[2019] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2019CV00096

APPLICATION NO COA2019APP00203

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MISS JUSTICE SIMMONS JA (AG)

BETWEEN	**HOMER DAVIS**	**FIRST APPELLANT**
AND	**ST JAMES MUNICIPAL CORPORATION**	**SECOND APPELLANT**
AND	**MAURICE TOMLINSON**	**RESPONDENT**

Ransford Braham QC, Mrs M Georgia Gibson-Henlin QC and Ms Stephanie Williams instructed by Henlin Gibson Henlin for the appellants

Ms Nastassia S Robinson for the respondent

17, 18 October and 8 November 2019

BROOKS JA

[1] It is to be clearly understood that this is an appeal only against the decision of a judge of the Supreme Court to grant a mandatory injunction in this case. The important issues, which lie in the distant background of his decision and, indeed, this judgment, are for consideration at another time.

[2] This court heard this appeal on 17 October 2019. Due to the urgency of the matter, the court, after having the benefit of submissions by counsel, handed down its decision on 18 October 2019. It was as follows:

> "a. The appeal is allowed;
> b. Order NO. 3 of Batts J in the decision handed down on 14 October 2019 is set aside;
> c. The interim order that the [appellants] permit Mr Tomlinson to host his events at the Montego Bay Cultural Centre on the 16th, 18th and 19th October 2019 on condition that the agreed consideration is paid, is set aside;
> d. The Registrar of the Supreme Court is directed to fix a date for the hearing of the application for judicial review;
> e. No order as to costs."

[3] Despite this court disagreeing with the decision of Batts J (also referred to herein as the learned judge), it nonetheless is favourably impressed with his admirably organised and expressed reasons for judgment.

The decision and the appeal

[4] The learned judge handed down his decision on 14 October 2019. He ordered Mr Homer Davis (Mayor Davis), who is the chairman of the Saint James Municipal Corporation (the Corporation), and the Corporation, to permit Mr Maurice Tomlinson to host a series of events to be put on by his group, Montego Bay LGBT Pride, at the Montego Bay Cultural Centre (the Cultural Centre). These events were to have been held on 16, 18 and 19 October 2019.

[5] Mayor Davis and the Corporation have appealed from the decision of the learned judge. This judgment will refer to Mayor Davis and the Corporation together as, "the appellants". They argue, among other things, that although the learned judge was not deciding the major issues between the parties, the learned judge has given Mr Tomlinson his entire claim.

[6] In order to understand the appeal, it is necessary to give a bit of the background to Mr Tomlinson's claim.

Background

[7] The essence of the dispute is that Mr Tomlinson contracted with the Cultural Centre's Operations Manager, Ms Hilary Clarke, to use, for a fee, the Cultural Centre. Firm dates were booked, and Ms Clarke issued an invoice for the charges. They agreed that Mr Tomlinson could pay for the use at the time of the events. Ms Clarke also agreed to help publicise the events.

[8] The arrangement between Mr Tomlinson and Ms Clarke was later discussed at a meeting of the Corporation. Mayor Davis was reported in the Jamaica Gleaner newspaper, of Friday 13 September 2019, as not being in agreement with the arrangement. He was of the view, the article stated, that nothing should be done "to disturb the sacredness and purpose" of the Cultural Centre. The article reported that Mayor Davis declared that he would not give permission for Mr Tomlinson's group to use the Cultural Centre. Another councillor of the Corporation reportedly made similar comments. All those comments were reported in the same newspaper article.

[9] Mr Tomlinson says that he was subsequently informed (his evidence on this point is very vague), that the permission to use the Cultural Centre had been withdrawn. He, apparently, initially accepted the purported rescission of the arrangement. Consequently, he issued a notice cancelling the event. He thereafter, again apparently, reconsidered his position, and sued. He filed an application for leave to apply for judicial review. He asked for:

> "Leave for judicial review of the decision of [the appellants] to rescind previously granted permission to the [Mr Tomlinson] and his colleagues to host a public forum as part of the Montego Bay Pride events at the [Cultural Centre] on October 16 and 19 on the basis that there is need to keep the 'sacredness' of the Centre intact."

