In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016 No: 284

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

AND IN THE MATTER OF A CLAIM FOR DAMAGES FOR UNLAWFUL ARREST AND TRESPASS

BETWEEN:

MAHESH SANNAPAREDDY

Applicant

-v-

THE COMMISSIONER OF THE BERMUDA POLICE SERVICE

Respondent

-and-

THE ATTORNEY-GENERAL

Interested Party

RULING

(in Court)[1]

Judicial review- costs-whether partial success of respondent merits a reduction of successful applicant's costs-special approach to constitutional costs applications

Date of hearing: June 23, 2017
Date of Ruling: July 5, 2017

[1] The present Ruling was circulated without a hearing to hand down judgment to save costs.

Mr Delroy Duncan, Trott & Duncan Limited, for the Applicant
Mr Mark Diel and Mr Dantae Williams, Marshall Diel & Myers Limited, for the Respondent
Mr Norman MacDonald and Mr Brian Myrie for the Interested Party

Introductory

1. On June 23, 2017 this Court granted the following relief on the substantive hearing of the Applicant's judicial review application:

> (1) an Order quashing the decision summarily arrest the Applicant and subject him to bail conditions;
>
> (2) a declaration that the search of the Applicant's home was unlawful;
>
> (3) an Order directing the Respondent to return to the Applicant any retained items seized during the unlawful search;
>
> (4) The Applicant's application for relief under paragraph 4 of the Notice of Originating Motion, which sought:
>
> > "a declaration that section 23(6) of the Police and Criminal Evidence Act 2006:
> >
> > > a.to be interpreted to include the limits on the power or summary arrest set out in sub-sections 24(4) and (5) of the UK Police and Criminal Evidence Act 1984 (as amended) ("UK PACE"); or in the alternative,
> > >
> > > b.is unconstitutional, pursuant to section 15(2) of the Constitution of Bermuda;"
> >
> > is dismissed;
>
> (5) the application for damages is adjourned to a date to be fixed by the Registrar, initially for directions only.

2. Mr Diel made an at first blush surprising application for costs on the premise that the Respondent had succeeded on the sole legal ground on which leave to seek judicial review had been granted. He also complained that the Respondent had not appreciated that the Court would consider evidence relating to the discretion to arrest. With lunchtime approaching, I decided to reserve judgment to properly evaluate a

submission which turned on its head the way I had until that point viewed the course of the present proceedings. I indicated that I would only request submissions in reply from Mr Duncan if this proved to be necessary. In the event it did not prove necessary to invite any reply submissions.

3. Mr MacDonald made an at first blush unsurprising application for the Attorney-General's costs of successfully dealing with the constitutional limb of the application. However, after hearing initial argument, he was granted seven days within to which to file supplementary submissions on why the Court should not follow the Court of Appeal's recent decision in *Minister of Home Affairs and Attorney-General-v-Barbosa* [2017] CA (Bda) 5 Civ (30th March 2017). That case held (approving the first instance ruling of Hellman J on this issue) that the usual rule is that an unsuccessful constitutional applicant should not be required to pay the Crown's costs unless he has acted unreasonably.

Has the Applicant won in 'real life' terms as against the Respondent?

4. It seemed to me to be self-evident that the Applicant having been granted all three heads of the non-constitutional relief sought in his Notice of Motion and Notice of Application for Leave had achieved overall success in 'real life' terms. The Applicant sought declarations that his arrest and search were unlawful which he successfully obtained.

5. Mr Diel argued that in fact the Applicant had lost on the sole ground in relation to which leave had been granted and that accordingly the Respondent should be granted its costs. More broadly, he invited the Court to follow the principles in *Binns-v-Burrows* [2011] Bda LR:

> "*6.The above authorities suggest that, unless the Court or the parties have identified discrete issues for determination at the trial of a Bermudian action, the Court's duty in awarding costs will generally be to:*
>
> *(a) determine which party has in common sense or "real life" terms succeeded;*
>
> *(b) award the successful party its/his costs; and*
>
> *(c) consider whether those costs should be proportionately reduced because e.g. they were unreasonably incurred or*

there is some other compelling reason to depart from the usual rule that costs follow the event.

