IN THE GRAND COURT OF THE CAYMAN ISLANDS
CRIMINAL SIDE

CASE #: 03767/2014

FRONT DOOR (CAYMAN) LTD.

V.

THE QUEEN

Appearances:	**Mr. Nick Hoffman of Priestleys for the Applicants and Appellants**
	Mr. Greg Walcolm for the Crown/Respondent
Before:	**Justice Michael Mettyear (Actg.)**
Heard:	**29th October 2015**
Applicant's Further Written Submissions:	**4th November 2015**
Crown's Further Written Submissions:	**13th November 2015**

JUDGMENT

INTRODUCTION

1. This is an application for Leave to Appeal a Costs Order made by Acting Magistrate McFarlane on the 21st January 2015. The learned Magistrate gave a short oral judgment on that date in terms set out in a document headed "Ruling on Costs".

2. Leave to appeal is required because of an administrative error made by Messrs. Priestleys, attorney for Front Door Cayman Ltd, in wrongly filing the Notice of Appeal. It is common ground that the error was not the fault of Front Door Cayman Ltd. and that no prejudice was suffered as a result of the error. As a result, Mr. Walcolm rightly agreed that it was appropriate that the leave sought should be granted. So, at the very start of the hearing before me, I granted leave. Hereinafter, I will refer to the Company as the Appellants.

3. The order appealed is set out in paragraph 7 of the "Ruling on Costs" – dated the 8th December 2014 – which reads as follows:

> *"I therefore order that the costs of preparing and attending the 5 November 2014 hearing (as detailed in line 8 of the Draft Bill of Costs) of US$1,100 be awarded to the Defendant against the Crown pursuant to section 33(5) of the Summary Jurisdiction Law."*

4. The Appellants' case, as put forward by Mr. Hoffman, is that, having decided that a Costs Order against the Crown was appropriate, the Acting Magistrate should have ordered that the Appellants' full costs be paid.

5. The Costs Order was made following a trial before the learned Magistrate at which time she ruled that the 38 summonses laid against the Appellants were time-barred. I have not been shown much of the evidence relating to that hearing, but I work on the assumption, which has not been disputed, that the history set out in the Appellants' "Outline Submissions on Appeal" is correct. I can do no better than repeat the relevant paragraphs in that document:

"*RELEVANT FACTS*

19. The subject matter of the substantive case were the 38 charges alleging offences contrary to the Labour Law (2011 Revision) which were laid against Front Door Cayman Ltd on 24 July 2014.

20. The issue between the parties was whether the charges were statute barred in accordance with the terms of section 78 of the Criminal Procedure Code (2013 Revision).

21. On 13 January 2014 the Department of Labour and Pensions produced a written audit report (exhibited as FD2) indicating the Department's findings following a review of the documentation they had received from the Applicant. This report concluded that offences contrary to the Labour Law had been committed and recommended that the Applicant make reparation to the employees in question.

22. On 16 May 2014 the Director of Labour and Pensions wrote a memorandum to the Director of Public Prosecutions requesting assistance and advice in relation to the alleged offences committed by the Applicant contrary to the Labour Law.

23. Front Door Cayman Ltd was summonsed to attend the Summary Court on 16 September 2014. At that time only the charge sheets had been disclosed. The matter was adjourned until 7 October 2014 for the service of the evidence. This was served by hand on the Applicant's attorneys on 18 September 2014.

24. At the hearing on 7 October 2014 the Applicant's attorneys indicated that they wished to challenge the jurisdiction of the Summary Court to hear the charges on the basis that they were statute barred. The Court invited the Applicant's attorneys to write to the Crown indicating the grounds upon which this position was taken and to request a review. It was the expressed hope of the Court that this may obviate the need for a hearing. Further, a date of 5 November 2014 was allocated for submissions in the event that the Crown took the view that it should proceed to trial.

GRAND COURT CAYMAN ISLANDS

25. On 17 October 2014 the Applicant's attorneys wrote to the Crown setting out in terms the basis upon which they sought to challenge the jurisdiction of the Summary Court and explicitly that those same charges were, in their view, statute barred.

26. No response of any kind was received from the Crown to the Letter until the morning of the court hearing on 5 November 2014 on which date it was announced that the Crown had reviewed their files and had taken the decision to proceed. No explanation was given. Further, the Crown applied to adjourn the hearing as they were not in the position to respond to the submissions provided to the Court by the Applicant's attorneys by way of the Letter.

The Applicant did not object on the basis that in the circumstances the Court could not be expected to come to a fair determination, given the unpreparedness of the Crown. The Court adjourned that hearing until 25 November 2014 and the Applicant's attorneys put the Crown on explicit notice that in the event that the argument was determined in the Applicant's favour they would seek the costs thrown away. A request was also made that written submissions be provided to the Applicant in response setting out the basis upon which the Crown stated the case should proceed to trial.