[10] Mr Tomlinson claimed that the decision, on the basis that the event would "disturb the sacredness" of the Cultural Centre, was discriminatory in nature. He asked for, among other remedies, permission to apply for a declaration to that effect and an order quashing that decision.

[11] He also applied for an interlocutory order allowing his group to proceed with their events as planned. The application went, without notice to the appellants, before a different judge of the Supreme Court (the first judge). On 4 October 2019, the first judge granted leave to apply for judicial review and a number of other orders, including quashing the Corporation's decision.

[12] The appellants applied to set aside the orders of the first judge. That was one of the applications that came before Batts J. On 14 October 2019, Batts J made a number

of orders. Some of his orders confirmed, and some set aside, orders made by the first judge.

[13] After the learned judge made his orders, Mr Tomlinson went about securing the Cultural Centre for 16 and 18 October 2019. In that regard, he applied to the Corporation, and paid the fees, for the grant of an entertainment licence to hold an event on each of those days.

[14] The appellants were also busy. They appealed from the learned judge's decision. The order, which they seek to have set aside, states:

> "It is hereby ordered that [the appellants] permit [Mr Tomlinson] to host its [sic] events at the Montego Bay Cultural Centre on 16th 18th and 19th October 2019 on condition that the agreed consideration is paid."

The grounds of appeal

[15] The appellants challenged a number of the findings of fact and of law made by the learned judge. The grounds of appeal on which they rely are as follows:

> "a. The learned judge erred as a matter of law in his application of or failure to apply the principles relating to the grant or refusal of interim orders that give a party the entire relief that is claimed on [Mr Tomlinson's] case and in circumstances where:
>
> (i) [Mr Tomlinson] conceded that [he] had cancelled the events due to security and other concerns;
>
> (ii) [Mr Tomlinson]conceded that [he] can hold the events at a later date;

(iii) the order gives [Mr Tomlinson] the whole of the relief sought while depriving the [Appellants] of the right to a trial particularly on the question of whether a decision was made;

(iv) no date was fixed for the hearing of the claim for Judicial Review taking into account r. 56.4(11) [of the Civil Procedure Rules (CPR)]; and

(v) having succeeded in obtaining the orders sought, the question of whether [Mr Tomlinson] can host the events at the Montego Bay Cultural Centre on the dates requested will be an exercise in futility or moot.

b. [Mr Tomlinson] did not establish that [he] was able to meet [his] undertaking as to any damages that the appellants may suffer.

c. The learned judge erred as a matter of law in taking into account financial loss as evidence of greater prejudice to [Mr Tomlinson] in the grant or refusal of the injunction without regard for the fact that there was no evidence of financial loss and if there was financial loss, damages would be an adequate remedy.

d. The learned judge erred as a matter of fact and law in failing to take into account the following factors in relation to the interim order for a mandatory injunction:

i) that [Mr Tomlinson] had not disclosed that [he] cancelled the event; or

ii) the evidence before him was that [Mr Tomlinson] proposed to host the event at a later date; and

iii) the police had not granted permission for the event to be held due to security considerations.

iv) The State of Public Emergency that exists in St. James.

e. The learned judge erred on the facts and in law when he found that there were serious questions to be tried on the basis that Ms. Hilary Clarke was authorised to grant permission to host the event.

f. The learned judge erred on the facts and in law when he found that there were serious questions to be tried based on the fact [that] a decision was made to revoke the hearing.

g. The learned judge erred as a matter of fact and/or law in introducing and deciding the case on the basis of a breach of the Constitution when neither a claim nor submissions were made on that point before him."

[16] The appeal could not have been heard on 16 October 2019 as the parties had requested. The holding of the event on that date was therefore stayed, pending the hearing of the appeal on 17 October 2019.

