Privy Council Appeal No 43 of 2008

Wendal Swann *Appellant*

v.

Attorney General of the Turks and Caicos Islands *Respondent*

FROM

THE COURT OF APPEAL OF
THE TURKS AND CAICOS ISLANDS

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 21st May 2009

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Present at the hearing:-

Lord Phillips of Worth Matravers
Lord Scott of Foscote
Lord Brown of Eaton-under-Heywood
Lord Mance
Lord Neuberger of Abbotsbury

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*[Delivered by **Lord Neuberger of Abbotsbury**]*

1. The appellant, Mr Wendal Swann, complains that he has suffered an unlawful reduction in his remuneration. The principal issue on this appeal is whether, as he contends, the complaint can be properly raised by way of judicial review, or whether, as the courts below concluded, the claim should be pursued by writ. Mr Swann is appealing against the decision of the Court of Appeal, upholding the order of Chief Justice Christopher Gardner, who dismissed his application for leave to apply for judicial review.

2. The basic facts are as follows. The appellant was appointed to the post of chairman of the Public Service Commission of the Turks and Caicos Islands ("the PSC") on 1 September 2003, pursuant to the 1998 Constitution, which was then in force. The post was part time, and the appellant was remunerated by way of an allowance rather than a salary. The appellant was reappointed as chairman of the PSC on 6 September 2005 for a further term of two years by the Governor, Richard Tauwhare. It is common ground that the post remained part time at that point. However, it is the appellant's case that, when the new Constitution came into force on 8 August 2006 (pursuant to the Turks and Caicos Islands Constitution Order 2006, S.I. 2006/1913), the post became full time, and he was entitled to an increased rate of remuneration, namely $90,000 a year.

3. It is common ground that the appellant was thereafter paid $8,640 in respect of each of the months August to November (inclusive), and that this represented remuneration at the rate of $90,000 a year (subject to an adjustment which is irrelevant for present purposes). However, on 15 November 2006, at a meeting of the Cabinet, presided over by the Governor, it was decided to reduce the remuneration of the PSC chairman to $30,000 a year, a decision which was communicated to the appellant on 5 December. On 26 January 2007, the appellant filed a notice of application for leave to apply for judicial review seeking an order quashing the decision to reduce his remuneration to $30,000 a year, and no fewer than twelve associated declarations, all of which were directed to establishing that that decision was unlawful. (As if that were not enough, a further three declarations, with the same purpose, were claimed in a supplemental notice dated 6 March 2007).

4. Meanwhile the decision to remunerate the appellant at the rate of $30,000 a year was implemented, and he was accordingly paid $2,500 in respect of each of the months December 2006, and January and February 2007. However, on 21 February, before a decision whether to give him leave to make his judicial review application was made, the appellant left his post as chairman of the PSC, as he was appointed by the Governor as a member of the House of Assembly, pursuant to section 45(1) of the 2006 Constitution.

5. The application for leave came before the Chief Justice, who "had concerns as to whether the [appellant] had an arguable case that this was a public law rather than a private law matter, … whether in any event judicial review was appropriate if he had an alternative remedy … and whether he had a sufficient interest to continue with his application" (to quote from paragraph 13 of his judgment). Accordingly, the Chief Justice

ordered the Attorney General to be made a respondent to the application, and directed a hearing on those issues.

6. The hearing duly took place, and, in a reserved judgment given on 19 April 2007, the Chief Justice decided not to grant the appellant leave to apply for judicial review. His reasons were that the appellant's "essential claim [was] for damages as a result of an alleged breach of an agreement as it relate[d] to his salary", which "would be enforceable by an ordinary action", that "the judicial review procedure [was] neither necessary nor appropriate", and that "even if it [was] arguable that there [was] a collateral public law issue" and the appellant had sufficient interest to pursue it, the Chief Justice "would exercise [his] discretion to refuse leave in this case" (quoting from paragraphs 29 and 30 of the judgment).

7. The appellant appealed against that decision, and, at the end of the hearing of the appeal on 14 August 2007, the Court of Appeal dismissed the appeal. The Board was told that no reasons were given that day, and that, despite at least one request by the appellant, the Court of Appeal has still given no reasons for its decision. If that is indeed the case, it is highly regrettable. Any court giving a decision after submissions have been made has a clear duty (at least in the absence of the parties expressly or impliedly agreeing otherwise) to give not only a decision, but also the reasons for that decision. Sometimes very shortly expressed reasons are appropriate, or at least acceptable. In the present case, for instance, provided of course that it represented its reasoning, the Court of Appeal could have complied with its duty by stating that the Chief Justice's decision was right in the sense that it was the only correct outcome and/or because it was a decision which he was entitled to reach as a matter of discretion, and that his reasoning was unassailable. However, it appears that the Court did not even go that far: if that is indeed the case, the Court of Appeal failed to do its duty. This should not happen again.

8. Reverting to the history of this case, the appellant was dissatisfied with the decision of the Court of Appeal, and his application for leave to issue judicial review proceedings is therefore now before the Board. The written and oral arguments of both parties went into issues such as whether, under the 2006 Constitution, the rate of remuneration of the chairman of the PSC was to be determined by the Governor, and, if so, whether the determination was at his discretion or after consultation, whether the remuneration had actually been decided by the legislature to be $90,000 a year, or whether that figure had merely been included as a relatively tiny item in a much larger approved budget or estimate, whether the Cabinet had the right to overrule the decision of the Governor to pay the appellant at the rate of $90,000 a year (if he had so decided),

and whether the Governor had entered into a binding agreement with the appellant that he would be paid at that rate.