7.The Bermudian legal position, absent a directions order identifying discrete issues for determination at trial, requires reference (in terms of persuasive English authority) to the old pre-CPR principles governing the award of costs. These principles were described as follows by Warren J in Actavis-v- Merck & Co. Inc. [2007] EWHC 1625 (Pat):

'12… costs at the discretion of the court; follow the event, except where it appears that some other order should be made; the general rule does not cease to apply because the successful party raises issues which he fails on, but where that has caused a significant increase in the length of the proceedings, he may be deprived of the whole or part of his costs; where the successful party raises an issue improperly, he cannot only be deprived of his costs but be ordered to pay his opponent's costs."

6. The only recognised basis for refusing to grant the Applicant all his costs is if substantial time was expended on issues which he lost.

The scope of leave

7. I reject the suggestion that the broad legal basis on which the Applicant succeeded on obtaining leave was a legal basis upon which the Respondent ultimately succeeded. I also reject the suggestion that in granting leave that I restricted the Applicant's case to arguing only the ground which was specifically addressed at the leave stage.

8. On August 4, 2016, I ruled, so far as is material for present purposes, as follows:

"*2. The grounds of the application cover nearly 35 pages. The application is also supported by the Applicant's Affidavit sworn on July 26, 2016, a short Skeleton Argument and nearly 30 authorities…*

3. In broad-brush terms, the Applicant complains that there was no sufficient basis for his arrest and that the subsequent search and seizure was accordingly also unlawful. <u>For present purposes I have only considered the primary unlawful arrest complaint</u>…

5. the Applicant's case, based on construing provisions which have not seemingly been judicially considered before as a matter of Bermudian law, does in my judgment clearly raise issues which are fit for further investigation at an inter partes hearing…

6. Leave to seek judicial review is accordingly granted" [Emphasis added]

9. The Ruling cannot conceivably be read (without distortion on an '*Alice Through the Looking Glass*' scale) as granting leave on only one ground. Leave was granted generally after considering the main ground alone at that stage.

10. It is true that one legal strand of what I regarded as the "*primary unlawful arrest complaint*" was rejected on the basis of very little analysis and very brief oral argument. The submission in the Skeleton Argument submitted in support of the application for leave crucially provided as follows:

> "*10. It is the Applicant's contention that section 23(6) of PACE must be interpreted so as to fetter the discretion of police officers to proceed to summary arrest; the decision not to seek an arrest warrant from a magistrate's court under section 3 of the Criminal Jurisdiction and Procedure Act 2015 ('CJPA') must be reasonable in accordance with the scheme of PACE, the Constitution of Bermuda, the ECHR, and the common law.*"

11. Mr Diel succeeded in demonstrating, very shortly, that the reliance placed on the CJPA was wholly misconceived. There is no alternative power of arrest with a warrant which can be used by the Police at the investigative stage. Rather than considering whether or not to arrest summarily or with a warrant, the Police must decide whether or not to arrest at all, and, if an arrest is appropriate, what form of arrest is it reasonable to carry out. What is appropriate does indeed depend on the scheme of PACE, the Constitution of Bermuda, the ECHR (to some extent at least) and the common law.

12. On any sensible view of the record, leave was granted for a broad legal complaint which was substantially successful at the final hearing. The misconceived arrest warrant point consumed a minuscule amount of time relative to the main issues. In short, the Applicant's unsuccessful 'scope of leave' point does not provide a valid basis for concluding that a disproportionate amount of time was spent on an issue upon which the Respondent succeeded.

