Case Ref: SC/CIV/5/11

IN THE SUPREME COURT OF THE FALKLAND ISLANDS
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW
THE HONOURABLE CHIEF JUSTICE CHRISTOPHER GARDNER QC
DATED THIS 22nd DAY OF NOVEMBER 2011
BETWEEN:

THE QUEEN
on the application of
COPEMAR S.A.
and
BEAUCHENE FISHING COMPANY LIMITED

Applicants

-and-

THE DIRECTOR OF FISHERIES OF THE GOVERNMENT OF SOUTH GEORGIA AND THE SOUTH SANDWICH ISLANDS

Respondent

JUDGMENT

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1. Today Mr. Woolgar, counsel for the Respondent, seeks an award of indemnity costs, and I therefore set out the background to that application. Prior to my granting leave to apply for Judicial Review on 12 July 2011, there were inter partes hearings in respect of which Leading Counsel for the Applicants submitted, based on a case in the White Book, a copy of which he did not provide, that the Court had no power to award costs incurred prior to an application for leave to apply for judicial review being determined. In the result I reserved costs. At those inter partes hearings the Applicants stated that, although the 2011 fishing season would finish on 31 August, they still wished the Court to consider their Application, as any declaration made could affect the Director of Fisheries' grant of licences to be made in January 2012 for the 2012 season. I considered that this was sensible and that it was in the interests of both parties for a determination to be made before the end of 2011, and the timetabling was designed to achieve this.

2. Accordingly on 28 July, again following an inter partes hearing, I made an Order for Directions, including fixing 22 November as the date for the substantive hearing, namely today. At the request of both parties the hearing was to take place in the Supreme Court at Stanley.

3. The Respondent served his Affidavit in September, The Applicants' affidavit evidence in response was due to be served on 11 October, but on 12 October the Applicants filed a summons for specific discovery. Following an inter parties hearing in London on 25 October, I refused the application. I extended the time for the service of the Applicants' affidavit evidence to 4 November, and this was duly served.

4. Also on 4 November the Applicants' solicitors wrote to me asking for leave to appeal my refusal, stating that, if I did not do so, leave would be sought from the Court of Appeal. It was submitted that in either event the trial date would be imperilled, and I was asked to adjourn it. On 7 November I made an Order both refusing leave and the adjournment.

5. The Trial Bundle was served on 10 November, one day before the due date and, so far as the Court was concerned, the matter was ready for trial on its fixed date.

6. On 16 November the Court of Appeal dismissed the Applicants' application for leave to appeal my Orders of 25 October and 7 November and also refused an application that the substantive hearing be adjourned.

7. A letter to me dated 17 November from the Applicants' solicitors informed me of an intention to seek leave to appeal to the Privy Council and again asked me to adjourn the substantive hearing as it would be unjust and contrary to their clients' rights to proceed with the hearing whilst the appeal procedure was extant. It then continued as follows:

"Insofar as our application to adjourn is dismissed, our clients wish to make it clear that they will reserve all their rights in this regard, including the right not to attend next week. Clearly were that hearing to take place in their absence with a consequential adverse effect on their interests, it would be possible for them to appeal any such decision on the grounds inter alia of lack of due process."

8. I responded through the Registrar refusing the application to adjourn.

9. A letter from the Applicants' solicitors of 18 November informed me that an appeal application to the Privy Council would be lodged the following Monday, asserted that such appeal application could be adversely affected by a prior determination of the substantive judicial review, as the Respondent could argue that the appeal would serve no purpose as the substantial Judicial Review had been determined. The letter also gave notice that their clients would not be present at the substantive hearing in order to protect their clients' interests, and they reserved their right to appeal by reason of a breach of their right to be heard. For the avoidance of doubt, they stated that their clients were not withdrawing their application for judicial review and, if not adjourned, "it will have to be determined on the materials before the Court with the reservation of rights set out above."

10. I replied through the Registrar, noting that leave to appeal to the Privy Council was refused by the Court of Appeal, and stating that I did not accept that, in the event of the Privy Council being persuaded to give leave, an appeal thereto would be adversely affected by the prior determination of the substantive judicial review, at which determination the Applicants' have the right to be heard, and urged the Applicants to exercise that right. I also stated that I did not consider that non attendance was necessary to protect the Applicants' interests and that, if they did not appear, they would be at risk of their Application being dismissed and an order of costs being made against them.