27. *On 21 November 2014 the Crown produced an unsigned memorandum setting out their position. The content of this memorandum was largely adopted by the Crown in oral submissions.*

28. *The Applicant's argument can be summarised in this way: the evidence discloses that as competent complaints, the Department of Labour & Pensions' Inspectors ("the Inspectors") had actual and constructive knowledge of evidence sufficient to justify proceedings from, at the latest, 13 January 2014.*

29. *The Crown's response was that the Inspectors were incapable of forming a proper view of whether there was evidence sufficient to justify proceedings in the absence of the employees' contracts of employment or time sheet records which were not in their possession at the material time. Further that the Court could "look behind" the clear and unequivocal conclusions formulated in the evidence and come to its own and contrary view.*

30. *In the result, and by her Ruling, Acting Magistrate McFarlane did not accede to the submissions made by the Crown and found that the invitation to "look behind" or "judicially review" the clear conclusions of the Inspectors was not one open to the Court.*

31. *Acting Magistrate McFarlane stated at paragraph 25 of the Ruling:*

> *"The Department of Labour and Pensions should ensure that immediate efforts are made to ensure that charges in summary only matters are laid without delay once it has formed the view that there are reasonable and probable grounds for believing that a potential defendant has committed an offence. Moreover, the Department of Labour and Pensions should also ensure that its Inspectors understand the distinction to be drawn between evidence which is sufficient to justify proceedings, as opposed to evidence which is sufficient to found a conviction."*

6. Mr. Walcolm added that at least part of the reason for the tardiness of the Respondent was due to the failure of the Appellants to supply information which the Respondent regarded as essential to enable a proper decision to be made on whether or not to prosecute. In particular, time sheets and contracts of employment – which could have provided a defence for the appellants – were sought, but not supplied in a timely fashion. This was not entirely accepted by Mr. Hoffman. The issue is not of central importance as it is agreed that the information requested was supplied by the time the file was submitted to the Office of the Director of Public Prosecutions on the 16th May 2014.

THE RULING ON TIME BAR

7. Argument on the issue of a time bar took place on the 25th November 2014 and judgment given on the 8th December 2014. The issue between the parties was the date on which a "competent complainant" had actual or constructive knowledge of "evidence sufficient to justify proceedings."

8. The arguments put forward, and the decision reached, are set out in the judgment which appears as Document 1 in the Appeal Bundle. No useful purpose would be served by me repeating the contents of the judgment. It is sufficient to record that the learned Magistrate concluded:

> "*...evidence sufficient to justify proceedings came to the actual or constructive knowledge of a competent complainant on 13 January 2014*".

9. It had been common ground that the charges were laid on the 24th July 2014. Therefore, the summonses were statute barred by reason of s.78 of the Criminal Procedure Code (CPC) (2013 Revision).

THE COSTS ORDER MADE

10. The learned Magistrate, having cited dicta in ***R v P***[1], ruled :

> *"4. I find that in this case there was such a legitimate difference in opinion, and the Crown pursued an argument (albeit belatedly) which it genuinely considered was sustainable on the facts. I do not accept, as submitted by Mr Hoffman, that the Crown acted improperly by pursuing this action. It is not that the Crown's argument had no basis in law; it was simply not, on my review of the facts...sustainable in the circumstances.*
>
> *5. Therefore in my judgment the Crown should not in the circumstances of this case be penalised because the Court has decided that the prosecution is time barred."*

11. The learned Magistrate went on to make a costs award of eleven hundred US dollars (US$ 1100) in favour of the Appellants because of failures by the Crown, which caused an aborted court hearing on the 5th November 2014.

12. In paragraph 32 of his "Outline submissions on appeal" Mr. Hoffman states:

> *"...the discretion open to the Court to award costs against the Crown once exercised in favour of the Applicant should have been exercised to award all the costs sought."*

I take this to mean that because an award of US$1100 was made, his argument is strengthened for the rest of his costs. If that is the argument, I reject it. The award of US$1100 was made following a concession by the Crown and was regarded as a wasted cost order. In my judgment it provides no help or guidance so far as the application for a general costs order is concerned.