The extent to which the Respondent was not aware of the need to file evidence with respect to the reasons for which the discretion to arrest was exercised

13. It is difficult to see how the complaint that the Respondent was misled by the Court's interlocutory Ruling is relevant to the allocation of costs at all, having regard to the history of the proceedings. It is difficult to see how the complaint of being misled is valid in any event. After the strike out application was dismissed on January 24, 2017, I gave leave to the Respondent to file further evidence in response to the merits of the

present application within 21 days. This was because it was obvious that the Respondent had not yet addressed in evidence the nub of the present case. In giving Reasons for my decision ([2017] SC (Bda) 12 Civ (6 February 2017), I stated:

> "*13. .. by the time of the hearing the Respondent's two* Summonses *on January 24, 2017 there was virtually no evidence before the Court which was responsive to the main thrust of the Applicant's case: that his summary arrest and subsequent search was unlawful because no sufficient reasons for exercising those intrusive powers existed, even if in general terms sufficient grounds for an arrest could be made out.*"

14. Thereafter the Respondent filed evidence specifically addressing this point. It is true that I also stated in the same judgment:

> "*29…As at the date of the hearing of the Respondent's Summonses, the motivations behind the arrest appeared to be largely irrelevant as, in the absence of any reasons being advanced for the decision to use the summary power, there was no obvious need to discredit the genuineness or bona fides of the Respondent's motives in effecting the Applicant's arrest. After all, the Respondent's main legal argument appears to be that as a matter of construction of section 23(6), no need arises to justify the decision to exercise the summary arrest power when the grounds for exercise of the power are made. In these circumstances, the Applicant's primary case appeared to be that the arrest was unlawful because the Respondent gave no consideration at all to the question of whether it was appropriate to exercise the summary arrest power."* [Emphasis added]

15. Those views were based on the position at the strike-out stage. The Respondent subsequently filed evidence to address the discretion to arrest issue. In terms of the legal case, the Respondent at the substantive hearing for the first time conceded that there was, as a matter of law, a discretion to arrest to be exercised (the third *Castorina* requirement). The Respondent argued that the burden was on the Applicant to establish that the discretion had not been properly exercised and positively invited the Court to consider the evidence which had been filed on this issue. So because of the Respondent's own change of position, the application ended up being resolved on the basis of an analysis of the Affidavit evidence rather than solely on the basis of a construction of section 23(6) of PACE. The submission at the costs hearing that the Respondent did not anticipate being required to defend the case on an evidential basis simply makes no sense.

16. The complaint might have made sense if the Respondent had offered to resolve the case on the initial statutory construction dispute so that the time spent on analysing

the evidence was wasted, but no such offer was made. Had the case been argued on the basis of the initial dispute as to the construction of section 23(6) alone, the result would have been no different. The Applicant said from the outset that proof of reasonable grounds to suspect an offence had been committed was not enough to establish a lawful arrest. The Respondent said that it was. The Court would have found that, contrary to the Respondent's initial position, it was necessary for the decision to arrest be exercised in a reasonable manner. This issue would have been resolved in the Applicant's favour. It was ultimately resolved in the Applicant's favour, in large part, by concession. The Respondent's own position as to what the statute requires was ultimately, subject to minor refinements, the meaning of section 23(6) which was adopted by the Court.

17. The alternative remedies argument raised by the Respondent was, of course, rejected at the interlocutory stage on the basis that the present application would be determined either as a matter of statutory construction or on the basis of substantially uncontested evidence about why the discretion to arrest was exercised. That position was not altered to any material extent by the date of the final hearing. I did foreshadow at the interlocutory stage in the course of a hearing at which Mr Diel did not appear, that the alternative remedies argument could be revisited prior to the substantive hearing of the present application if intervening circumstances justified a fresh application to stay the present proceedings pending the determination of the criminal investigation[2]. No such fresh application was made[3].

18. It is accordingly impossible to see how any of the procedural antecedents to the final hearing alters the very simple position that the Applicant succeeded in establishing that he was subjected to an unlawful arrest and search in proceedings in which the Respondent never conceded that any breach of the law had occurred. The crucial point is that Mr Diel was unable at the costs hearing to identify any issue on which the Applicant did not succeed which consumed so significant an amount of time as to displace the usual costs follow the event rule. Having reserved judgment to further consider the matter, neither have I.

[2] In orally dismissing the stay Summons, I stated that this was without prejudice to the right of the Respondent to make a fresh application based on new facts: January 24, 2017, Courtsmart 12.16:15 pm. This *caveat* was not included in the formal Order.

[3] It was against this background that, when Mr Diel sought to revisit at the final hearing the same alternative remedies argument which had been previously rejected at the interlocutory stage, that I queried why the January 24, 2017 decision had not been appealed.