The application for fresh evidence

[17] When the appeal came on for hearing, Ms Robinson, appearing for Mr Tomlinson, applied for the admission of three documents by way of fresh evidence. There was some resistance by Mrs Gibson-Henlin QC, appearing for the appellants, but the court decided, for what the documents were worth, to look at two of them. The court rejected a newspaper article, dated 17 October 2019, as it was unsubstantiated and unhelpful. It is clear that the two remaining documents could have been discovered with reasonable diligence prior to the hearing before the learned judge. It is also understood, however, that there was a great deal of urgency surrounding the filing of

that application for leave, and that that could have prevented the documents being placed before the learned judge.

[18] The first of the two documents is an extract from the register of the Companies Office of Jamaica, which showed the particulars of a company named "Montego Bay Arts Council Limited". Among the persons on the board of directors of the company, hereafter called "the Arts Council", are Mayor Davis and Mr Gerald Lee. In the court below, Mr Lee swore to an affidavit in support of the Appellants. He deposed that he is the Chief Executive Officer of the Corporation.

[19] The second document is an extract from the website of the Cultural Centre. It, among other things, gives a description of the Cultural Centre on one of the website pages. The description states, in part, that the Cultural Centre "is overseen by the board members of the [Arts Council]. The Arts Council, headed by Chairman Josef Forstmayr, represents a wide cross section of…stakeholders". It also states that the Cultural Centre, "opened its doors on July 11, 2014 on the basis of a Memorandum of Understanding forged between the [Corporation] and the [Arts Council], which set [sic] the legal and administrative foundation of this Centre of Culture".

[20] These documents, Ms Robinson submitted, demonstrated that the Corporation did not have control of the Cultural Centre and so could not have been prejudiced by the learned judge's order.

[21] It seems, however, that the new information, far from supporting the learned judge's decision, instead further renders uncertain, the factual basis upon which the orders were based. The documents may well support the Corporation's contention that it made no decision in respect of whether Mr Tomlinson would be permitted to use the Cultural Centre.

The overarching approach to the appeal

[22] It is understood that in order to succeed in this court, the appellants must show that the learned judge, in arriving at his decision, erred either in a finding of fact or a matter of law, or both. The learned judge was exercising a discretion given to him and this court will not disturb his decision merely because it would have arrived at a different decision (see **Attorney General of Jamaica v John Mackay** [2012] JMCA App 1).

[23] It is also borne in mind that the approach to applications for injunctions should normally follow that set out in **American Cyanamid v Ethicon** [1975] AC 396. That case establishes that the issues to be considered are whether the claim raises a serious issue to be tried, whether damages would provide an adequate remedy to one party or another, and if not, where the greater prejudice would lie if the injunction was granted, on the one hand, or refused, on the other.

[24] There are also two additional features to approaching cases involving injunctions, which must be considered. The first is that a court will only grant a mandatory injunction at an interim stage of litigation, if the court is confident that at the end of the

case, the injunction would be found to have been rightly granted. Authority for that principle may be found in the decision of Megarry J in **Shepherd Homes Ltd v Sandham** [1970] 3 All ER 402 at 412. The principle was considered in **National Commercial Bank Jamaica Ltd v Olint Corp Ltd (Jamaica)** [2009] UKPC 16. Although their Lordships agreed broadly with that principle, they did not confine it to mandatory injunctions. The principle, their Lordships stated, is that the court should decide on the course that would cause the least irremediable prejudice. They said, in part, at paragraph 19 of their judgment:

> "…What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances that it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J said in **Shepherd Homes Ltd v Sandham** [1971] Ch 340, 351, 'a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted.'"

[25] The second feature is that in public law cases, such as this, if the injunction in such cases would give a party the entire remedy that it seeks, and there are issues of fact to be resolved, the court should not normally grant the injunction (see **Miller and Another v Cruickshank** (1986) 44 WIR 319).

Analysis of the complaints in respect of findings of fact

[26] The learned judge made at least three findings of fact, which are significant to this exercise. He found that:

a. The website to which he referred in paragraph [4] of his judgment belongs to the Corporation;

b. Ms Clarke held a position as Operations Manager (paragraph [4]) in the Corporation (paragraph [15]) and that she was the Corporation's agent (paragraph [8]); and

c. "On the evidence there was a decision to no longer allow [Mr Tomlinson] to use the [Cultural Centre]" (paragraph [17]).

