the inquiry is left entirely to the Commissioner's discretion. He was to decide which contracts and which tenders over an eight year period should be inquired into. However, by section 2 of the Act the matter to be inquired into must be one in respect of which an inquiry will "in the opinion of the Governor-General" be in the interest of public welfare. Accordingly, the scope of the inquiry, instead of being limited by the Governor-General as in the terms of the Act it should be, is to be decided by the Commissioner. The appointment of the Commissioner was therefore *ultra vires* and could not stand.

13. Mr. Johnston relies strongly on *Ratnagopal* which he points out was concerned with almost identical enabling legislation. The present appeal, he submits - is effectively, on all fours with *Ratnogopal.* In *Bethel v. Douglas* [1995]1 WLR 794 it was held that a Commission had been validly appointed. Lord Jauncey giving the judgment of the Board said at page 802F that *Ratnagopal's* case was authority for the proposition that the Governor-General must specify the matters to be inquired into and is not entitled to leave it to the Commissioner to determine what those matters are to be. The Governor-General had done exactly that by confining the matters to those arising out of three named companies and there was no ground for challenging the validity of the reference. Mr. Johnston relies on this authority as demonstrating that there must be specificity. He also referred us to

Hoffman v. Commissioner of Inquiry and the Governor of Turks and Caicos [2012] UKPC 17 and *Robinson v Auld* [2008] Civ App 17/08 (26 September 2008) but neither of these cases takes the law any further than as described by the Privy Council in *Ratnagopal.*

14. Mr. Elkinson, who appeared for the Commission, drew our attention to *In re The Royal Commission on Licensing* [1945] NZLR 665. In that case the warrant of the Commission contained a paragraph:

> "And generally to inquire into and report upon such other matters arising out of the premises as may come to your notice in the course of your inquiries and which you consider should be investigated in connection therewith, and upon any matters affecting the premises which you consider should be bought to the attention of the Government."

15. It was held that this did not extend the scope of the Commissioner's authority so as to add to the task defined by the earlier words another task of a fundamentally different nature. It operated as an omnibus paragraph to give the Commission power to inquire into allied and related incidental topics. Myers C.J. giving the leading judgment said at page 680:

> "It comes back then, in my opinion, to the interpretation of the instrument itself. A Commission of Inquiry under the Statute and a Royal Commission under the letters Patent are alike in their respect – each of them is an inquiry, not an inquisition. By that I mean that the Commission is not a roving Commission of a general character authorising investigation into any matter that the members of the Commission may think fit to inquire into and that the ambit of the inquiry is limited by the terms of the instrument of appointment of the Commission."

Then having referred to the allegedly offending paragraph he said this at p. 682:

> "I find no difficulty in the interpretation of this further mandate. Counsel... contend in effect that the words confer no additional authority on the Commission, but with that I am unable to agree. The paragraph in what might be called an "omnibus" paragraph intended generally to gather up previously unspecified matters arising out of or affect *the premises*... and to confer upon the Commission a power to inquire into matters which power would not otherwise have existed or the existence of which might at least have been open to doubt."

And then at page 683:

> "Were it otherwise, there would be no limit to the inquiry, though I recognise that that fact itself would not disposed of the matter.... A construction of the instrument that would confer such powers upon the Commission, assuming such interpretation to be possible (which in my opinion, it is not) would, in my view, be so unreasonable as that, if the document is capable of a more reasonable construction not involving such consequences (as in my opinion it is), the more reasonable construction should be adopted. That is one of the well-established principles of construction."

Mr. Elkinson for the Commission relies on this authority.