Award of costs as between Applicant and Respondent

19. The Applicant is awarded his costs to be taxed if not agreed on the standard basis.

Costs as between the Applicant and the Attorney-General

The constitutional costs principles in outline

20. The Attorney-General intervened to deal with an application for constitutional relief which the Applicant did not pursue in light of the Respondent's concession as to the proper construction of section 23(6) of PACE. The Court of Appeal (Baker P) in *Minister of Home Affairs and Attorney-General-v-Barbosa* [2017] CA (Bda) 5 Civ (30th March 2017) approved the following approach to costs in cases where constitutional relief is sought. This approach was first adopted by Hellman J in *Holman* [2015] SC (Bda) 70 Civ (13 October 2015) in which he followed the South African Constitutional Court decision in *Biowatch Trust v Registrar: Genetic Resources and Others* [2009] ZACC 14 and the Eastern Caribbean Court of Appeal decision in *Chief of Police et al v Calvin Nias* (2008) 73 WIR 201. It encourages litigants to seek to vindicate their constitutional rights by displacing the 'costs follow the event' rule with a more generous principle. That is that when a constitutional applicant loses, the usual order will be no order as to costs unless the pursuit of constitutional relief was unreasonable. A successful applicant will still be able to recover his/her costs against the State.

21. Sir Scott Baker (P) in *Barbosa*, after reciting the key passages from the *Biowatch* case, stated :

> "*7. Hellman, J pointed out that a similar approach has been adopted by the East Caribbean Court of Appeal and referred to Chief of Police et al v Calvin Nias (2008) 73 WIR 201 where Rawlins CJ said at para 38:*
>
> > *'The State has prevailed in this appeal. In proceedings such as this, rule 56.13(4) of CPR 2000 permits the court to make any order as to costs as appears just. However, rule 56.13(6) states that no order as to costs may be made against an applicant unless the court thinks that the applicant has acted unreasonably in making the application or in the conduct of the proceedings.* ***This mirrors the prior practice of our courts in constitutional cases in relation to a private citizen seeking to enforce constitutional rights.*** *I do not think that the applicant acted unreasonably in making the application or in the conduct of his case such as to permit the State to recover costs against him either in the High Court or in this court. Accordingly, I would make no costs order against him in either court.' [Emphasis added.]*"

22. It is impossible to overstate the significance of the Court of Appeal for Bermuda's decision in *Barbosa* in terms of promoting access to the Court by litigants wishing to seek constitutional relief. Implicit in the new costs regime is the notion that the State should be willing to bear its own costs in assisting the Court to construe the Constitution in the context of adjudicating a citizen's non-frivolous complaint that his or her fundamental rights have been contravened.

The present case

23. In the present case the application for constitutional relief which was not pursued was always an alternative argument. Substantially the same constitutional law submissions were successfully deployed in support of the primary argument that the arrest was unlawful if section 23(6) was construed in light of sections 5 and 7 of the Constitution. That portion of the Intervener's submissions which contended that these constitutional provisions were not even engaged by the present application was successfully established by the Applicant to be misconceived. The application was in large measure only clearly unnecessary once the Court accepted the supporting arguments and accepted the primary construction of section 23(6) the Applicant contended for. The redundancy of the application for constitutional relief did not become apparent until after the Attorney-General had already intervened. Neither the parties nor the Court effectively applied their minds to or dealt with the need of the Attorney-General to be involved before the final hearing. Even then, after Lord Goldsmith early on the first day of the hearing made it clear that no constitutional relief was being sought, the Intervener's counsel remained in Court and did not seek permission to be excused.

24. In light of the *Barbosa* principles of which the Attorney-General was of course aware, the Intervener should ideally have put the Applicant on warning that an adverse costs order would be sought if it was considered that pursuit of the constitutional relief application was unreasonable. The mere fact that the point was ultimately was abandoned and the Court expressed doubts about its merits is surely not enough to displace the usual (new) constitutional costs rule. The Intervener however argued that the converse should be the case. It was submitted that it was unreasonable for the Applicant not to have withdrawn the constitutional application sooner. Reliance was placed on *Jaroo-v-The Attorney-General* [2002] UKPC 5, a case which concerned freestanding constitutional applications which amounted to an abuse of process because a parallel remedy existed.