9. The Board is of the view that it will be unnecessary to consider most of these issues in connection with the appellant's claim at any stage, and that it would be inappropriate to resolve any of them at this interlocutory stage. There is (quite rightly) currently no contention that the appellant is bound to succeed or bound to fail in relation to his basic complaint, so the only issue is the narrow procedural one of whether the Chief Justice was right, or at any rate entitled, to refuse the appellant leave to seek redress by way of judicial review, and to leave him to issue a writ if he saw fit. In order to determine that issue it is necessary to identify the nature and the legal basis of the appellant's complaint.

10.The appellant's complaint is that he was wrongly deprived of his remuneration of $90,000 a year for a period of three months (or thereabouts), during which he was only paid at the rate of $30,000 a year. In order to found a legal claim on that complaint, the appellant would have to establish that he had an enforceable right to be remunerated at the rate of $90,000 a year as chairman of the PSC.

11.In the Board's view, the only basis for advancing such a right, in the light of the evidence and the arguments which have been presented, arises out of conversations which, according to the appellant, he had with the Governor and the Chief Secretary, in which they "invited" him "to continue in the office of chairman on [a full time] basis" and "on the basis that the base salary was to be … $90,000 … per annum", and that he "decided to accept the challenge, including taking up residence in Grand Turk", which he duly did (quoting from paragraphs 10 to 13 of the appellant's first affidavit, sworn on 26 January 2007).

12.It is true that other grounds for supporting the contention that the appellant was entitled to remuneration at $90,000 a year were raised on his behalf, but the Board does not consider that any of those arguments take the appellant's case further. The fact that the budget approved by the legislature was arrived at on the basis that the appellant was to be paid at that rate does not give him an enforceable right to be so paid. Furthermore, his contention that the Cabinet was not entitled to over-rule the Governor's agreement to remunerate him at the rate of $90,000 a year is irrelevant. If he had an enforceable commitment by the Governor to pay him at that rate, then, even if the Cabinet had the right to reverse the Governor's decision, Ms Mountfield, who appeared for the respondent, realistically conceded that such a reversal would not undermine the appellant's ability to enforce that commitment. For the same reason, there is no need to resolve the question of whether the Governor ought to

have consulted the Cabinet under section 25(1) of the 2006 Constitution before agreeing (if he did) to remunerate the appellant at the rate of $90,000 a year.

13. Accordingly, the appellant's complaint amounts to a straightforward private law claim for around $15,000, being the difference over a period of about three months between (a) $90,000 a year, the rate of remuneration to which he claims to have been entitled, and (b) $30,000 a year, the rate at which he was actually paid. The basis of his entitlement is a conversation, or a series of conversations, described in paragraphs 10 to 13 of his affidavit, cited in paragraph 11 of this judgment. His claim is thus almost certainly in contract (although it is conceivable that it could be founded on an estoppel), and whether it is made out will turn on oral evidence.

14. In those circumstances, it seems clear that the appellant should not have sought to bring his claim by way of judicial review, and should have issued a writ. That is primarily because his claim is, on analysis, a classic private law claim based on breach of contract (or, conceivably, estoppel). Furthermore, proceeding by writ would in any event be the more convenient course, given that a properly particularised pleaded case would be appropriate, and discovery and oral evidence will probably be required.

15. The Board accepts that the appellant may conceivably be able to mount an argument on the public law ground of legitimate expectation, but this would be very much of a fallback contention. In any event, it is a contention which would be based on the same evidence, and indeed much of the same argument, as his possible estoppel ground, which itself would be an alternative to his primary argument, namely the claim in contract. Consequently, the possibility of such a contention being advanced can scarcely justify the claim being brought by way of judicial review. Even if this contention could justify the appellant's claim being brought by way of judicial review, determining whether to permit it to proceed as such is a case management decision, with which an appellate court should be slow to interfere. In this case, the Chief Justice's decision is unassailable, in the light of the need for a full particularised document identifying the claim and the probable need for discovery and cross-examination (which can be ordered in judicial review cases, but are normally more appropriate in actions begun by writ).

16. Similarly, the appellant's desire to establish that the decision-making process culminating in the reduction of his remuneration did not comply with the requirements of the 2006 Constitution does not justify a judicial review claim. The appellant plainly has a legitimate interest in

maintaining a claim for about $15,000; indeed, he has a right to bring an action to recover that sum. However, the Board considers that the appellant's complaint that he has not been paid some $15,000 which he is owed cannot possibly justify investigating the public law issues which he seeks to raise in his judicial review application. There are occasions where it may be appropriate to permit public law issues to be raised in what is essentially a private law claim, but they are relatively exceptional. Those occasions would normally be where the public law issues are of particular importance to the applicant or where they should be aired in the public interest. However, there is no suggestion of either of those exceptional factors applying in this case.

17. Having decided that the appellant should have proceeded by way of writ, the remaining issue is whether, rather than refusing leave, the Chief Justice should have converted the application for leave to proceed to seek judicial review, into a writ action. Again, determining whether to make such an order is essentially a case management decision, with which an appellate court should be slow to interfere. In the Board's opinion, the Chief Justice was, to put it at its lowest, entitled to refuse leave to apply for judicial review, and to make no further order, thereby leaving the appellant to issue a writ, if he wished to pursue the matter further. The application for leave sought inappropriate relief, and did not expressly seek any payment, and the supporting evidence was too vague in the essential passages (paragraphs 10 to 13 of the appellant's first affidavit) to stand as a satisfactory pleading. Converting the claim into a writ action would not therefore have assisted the appellant significantly if at all, and it would have ensured that the action began on an unsatisfactory basis from the point of view of the court and of the respondent.

18. In these circumstances, the Board will humbly advise Her Majesty that this appeal should be dismissed.