11. By their letter of 21 November, the Applicants' solicitors reiterated that they were applying that day for permission from the Privy Council to appeal the order of the Falkland Islands Court of Appeal, and making an urgent application for an adjournment. They asserted that, if I determined the Judicial Review, then the Privy Council would be unable to hear the interlocutory appeal before them, this Court would be functus and a new claim would be statute barred. I did not accept the propositions of prejudice contained in their letters. Firstly, they might have succeeded on the substantive hearing without the discovery they sought. If they failed to obtain a declaration at the substantive hearing, and considered such decision to be appealable, they could have appealed to the Court of Appeal and, if successful, that would have had the same result. If the Privy Council were persuaded that this was a matter of general public importance and that discovery should have been given, a rehearing could be ordered.

12. Running throughout this correspondence is the contention that this Court could not proceed with a judicial review hearing until all appeal options in relation to refusal of discovery had been exhausted, and therefore the Court was obliged to adjourn the substantive hearing until all appeals had been determined, even though that deprived the parties of any chance of the matter being decided before the start of the next fishing season. In other words, the Applicants had only to lodge an appeal, irrespective of its merits, and this Court could not proceed.

13. I did not accept that this Court is so constrained or that the filing of an appeal has the effect of depriving an inferior Court of its ability to determine the cases before it. If that were the case, there would be a very clear Rule to that effect. Instead, Order 35 Rule 1 (2) empowers the Court to proceed when one party does not appear. Where the party that does not appear is the party that has the carriage of the Application, the Respondent is entitled to have the Application dismissed and an order for their costs, as if there were a judgment dismissing the action on its merits. In the event of non-appearance by the Applicants, a hearing on the merits is not possible.

14. By an e-mail of today's date the Registrar of the Privy Council has informed the parties that the applications have been refused because "on the material available to the Board no sufficiently arguable case on the merits has been disclosed, and in any event no arguable point of law arises in respect of the exercise of his discretion by the Chief Justice." It follows that the Applicants asserted basis for an adjournment has now gone.

15. The commendable alacrity with which both the Court of Appeal and the Privy Council have been willing to act here has, I believe, been motivated by the realisation that this substantive hearing was fixed for today, but the Applicants do not appear before me today by their local or other legal practitioner to present their Application or to make any other application.

16. Mr. Woolgar submits that this decision not to pursue their substantive hearing puts in question whether they were ever serious about doing so. A suggestion that their failure to succeed in the Privy Council leaves them with no option but to withdraw is absurd, he submits. It left them with no option but to proceed, and yet they have decided not to, for reasons which he accepts are difficult to devine and upon which the Court should not speculate. He submitted that costs have been unnecessarily incurred by the Applicants' failure to seriously consider the Director of Fisheries letter of 19 April 2011, which contained all the information necessary for them to assess the chances of success of a judicial review application. That was the time for them to decide that whether or not to pursue it.

17. The problem with that argument, however, is that they did proceed and the Court did give leave. Further, whatever comments might be made as to their merits, they were entitled to pursue their appeals, and have been ordered to pay the Respondent's costs when they failed.

18. Mr. Woolgar also referred to the discourtesy to the Court by the Applicants' failure to attend today. That, however, could not form a basis for awarding indemnity costs in favour of the Respondent.

19. The fact that they are not here means that the Applicants do not know this application is being made. I accept that their abandonment was made at the very last minute, but they have not been put on notice of this application. Normally I would give a party an opportunity to be heard before determining an indemnity costs application.

20. Mr. Woolgar accepted that very little guidance is given in the pre CPR White Book at Order 62 Rule 12 as to the circumstances in which the discretion to award indemnity costs should be exercised.

21. He made what I consider to be two very telling points. Firstly. The Respondent considered making a wasted costs application against the Applicants' legal advisers but decided, in a finely balanced decision, not to do so on the basis that such was likely to provoke satellite litigation involving the Respondent in incurring further costs, even if they were ultimately recoverable. Secondly, he stated that the Respondent, or rather the public body that he represents, accepts that it will from time to time be subject to public scrutiny as to the lawfulness of its decisions, and that is all part of good governance.

22. Having considered all of these matters, although I have considerable sympathy for the arguments advanced by Mr. Woolgar, I am not persuaded that I should depart from

the usual rule of awarding costs on the standard basis, which costs will include those incurred prior to the grant of leave, and the attendance of Mr. Woolgar here today.

23. I accordingly dismiss the Application and Order that the Applicants shall pay the Respondents costs on the standard basis to be taxed if not agreed.

Christopher Gardner QC
Chief Justice
22 November 2011