25. This case is of little assistance in elucidating how constitutional applicants should conduct themselves with a view to avoiding having to pay constitutional costs. Moreover, it confirms the appropriateness of the procedure adopted by the Applicant here. Rather than filing a freestanding application under section 15 of the Constitution before exhausting his ordinary public law discretionary remedies by way of judicial review, the Applicant sought judicial review as his primary remedy. As Lord Hope opined in *Jaroo*:

"*39. Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.*"

26. The Intervener also submitted that the *Barbosa* principle should be limited to cases where the constitutional litigant is of limited means. Here, because the Applicant's employer has pronounced that he will spare no money to support the Applicant, the ordinary costs rules should apply. Reliance was placed on *Incredible Electronics Inc-v-Canada* (2006) 80 O.R. (3d) 723. This was a case where it was held that the usual costs rules applied because a commercial company advancing its own commercial interest could not validly claim to be a public interest litigant. That case has little bearing on the present costs application. In the present case an ordinary citizen has sought to vindicate his fundamental individual human rights and freedoms. The proposition that the ordinary constitutional costs rules should not apply to a citizen who happens to have generous financial support is not necessarily as wholly incredible as it at first appears.

27. There may be cases where, for instance, a commercial entity is seeking to vindicate primarily commercial rights to property (section 13) or commercial freedom of expression rights (section 9) with no discernible wider public benefit in which the ordinary costs rules could potentially be invoked. There may be other cases where an obsessive or politically motivated individual, who is well-resourced, repeatedly files frivolous constitutional claims against the Government. Absent such unusual circumstances, however, it is wrong as a matter of principle to suggest that the special constitutional costs rule should be subjected to a means-based test. In the present case, the Applicant has succeeded in establishing that he was unlawfully arrested and his home was unlawfully searched. The facts of the present case are a galaxy removed from the factual matrix of *Incredible Electronics* or, indeed, the hypothetical well-resourced vexatious litigant with a penchant for filing frivolous claims.

28. Only marginally more persuasive was the reliance placed on *Succession Odhavji-v-Woodhouse* [2003] 3 S.C.R. 263 where the Supreme Court of Canada held (at paragraph 76) that "*it is difficult to regard a plaintiff who is seeking several millions*

of dollars in damages as a public interest litigant." That was, again, ordinary civil litigation and consideration of a different test for disapplying the usual costs follow the event rule, albeit an action for damages in relation to a fatal shooting by the Police. The constitutional costs rule which the Court of Appeal for Bermuda has approved is designed to ensure that constitutional litigation is not discouraged but that frivolous invoking of constitutional points should still be subject to the discipline of the ordinary costs rules.

29. As Sachs J opined in *Biowatch* in a passage upon which the Intervener selectively relied :

> "*[22]…In litigation between the government and a private party seeking to assert a constitutional right, Affordable Medicines established the principle that ordinarily, if the government loses, it should pay the costs of the other side, and if the government wins, each party should bear its own costs.*
>
> *[23]The rationale for this general rule is three-fold. In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse. Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy. Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door.*
>
> *[24]At the same time, however, the general approach of this Court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious, or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immunise it against an adverse costs award. Nevertheless, for the reasons given above, courts should not lightly turn their backs on the general approach of not awarding costs against an unsuccessful litigant in proceedings against the*

state, where matters of genuine constitutional import arise. Similarly, particularly powerful reasons must exist for a court not to award costs against the state in favour of a private litigant who achieves substantial success in proceedings brought against it.