[27] Mrs Gibson-Henlin first challenged the learned judge's finding that Mayor Davis and the Corporation had decided to terminate the permission that Ms Clarke had given to Mr Tomlinson. Learned Queen's Counsel submitted that that finding of fact, on which the learned judge based his decision, was plainly flawed. She submitted that there is no evidence that the Corporation made a decision to grant permission for Mr Tomlinson to use the Cultural Centre, or made a decision to rescind any such permission. Learned Queen's Counsel relied for this submission on, what she submitted, is a distinction between the licensing process set out in the Saint James Parish Council (Places of Amusement) Regulations 1999 (the Regulations), on the one hand, and the contractual relationship between the Cultural Centre and Mr Tomlinson, on the other.

[28] She argued that whereas the Corporation had charge of the former process, Mr Tomlinson, up to the time of the hearing before the learned judge, had not engaged it

in respect of that process. The latter process, learned Queen's Counsel submitted, did not involve the Corporation and there is no evidence that it made any decision in respect of the contract between the Cultural Centre and Mr Tomlinson.

[29] She, therefore, argued that there is no evidence of any decision to rescind, which could be the subject of an application for judicial review.

[30] Mrs Gibson-Henlin also submitted that utterances of Mayor Davis and the other member of the Corporation could not constitute a decision of the Corporation. She relied on the relevant provisions of the Local Governance Act, 2016, which, among other things, states the structure of municipal corporations, the manner by which the municipal corporations must take their decisions and the persons who carry out the mandate of such corporations. She referred to the evidence of Mr Lee, who categorically stated, at paragraph 18 of his affidavit, that the Corporation had:

a. received no application from Mr Tomlinson for a licence to host an event;

b. made no decision to grant a licence; and

c. not revoked any licence that had been granted to him.

[31] Ms Robinson made a spirited response to the appeal. In respect of this aspect of the appeal, she referred to the chronology of events, and in particular to the report of Mayor Davis' statements. She argued that something must have happened on 12 September 2019. She contended that Mr Tomlinson, as he had in previous years, was

progressing nicely with his arrangements with Ms Clarke, who, Ms Robinson submitted, did not indicate to him that he needed any other permit to be able to use the Cultural Centre. Yet, learned counsel submitted, after Mayor Davis' statements, as reported, Mr Tomlinson could make no progress with confirming the use of the Cultural Centre.

[32] Learned counsel submitted that although Mr Lee deposed that the Corporation made no decision in respect of a permit, some of his other statements in his affidavit were in support of the baseless comments made by Mayor Davis about the "sacredness" of the Cultural Centre. Learned counsel also dismissed, as baseless, Mr Lee's statements that the Cultural Centre could not accommodate large groups. She pointed out that the Cultural Centre's website boasted that it could accommodate up to 300 persons. She argued that the evidence was that Mr Tomlinson's events would involve only between 20 and 50 persons.

[33] In examining these competing submissions, it must be acknowledged that the appellants' position seems to be somewhat self-conflicting. On the one hand, Mr Lee sought to justify the opinions that Mayor Davis expressed at the Corporation's meeting on 12 September 2019. Mr Lee spoke to the need to "ensure that the events that are approved to take place at the Centre are in keeping with the purpose and spirit of the Centre" (paragraph 13 of his affidavit). No doubt, that assisted in drawing the learned judge's ire, but it is not the issue upon which the Corporation was really relying. Only after giving that explanation did Mr Lee go on to say that the Corporation had made no

decision on any application by Mr Tomlinson. It is the latter position that has been advanced before the court.

