CAUSE NO: G 0162 OF 2023

IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION
BETWEEN

THE KING (on the application of FERNANDO SOTO)

Applicant

-and-

THE POLICE SERVICE COMMISSION

Respondent

-and-

THE COMMISSIONER OF POLICE

Interested Party

Appearances: **Mr Pramod Joshi of McGrath Tonner for the Applicant**

Dr Jevon Alcock, Deputy Solicitor General, with Ms Heather Walker of the Attorney General's Chambers for the Respondent and Interested Party

Before: **The Honourable Justice Jalil Asif KC**

Judgment: **19 July 2024**

Costs—allocation of costs—determination of who is the "winner"—exercise of discretion

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JUDGMENT ON COSTS AND CONSEQUENTIAL ORDERS

1. This is my judgment on costs and consequential matters following the handing down of my judgment dated 31 May 2024 on the four substantive matters that were before me, namely:

   1.1 the Applicant's summons, which was in part to debar the Respondent from adducing evidence in response to the claim;

   1.2 the Respondent's oral application, made during the hearing, for an extension of time to adduce such evidence;

   1.3 the remaining part of the Applicant's summons, which was for further discovery; and

   1.4 the Respondent's summons for directions.

2. I would not normally prepare a separate judgment on costs and consequential matters for summonses of these kinds but, having indicated to the parties the orders that I intended to make, the Respondent's counsel made some further submissions and requested that I provide reasons for my decisions on costs, which I now do.

3. My substantive judgment was circulated to counsel for the parties on 31 May 2024 with a request that they prepare a draft order reflecting the terms of the judgment. On 11 June 2024, the court followed up for the draft order and date for a hearing to address matters consequential on the judgment, as it had not received any materials. The parties responded that they were in discussions on the form of an order.

4. Not having heard anything further from the parties, on 25 June 2024 I directed that by 4 July 2024 the parties must jointly indicate whether they wished there to be a hearing to deal with consequential matters and costs, in which case they were to provide their dates of availability, or whether they wished to address the outstanding matters in writing, in which case they were to file the same by 11 July 2024.

5. The Respondent filed written submissions on costs on 27 June 2024. The Respondent indicated that it would attend a hearing on these issues if required. The Applicant filed his submissions on costs and on consequential matters on 11 July 2024.

6. Having read the submissions on both sides, on 15 July 2024 I determined the orders that I intended to make and arranged for draft orders to be circulated to counsel for their comments.

7. In response to this, the Respondent made further submissions on the costs issues and requested that I provide reasons for my decisions.

8. Turning to the substantive positions adopted by each party, the Respondent indicated in its correspondence sent with its initial submissions on 27 June 2024 that it considers that it is premature to address directions towards a final hearing. This is said to be because: (a) it has filed an application to strike out the Applicant's claim for failure to comply with GCR O.53, r.5(2); and (b) the issues in this case overlap with two other cases which are before me, namely *The King (on the application of GT Retail Suppliers Ltd) v Department of Commerce and Investment and others* (unreported, 21/06/24), in which an application for leave to appeal was being considered by the Attorney General's Chambers, and *The King (on the application of Berry and other) v Public Lands Commission*, in which my judgment was awaited. Subsequently, on 12 July 2024, the Respondent confirmed that it had issued a summons for leave to appeal in *GT Retail Suppliers Ltd*.

9. Briefly, the Respondent's submissions on costs are:

   9.1 the court exercises a broad discretion in relation to costs;

   9.2 the starting point is that the "successful party" should recover their reasonable costs from the opposing party;

   9.3 the Court should consider the extent of the success and failure of the parties, and can identify the "winning party" by applying common sense;

   9.4 in addition, the court can examine whether a substantial amount of time was expended on a "major item".

10. The Respondent's further submissions on the principles to be applied provided on 15 July 2024 reiterated that the winner should recover their costs and that costs should follow the event unless there are exceptional circumstances.

11. Applying these principles, the Respondent submits that the Applicant failed to achieve what he set out to achieve, and that my costs order should reflect the overall justice of the case. The Respondent submits that it was marginally more successful than the Applicant and proposes that I should make no order for costs or alternatively should order costs in the cause, which is said to reflect the real- life

outcome. In its further submissions on 15 July 2024, the Respondent indicated that it did not understand how the Applicant could be considered to be the winner.

12. In addition, the Respondent questions whether it is appropriate to make any costs order at all at this stage and suggests that it would be more usual to defer costs issues until the end of the case.