[25] Merely labelling the litigation as constitutional and dragging in specious references to sections of the Constitution would, of course, not be enough in itself to invoke the general rule as referred to in Affordable Medicines. The issues must be genuine and substantive, and truly raise constitutional considerations relevant to the adjudication. The converse is also true, namely, that when departing from the general rule a court should set out reasons that are carefully articulated and convincing. This would not only be of assistance to an appellate court, but would also enable the party concerned and other potential litigants to know exactly what had been done wrongly, and what should be avoided in the future." [Emphasis added]

30. These principles are in my judgment fundamentally different and more citizen-friendly than the narrower public interest litigation exception to the usual costs rule in ordinary civil litigation. They are based on principles which are far too broad to be limited only to constitutional litigants of limited means. In the present case, a serious constitutional point of potential interest to every citizen and resident of Bermuda was raised by the Applicant in a broadly appropriate manner in the context of proceedings in which the rights invoked were substantially vindicated on non-constitutional grounds. The form of declaratory relief appeared unlikely to be granted, it is true, but the point did not have to be determined by the Court because the Respondent effectively conceded the controversial point of construction in the Applicant's favour. The Applicant succeeded based in part on indirectly deploying the same constitutional arguments which underpinned the full-blown prayer for constitutional relief.

31. One authority which spoke to the present legal and factual matrix was impressively identified by Mr Myrie. The Supreme Court of British Columbia considered a costs application which was factually quite similar to the present case in *British Columbia Ferry and Marine Workers' Union-v- Workers Compensation Board* (2009) BCSC 54. The employer succeeded in defeating a judicial review application. The Court found that the constitutional issue had not been raised unnecessarily by the successful respondent but did not actually decide it because the need to do so did not arise: the respondent succeeded on a non-constitutional interpretation point. The respondent insisted on arguing the constitutional point over the petitioner's objections (an argument which ran over three days). The Court decided to award the respondent its costs of the constitutional application generally but to make no order as to the costs of the wasted three day hearing which the petitioner had positively argued should not take place.

32. The British Columbia case relied upon by Mr Myrie for the Intervener was not considering the legal test defined in the *Barbosa* case, but the British Columbia Court was carrying out a similar forensic task. It was deciding whether or not a party which had succeeded overall should be deprived of some of its costs because it had acted unreasonably in causing time and costs to be pursued in relation to an issue which it effectively lost because it did not need to be decided by the court. The approach taken by the court was to make no order as to the relevant wasted costs. It is to my mind significant that the costs which were regarded as wasted were costs which the opposing party had sought to avoid incurring before they were incurred by arguing that the point should not be pursued. There are four distinguishing factors in the present case which set it apart from the *British Columbia Ferry and Marine Workers' Union-v- Workers Compensation Board* case:

    (1) the declaratory constitutional relief which was sought appeared to me, in the way it was precisely framed, to be unmeritorious. (However the main constitutional arguments which were advanced in support of that prayer did in a general sense support the interpretation argument which succeeded);

    (2) the successful Intervener took no steps before incurring the costs which it seeks to recover to avoid incurring those costs by, for instance, inviting the Applicant to withdraw the prayer for relief or (as regards the Court costs) seeking permission to be excused from the hearing);

    (3) it could have been discerned by both the Applicant and the Intervener from May 9, 2017 when the Respondent filed (and presumably served) its Skeleton Argument, had they applied their minds to the issue, that the constitutional point might not need to be argued. However, the Respondent's position was not necessarily set out in a crystal clear manner which signified that any common ground existed on the interpretation of section 23(6) issue. Moreover, the Intervener filed his Skeleton Argument on May 12, 2017, only three days later;

    (4) It was clear from the Applicant's Skeleton which dealt with the constitutional relief limb of the case in four short paragraphs that this relief was only sought of if its primary case was rejected. It was therefore possible for the Intervener, if he was reluctant to incur the costs of participating in the hearing, to invite the Court to dispense with his participation until such time, if at all, as the active participation of the Attorney-General was required by the Court.

33. This case is most helpful in demonstrating the general rule that where litigants wish to obtain a wasted costs order, they must put the paying party on notice that they

consider that a particular course of litigation conduct will result in wasted costs. They cannot through their silence encourage a party to incur costs assuming that the usual rules will apply and only (without good reason) complain that a course of conduct which they assented to involved wasted costs which they should be permitted to recover. *British Columbia Ferry and Marine Workers' Union-v- Workers Compensation Board* (2009) BCSC 54 is also helpful in illustrating the usual approach of common law courts to dealing with a situation where a party who is successful overall fails on a discrete issue. The usual approach is to make no order as to costs, reserving the 'punishment' of making the party who has won overall pay his opponent's costs for cases of serious misconduct. The special constitutional costs rule approved by the Court of Appeal in *Barbosa* has synergies with that general costs rule.