GRAND COURT - CAYMAN ISLANDS

[1] (2011) EWCA 1130

13. Section 33(5) of the Summary Jurisdiction Law (2006 Revision) states:

> "*Costs, including wasted costs, may be awarded to or against the Crown*"

14. In his written and oral submissions, Mr. Hoffman, in seeking to persuade me how these words should be interpreted, relied heavily on dicta from Williams J. in ***R v Aaron John Bernardo***[2]. In it Williams J said:

> "*The Grand Court has a wide discretion. There is no guidance offered up in any legislation, rules, regulations or practice directions. A wholly consistent approach cannot be derived from the Cayman Islands case law. Therefore I am satisfied that when an application for costs is made, that the Court, when discharging its duty to act justly and fairly when deciding whether to make a costs order, should have regard to the circumstances of that particular case, and its approach when doing so is unfettered.*"[3]

Williams J. went on to proffer some proposed guidance:

> "*The Court may be assisted by having regard to some of the factors considered in England or in previous Cayman Islands case law. This may include a review of the Crown's conduct to see, for example, whether it has acted improperly or unreasonably. It may also include consideration as to whether the defendant's conduct has brought suspicion on himself ... I am not convinced that it is appropriate for the Court to fetter itself by having a strict starting point, whether it be that normally a court should not make an order ... or whether it be normally a court should make orders.*"[4]

15. As a result of this decision Mr. Hoffman at paragraph 18 of his written submissions, said:

[2] Unreported - 31st October 2014
[3] Paragraph 37 of *R v Aaron John Bernardo.*
[4] Ibid.

> *"It is therefore submitted that the present position in the Cayman Islands is that the Court has an unfettered and wide discretion. Such discretion should be exercised in the light of the circumstances of the case and factors that may weigh in the balance including the conduct of the Crown and the Defence."*

16. On the face of it, the submission that the discretion on costs is wide and unfettered runs counter to the authority relied on by the learned Magistrate, namely ***R v P.*** That was a case where the trial judge had formed the strong view that no prosecution should ever have been brought. He said:

> *"I find that the C.P.S. has incurred costs by way of unnecessary act, namely the bringing of the case at all".*

The defendant was acquitted by the jury. The judge made a poorly defined costs order that the C.P.S. pay costs. On appeal by the C.P.S., dealing with general principles, Lord Hughes, (*as he now is)*, said:

> *"The making of a costs order against the Crown in circumstances such as these is a very serious and unusual matter...The decision to prosecute or not is a thoroughly difficult and delicate one. It is one on which two perfectly responsible lawyers may easily differ. It is only in the clearest possible case that a decision taken by the appropriate authority in good faith could possibly justify a penalty in costs."*

17. I was troubled when I read the judgment of Williams J and the submissions of Mr. Hoffman because I had the strong feeling that not all relevant authorities were before Williams J in the ***Bernardo*** case, or me, in the present case. I was particularly concerned because my recollection was that the law was more accurately stated in the Cayman Islands Court of Appeal case of ***Attorney General v Cayman National Bank***[5], when Taylor J.A. said:

> *"It is not the normal practice to make an order for costs in proceedings of this sort, involving discharge by the Crown of responsibilities ancillary to its duties to enforce the criminal law."*

18. I raised my thoughts with Counsel who were not troubled by the same bells ringing as I was. I indicated that, after argument was complete, I would do some research of my own and, if I found the authorities which I thought I remembered, then, I would inform them and seek written submissions. I found four authorities which I referred to Counsel. Both have supplied further written submissions. I accept that the authorities, the memory of which was plaguing me, were, in the main, considering costs following regulatory proceedings. Nevertheless, re-reading them as I have, has reinforced my view that the law expects, for good reason, restraint to be used in the making of costs orders against the Crown.

19. I wish to make it clear that I am not saying that Williams J. is wrong. He draws attention to the fact that there is a different regime in England and Wales which often allows successful litigants to recover costs out of central funds. No such power exists in the Cayman Islands. However, there are lots of instances where an award from central funds is not available in England and Wales.

[5] (2004-2005) CILR 298

It is not easy to see why England and Wales authorities in such cases would not help or at least inform cases in the Cayman Islands. Anyway, I am not convinced that Williams J would have said what he did had all relevant authorities been put before him.

20. Whether Williams J is right or wrong is not something that I propose to attempt to decide in this case, for the following reasons:

a. I have not heard the issue fully argued. I did consider re-calling Counsel, but that would clearly increase costs in a way unjustified by the overall conclusion I had reached.

b. I am still not convinced that all relevant authorities have been found.

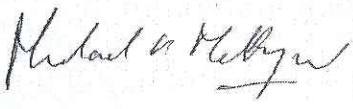
c. I would come to the same overall conclusion on the case whether I followed Williams J or not. The exercise would therefore be of academic interest only.

CONCLUSION

21. Turning back to the ruling in the present case, I can see nothing wrong with the approach taken by the learned Magistrate or with the decision she reached. I have come to the same conclusion myself.

22. The appeal is dismissed.

Dated this the 27th November 2015



Mr. Justice Michael Mettyear (Actg.)
Acting Judge of the Grand Court