[34] Nonetheless, learned Queen's Counsel is correct. The fresh evidence confirms the separate identities of the Arts Council and the Corporation. The Cultural Centre's website to which the learned judge referred is not the Corporation's website. The website makes it clear that the Cultural Centre is overseen by the Arts Council. The learned judge was therefore incorrect in finding that Ms Clarke, described on one of the Cultural Centre's webpages as "the Operations Manager", is an employee of the Corporation. There is no evidence to that effect. What Mr Tomlinson said was that she was the Operations Manager of the Cultural Centre. Admittedly, however, the learned judge could have been led to his erroneous conclusion by Ms Clarke's e-mail address as stated on the website. It is "operationsmanager4mbcc@gmail.com".

[35] Learned Queen's Counsel's submissions, as to error of fact, are also correct because Mr Tomlinson has not supplied any evidence of a decision by the Corporation. The opinion and expressions of intention by Mayor Davis do not constitute a decision of the Corporation. In the absence of any specific evidence to the contrary, the communication that Mr Tomlinson received must be interpreted as being that the Arts Council had rescinded its agreement with him. That, however, does not constitute a decision of the Corporation. The fresh evidence, establishing the distinct identity of the Arts Council, also helped to make the distinction clear. The fact that there was a change

in the approach of the Arts Council does not mean that the Corporation made a decision.

[36] The learned judge's finding of fact that the Corporation made a decision, is based on Mr Tomlinson's vague statement that he was "subsequently informed that [he] no longer had permission to host the events at the Cultural Centre" (paragraph 11 of his affidavit filed on 25 September 2019). In our view, the learned judge used that statement to escalate Mayor Davis' comments to the status of being a decision of the Corporation. However, the learned judge could not have properly made such a link.

[37] The provisions of the Local Governance Act 2016 demonstrate the manner in which the Corporation makes decisions. Section 32(j) of that Act states that "all acts of the Council [of the Corporation], and all questions coming or arising before the Council shall…be done and decided by the majority of such members of the Council as are present and vote at a meeting held in accordance with this Act...". Although the Local Governance Act 2016 allows for the creation of standing and special committees, it is the Council of the Corporation, which considers and grants licences under the Regulations.

[38] On the other issue of fact, and contrary to the learned judge's finding, Ms Clarke is not the Corporation's agent. She is the person in charge of the Arts Council, which is, also, not the Corporation's agent. The fresh evidence provided by Mr Tomlinson confirms that the learned judge did not appreciate that it is the Arts Council, which operates the Cultural Centre, and that Ms Clarke is its employee, not that of the

Corporation. On that basis, Ms Clarke's engagement with Mr Tomlinson could not have constituted either a permit or licence by the Corporation, and her communication of a rescission of the permit, if indeed it was her communication, did not constitute an act of the Corporation.

Analysis of the complaints about findings of law

[39] This court considered three of the issues of law, raised by the grounds of appeal. Mrs Gibson-Henlin's first criticism in law of the learned judge's decision is also hinged on the distinction she drew between Mr Tomlinson's contractual relationship with the Arts Council and the licence to be secured from the Corporation. She submitted that the learned judge was wrong in law to have rejected the appellants' contention that Mr Tomlinson required a separate licence under the Regulations. He, therefore, on learned Queen's Counsel's submissions, erred when he ordered the Corporation to grant a permit to Mr Tomlinson to use the Cultural Centre. Such an order, she submitted, trumped the requirements of the application process that is required by the Regulations.

[40] Ms Robinson supported the learned judge's finding that Mr Tomlinson did not require a licence under the Regulations. She argued that the learned judge was correct in finding that, in the circumstances, it is the Arts Council which was required to have that licence. Mr Tomlinson's past experiences of hosting such events without a licence, she submitted, undermined the appellants' contention that he needed a licence on this occasion.

[41] The requirement for Mr Tomlinson to have other approvals was brought to the attention of the learned judge, but he dismissed the concept as being neither real nor required.

[42] The learned judge found, firstly, that the argument that Mr Tomlinson required a permit from other agencies, such as the police force, to host the events, was a red herring. He found that that was a matter between Mr Tomlinson and the relevant agency. Secondly, he rejected the submission that Mr Tomlinson required a separate licence pursuant to the Regulations.