34. In all the circumstances, I find that the Applicant has not behaved so unreasonably in the way he has pursued his alternative constitutional relief claim so as to warrant the exceptional outcome that he should be required to pay the Intervener's costs. The Applicant could have taken proactive steps in the days before the hearing to clarify the limited significance of the constitutional relief once the Respondent's final position on the construction of section 23(6) became clear[4]. However the Intervener too could have sought clarification before the hearing at least. On balance, I find that neither the Applicant nor the Intervener acted unreasonably in failing to clarify the extent of the Intervener's necessary involvement in all the circumstances. All the parties could fairly be expected to understand from the Court of Appeal for Bermuda's recent *Barbosa* decision was that this Court's starting point on the constitutional costs would be that no order should be made even if the claim did not succeed. That justified the Applicant adopting a somewhat relaxed approach. The Attorney-General's Chambers was also entirely right to focus on assisting the Court to interpret the Constitution rather than engaging in a procedural chess game in relation to costs.

Constitutional costs for the Crown in future cases

35. Going forward, however, if the Attorney-General is either joined or chooses to intervene in a constitutional application and wishes to obtain the extraordinary remedy of an adverse costs order, the applicant must be put on notice from the earliest point possible that he is exposed to such a costs risk. Having regard to the duty of parties to assist the Court to achieve the overriding objective, where the Crown wishes to recover its costs from a constitutional application it contends is wholly unmeritorious at the end of the substantive hearing, steps along the following lines should be taken as a general rule:

[4] The Applicant's Skeleton Argument complained that the Respondent's position was less than clear.

(1) a letter should be written to the applicant warning that if the unmeritorious application is not withdrawn an application will be made to the Court for the offending portion of the application to be summarily dismissed;

(2) if the constitutional application the Crown contends is unmeritorious is not withdrawn, an application should be made before the main hearing for it to be summarily dismissed;

(3) on the hearing of any such application, the Court should either:

(a) summarily dismiss the application;

(b) permit the application to go forward on the basis that it is not wholly unmeritorious and that the usual constitutional costs rule will apply (assuming that the application is not pursued thereafter in an unreasonable manner); or

(c) permit the application to go forward on the basis that costs will follow the event if the Court's provisional view that the complaint is frivolous is confirmed after a full hearing.

36. In my judgment its fundamental to the fairness of this new constitutional costs regime that the applicant should understand what principles will be applied before the relevant costs are incurred. The distinctive rule is designed to promote the adjudication of constitutional issues without applicants for relief being punished in costs merely because they have pursued a point which has been rejected by the Court. The applicant's pursuit of the point must be in some way unreasonable for the Court to require the citizen to pay the State's costs.

37. It might be thought that because all parties are required to assist the Court to achieve the overriding objective that an applicant must take the initiative to ensure that a constitutional point is reasonably pursued. Because there will generally not be a level playing field between an applicant and the State, the overriding objective must in this context require that the State take the initiative to put the applicant and the Court on notice at the earliest possible stage that it considers the pursuit of the constitutional relief so unreasonable that the applicant should be exposed to the risk of an adverse costs order. That said, a legally represented applicant conducting litigation in a responsible manner should be expected to avoid a situation where the Crown is put to needless expense in preparing for points which it is possible to foresee it will not have to meet.

38. There may of course be circumstances where the above approach, which presupposes that the unsuccessful constitutional application is not obviously frivolous or otherwise inappropriate from the outset, need not be followed by the Crown. However, it will ordinarily not be possible for the Crown to defend a constitutional application on the merits only to raise for the first time the proposition that the application was so

misconceived from the outset as to justify displacing the usual constitutional costs rule.

Conclusion: Award of costs as between the Applicant and the Intervener

39. I accordingly make no order as to costs as between the Applicant and the Intervener. No need to consider the argument about the potential liability of the Applicant's funder for the Intervener's costs arises.

Dated this 5th day of July, 2017 _____

IAN RC KAWALEY CJ