13. The Applicant's position is that:

13.1 there should be no delay in listing the matter for a final hearing – the Respondent's application to strike out the Applicant's case is unlikely to succeed in light of my judgment in *GT Retail Suppliers Ltd* and no application for leave to appeal has been made in that case (but see above, that the Respondent subsequently filed that application by 12 July 2024);

13.2 as to the Applicant's summons, the Applicant succeeded in making his case that the Respondent should not be permitted to adduce late evidence;

13.3 the argument on this point became complex as a result of the arguments raised by the Respondent, and, consequently, occupied court time and needed to be determined;

13.4 the Respondent should pay the Applicant's costs of the Respondent's oral application for an extension of time to serve its evidence and his costs of the summons for directions;

13.5 the Respondent only replied to the bulk of the Applicant's discovery requests on the day immediately before the hearing, which was a public holiday;

13.6 the fact that the Applicant failed on the one discovery issue that remained live should not affect the overall outcome in relation to costs;

13.7 therefore, the Respondent should pay the Applicant's costs of his summons, to be taxed immediately.

14. Having considered those submissions, my determination is that the Respondent's summons for directions should be adjourned for a short period. This is to enable the parties to take stock. In particular, I have very recently refused leave to appeal in *GT Retail Suppliers Ltd* and my finalised judgment in *Berry* will be handed down in the next few days. Once the parties have taken stock, they should seek to agree an early hearing date for the adjourned summons for directions, preferably before 9 August 2024. The costs of the summons for directions relating to the hearing on 21 May 2024 should be costs in the cause.

15. My reason for making that order for costs on the summons for directions is that I was not addressed in argument regarding any substantive directions in relation to the conduct of the matter toward a final hearing and as a result I did not make any orders. The summons for directions was, in effect, a non-event. It is right that the Respondent's summons for directions referred to the Respondent being permitted to file evidence by a date to be determined by the court as an example of the kind of orders that might be made. However, any argument in relation on that point was subsumed into the argument on the Applicant's summons and the Respondent's oral application for an extension of time to serve evidence. Accordingly, it does not need to be reflected in the costs order on this summons.

16. I consider that the application for a debarring order made by the Applicant, and the Respondent's oral application for an extension of time to file and serve evidence, are inextricably bound together. As the Respondent argues, I have looked to determine who is the successful party overall, applying a commonsense approach. I am satisfied that it is the Applicant. The Applicant sought confirmation that the Respondent would not be permitted to adduce any evidence in response to the claim. The effect of my substantive judgment is to provide just that relief. The Applicant sought a debarring order. I did not consider that it was necessary to make an order in those terms. However, I determined the Respondent's oral application for an extension of time against it, which has the effect of preventing it from adducing any evidence unless (i) there is a change of circumstances, and (ii) the Respondent is success in an application to be allowed to adduce evidence late. In my view, in substance, the Applicant got what he was seeking and the Respondent did not.

17. As regards the Applicant's discovery application:

    17.1 The discovery issues occupied a much smaller proportion of the hearing time than the argument on the construction of GCR O.53, whether the Respondent was out of time to file any evidence and whether to grant the Respondent an extension of time to do so.

    17.2 The Respondent did engage with the Applicant's discovery requests and provided responses to them as a result of the summons. However, it only did so over the weekend and on the public holiday immediately before the hearing. Most of the costs involved on the discovery issues were therefore already incurred.

    17.3 The Respondent is right that I dismissed the one discovery issue that remained live at the hearing as being a fishing application. The argument on that was limited in duration and scope.

18. Looking at all these aspects in the round, in my judgment it is appropriate to describe the Applicant as being the overall winner, but to reduce the proportion of the Applicant's costs payable by the Respondent to 75% to reflect his loss on the outstanding discovery issue. Indeed, the Applicant would be forgiven for thinking that that reduction is being generous to the Respondent.

19. I do not agree with the Respondent that it would be more usual to defer addressing the costs issues concerning the various summonses and applications before me to the end of the case. As is common in civil proceedings, costs of a summons within the proceedings are generally determined and dealt with in accordance with the outcome of the summons – even if the order made at that time is that the costs should be in the cause or should be reserved.

20. Finally, I do not accede to the Applicant's request that those costs should be taxed forthwith. I agree with the Respondent's submission that that would have the potential to be unfair if other costs orders were to be made against the Applicant in the future. The law in the Cayman Islands is clear that an order for immediate taxation of costs, before the end of the overall proceedings, is exceptional. There is nothing exceptional about this case.

Dated 19 July 2024

THE HONOURABLE JUSTICE JALIL ASIF KC
JUDGE OF THE GRAND COURT