[43] The learned judge based his latter finding on his interpretation of regulation 3 of the Regulations. He opined that the onus was on the Arts Council to have secured the approval under the Regulations (see paragraph [8] of his judgment).

[44] In this regard, two provisions of the Regulations are relevant. Regulation 3(1) states:

> "No person shall operate a place of amusement in the parish of Saint James other than under the provisions of a licence grated to that person in respect of the place of amusement."

Regulation 2 defines a place of amusement as:

> "…any place open to the public, whether for a fee or free of charge, for the purpose of entertainment and, without limit to the generality of the foregoing, includes a cinema, dance hall, club, open air dance venue, amusement arcade, any place where a coin operated amusement machine is open to the public, a festival, discotheque, roller disco, or skate ring;"

[45] Whereas we do not disagree with the learned judge's reasoning in this regard, it cannot be viewed in isolation. It must be considered in light of:

a. Mr Lee's evidence, at pages 45-46 of the record, which suggests that such a licence is required for the use of the Cultural Centre;

b. Mr Tomlinson's evidence, at page 63 of the record of appeal, acknowledging the licensing process and speaking to the time period required for undertaking that process; and

c. the evidence that Mr Tomlinson, subsequent to the learned judge's order, applied to the Corporation for such a licence.

We are not of the view that, with that evidence, the issue is so clear as to justify the grant of a mandatory injunction at an interlocutory stage.

[46] On the second issue of law, Mrs Gibson-Henlin argued, and we agree, that the learned judge delved into the issue of the constitutional rights to freedom of speech and of conscience, when those were not issues raised by the application for leave to apply for judicial review.

[47] The learned judge dealt stridently with those issues. He said, in part, at paragraph [12] of his judgment:

> "On the question of relative merits, which falls for consideration because the interlocutory relief is in one sense final, [Mr Tomlinson] again prevails. The [appellants] it seems to me will have an almost insurmountable task to justify termination of permission on the basis outlined by the mayor in his publicly reported utterances. Those words betray an intolerance for freedom of speech and conscience. These are rights enshrined in the Constitution…."

[48] As pointed out by learned Queen's Counsel, no aspect of Mr Tomlinson's application for leave to apply for judicial review, spoke to any breach of any of his constitutional rights. Mr Tomlinson criticised the rescission of the permit on unreasonable and discriminatory grounds, but did not speak to any breaches of his rights under the Charter of Fundamental Rights and Freedoms under the Constitution. No doubt, those issues loom like a backdrop to the immediate action, and no doubt Mayor Davis' comments stirred the learned judge's understandable need to protect Mr Tomlinson's Charter rights, but we disagree that the learned judge was entitled to elevate those comments to a basis for granting a mandatory injunction.

[49] On the third issue of law that we considered, Mrs Gibson-Henlin submitted that the learned judge erred in failing to consider that in granting the injunction he was giving Mr Tomlinson his entire relief. Learned Queen's Counsel submitted that in the event that the relief is found to have been wrongly granted, the Corporation would have been irremediably prejudiced, while Mr Tomlinson would have got his entire remedy. She relied, for those submissions, on the decisions in **Belize Alliance of Conservation Non-Governmental Organisations v Department of The Environment & Another** (2003) 63 WIR 42 and **Miller v Cruickshank**.

[50] Ms Robinson countered that the appellants have not demonstrated that they would suffer any prejudice as a result of the grant of the injunction. In fact, learned counsel submitted that, the Corporation would benefit financially from the fees it would earn from the transactions.

[51] Based on the findings made above, it is unnecessary to decide this issue. There was no proof of a decision by the Corporation. It must be said, however, that the learned judge was alive to the fact that the grant of the injunction was, in effect, the grant of final relief. He said, in part, at paragraph [12] of his judgment:

> "…because the interlocutory relief is in one sense final…"

Learned Queen's Counsel is, therefore, not on good ground with this submission.

Conclusion

[52] It was on those findings of error of fact and law that we disagreed with the learned judge's decision, and made the orders set out at paragraph [2] above.