16. It seems to us that there can be no doubt that the opening paragraph of the warrant in the present case governs the nine following paragraphs. Accordingly it sets the limits of what the Commission is being directed to do. These are to have regard to the Report for the three years in question and any matters arising under section 3. Paragraph 1 headed Scope of Inquiry, then focuses the reader more specifically on what the

Commission is required to do, namely inquire into any potential violations of law etc. by any person or entity and determine how such violations arose but with the qualification "which the Commission considers significant." Now Mr. Johnston alights on those words and submits that they leave it open to the Commission to decide what it does and does not want to inquire into, in other words leaving the Commission to decide the ambit of its investigation and this falling within the objection that was fatal in *Ratnagopal.*

17. In our judgment this is to ignore the practicalities of the situation. Section 3 of the Report identified 17 specific areas of concern about maladministration one of which was "significant contracts not tendered". Amongst those was one involving the Appellant. In our view the reference in paragraph 1 to potential violations that the Commission considers significant is designed to limit the investigation to those issues that really matter. It is important that the opening paragraph refers to any matters arising under section 3 of the Report. Mr. Johnston submits this should be read as all matters arising under Section 3 and argues that paragraph 1 would be unexceptionable if the words "which the Commission considers significant" were removed. The consequence would be that the Commission would have to inquire into all matters, however, trivial. Put shortly Mr. Johnston equates the reference in paragraph 1 to "the Commission considers significant" to the reference to "absolute discretion" in *Ratnagopa*l. In our view the important difference is that in the present case the Commission is given a discretion to limit rather than expand the inquiry. It is, sensibly, not required to look into insignificant violations. Had this limitation not been expressly included it could very probably have been implied, especially as the Commission was required to report within a short time period of initially 20 weeks.

18. Mr. Johnston has further objection to paragraph 9 which he submits gives the Commission an impermissible discretion to expand the inquiry. Again the Commission is given an element of discretion but only within the boundary of what is "relevant to any of the foregoing." This is eminently sensible and might have been implied if not expressly stated. The controlling factor is the public welfare and the 17 areas of maladministration set out in section 3 of the Report.

19. Mr. Johnston submits three principles can be derived from the authorities:

> 1. The power to make an appointment under the 1935 Act must be strictly construed and cannot be delegated.
>
> 2. The scope of any appointment made under the 1935 Act must be sufficiently clear and free of interpretational doubt.
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> 3. The Commission appointed under the 1935 Act cannot be left with a discretion about what matters to look into and what to leave out of account.

20. No problem arises about the first and second of these, which were both plainly met in the present case. His third principle seems to us to be objectionable insofar as it is interpreted as meaning that the Commission should not have been left with a discretion to consider what is significant and what is not and what it considers relevant to the 17 areas of maladministration. There is, it seems to us, an obvious divide between the terms of reference of the Commission and the subsequent management of the Commission's process. The logical consequence of Mr. Johnston's submission seems to us to be that the Premier himself should have decided what violations were significant and directed the Commission accordingly.

21. The argument before us has shifted somewhat from that before the Chief Justice where it was contended that the opening paragraph of the appointment did not form part of the terms of reference with the result that the Commission was so broadly framed as to empower the appointed body to determine the scope of its own jurisdiction. It was therefore *ultra vires* and should be struck down. Before us the argument focussed on paragraphs 1 and 9 of the Commission. True the Commission was told what it was to inquire into but the complaint is that this was followed by unlawful delegation in these two paragraphs. We cannot accept that submission. On an ordinary reading of the warrant there is no unlawful delegation, nor is it too broad in scope. Mr. Howard for the Attorney made a valid point when he submitted that a finding of unlawful delegation was tantamount to letting the Commission decide what was in the public interest. The Premier has to delegate certain authority for the Commission to be managed effectively. Should the Commission act outside the discretion appropriately given to it for example by considering a matter that obviously wasn't relevant (Paragraph 9) or that obviously was not significant (Paragraph 1) then it would be amenable to judicial review. There has however, been no suggestion that that has occurred or will occur.

Conclusion

22. For these reasons we are satisfied that the Commission was lawfully appointed under section 1A of the Act and accordingly the appeal against the decision of the Chief Justice was dismissed.

Signed

Baker, P

Signed

Bell, JA

Signed

Bernard, JA