Trinity Term

[2015] UKPC 29

Privy Council Appeal No 0049 of 2014

JUDGMENT

Peerless Limited (Appellant) v Gambling Regulatory Authority and others (Respondents) (Mauritius)

From the Supreme Court of Mauritius

before

Lady Hale

Lord Clarke

Lord Wilson

Lord Hughes

Sir Paul Girvan

JUDGMENT GIVEN ON

15 June 2015

Heard on 25 March 2015

Appellant	Respondents
William Godwin	Geoffrey Cox QC
Robert Strang	Yvan Jean-Louis
	Ben Walker-Nolan
(Instructed by Sheridans)	(Instructed by Royds LLP)

SIR PAUL GIRVAN: (giving the judgment of the Board)

1.
This appeal, which is brought by leave of the Supreme Court of Mauritius, arises out of judicial review proceedings taken by Peerless Ltd, a Mauritius bookmaker ("the appellant"), against the respondent, the Gambling Regulatory Authority ("the GRA"), which is charged with the regulation and control of gambling activities in Mauritius. Its objectives are in part to promote public confidence in the integrity of the gambling industry in Mauritius and to ensure that gambling is conducted in a fair and transparent manner. The appellant was the holder of a licence granted by the GRA which was renewed from time to time and which permitted it to conduct fixed odds betting on football matches

played abroad. The appellant's licence as renewed on 14 July 2010 was suspended and subsequently not renewed. The appellant by its judicial review proceedings sought to challenge the decisions of the GRA in respect of the suspension and non-renewal of the licence.

2.

The appeal arises from the judgment of the Supreme Court given on 9 September 2013 refusing the appellant leave to apply for judicial review. The Supreme Court refused leave for three reasons. Firstly, the appellant failed to disclose material facts. Secondly, the appellant failed to exhibit full copies of the relevant licences in that it had omitted relevant conditions. Thirdly, notwithstanding the GRA's production of the full terms of the licence, the appellant persisted in its general denial of knowledge of the conditions imposed on the relevant betting licences. In essence the court refused leave by reason of the failure by the appellant to make full and frank disclosure of facts by reason of misleading statements made in the appellant's affidavits.

Factual background

3.

In January 2008 the GRA invited applications for licences to take bets on football matches played overseas. The appellant applied for a licence. By letter of 11 April 2008 it was informed that it would be offered a licence. A licence was duly granted to the appellant to operate as a bookmaker in respect of football matches taking place outside Mauritius as from 16 July 2008 to 15 July 2009 ("the 2008 licence").

4.

The appellant was at the same time as the licence was granted given a copy of the conditions of the licence ("the 2008 conditions"). These conditions included a condition requiring the appellant to use software of international standard and approved by an international institution. It was required to have a computer system properly configured so as to link to the respondent's Central Electronic Monitoring System ("CEMS") on a date to be determined by the GRA. Condition 7 required the appellant to pay unclaimed winnings into the National Solidarity Fund ("the NSF") within seven days of the expiry of 45 days after the match result. Condition 8 required the licensee to submit to the GRA a certified statement of such payments at the time of payment.

5.

The appellant chose as its software provider an English company called A Bet A Technology Ltd. The software did not provide for a report of unclaimed winnings on the expiry of 45 days after matches. Adaptation of the system to make such a report required a special reconfiguration. The appellant did not take steps to have that reconfiguration carried out. Nor did it take steps to establish manually the amounts of unclaimed winnings. It did not take any steps to pay over such winnings in accordance with conditions 7 and 8 until the GRA took steps to suspend the licence for non-compliance with the conditions in 2010. The unjustifiable explanation given by the appellant is that manual compilation would have been burdensome and time-consuming. The appellant asserted that it was waiting to reconfigure its software so as to provide automatic reporting of unpaid winnings in conjunction with a connection between the GRA's and the appellant's system after activation of the CEMS. The appellant alleges that it did engage with the GRA about connecting the appellant's computer system with that of the GRA. Although the Gambling Regulatory Authority Act 2007 ("the 2007 Act") required the GRA to set up and maintain a CEMS, it had failed to do so by the time of the events in 2010 giving rise to the appellant's judicial review claim.

6.

On 16 July 2009 the GRA renewed the appellant's licence ("the 2009 licence"). No further conditions were sent with the renewal, but the appellant accepts that the 2008 conditions continued to apply.

7.
On 16 July 2010 the GRA renewed the appellant's licence. By this time the appellant had still made no payment to the NSF of unclaimed winnings and had submitted no report to the GRA of any such payment. It is common case that on the 2010 renewal the GRA omitted to send the appellant a set of conditions as had been sent together with the 2008 licence. Other bookmakers did receive a set of new conditions. These incorporated the previous conditions used in 2008 (thus including conditions 7 and 8) and added two additional conditions, a new condition 3 (which reserved certain express powers to the GRA) and a new condition prohibiting the taking of bets from minors. The form of the 2010 conditions provided to the other bookmakers ended with a new warning that non-compliance with any condition of the licence, rules, regulations or provisions of the GRA might entail any action that the latter might deem fit.

8.
On 21 February 2011 GRA officers along with officers of the police des jeux attended at the appellant's main office and handed over a letter wherein the GRA informed the appellant that it had suspended the appellant's licence with immediate effect for failing to pay unclaimed winnings to the NSF pursuant to section 99(1)(m) of the 2007 Act. The letter stated that the GRA was aware that the appellant was in possession of certain winnings receipts which had remained unclaimed for over 45 days.

9.
Where the GRA considers that it should suspend a licence under section 99 of the 2007 Act, it has a power to act under either section 99(3) or section 99(4) of the Act. These provide:

"(3) The Board shall, subject to subsection (4), before suspension, revocation, or cancellation of a licence, by written notice inform the licensee of the reasons for the proposed suspension, revocation or cancellation and request the licensee to submit to the Board, within 14 days of the notification written reasons why the licence should not be suspended, revoked or cancelled.

(4) Where the Board is of opinion that a licence is to be suspended, revoked, or cancelled with immediate effect, written notice of the suspension, revocation or cancellation and the reasons therefor shall be given to the licensee forthwith, and the licensee shall be entitled to submit to the Board, within 14 days of the notification written reasons why the licence should be reinstated."

It is clear from the wording of the GRA's letter that it was proceeding under section 99(4). The appellant was one of five bookmakers whose licences were suspended on the same day for the same reason.

10.
Having surrendered its licence to the GRA by letter of 25 February 2011, the appellant wrote to the GRA on 2 March 2011 stating that it had already been attending to the matter of unclaimed winnings at the time of its suspension. It informed the GRA that it had sent a cheque representing 1,577,772 Rupees (equivalent to some £30,000) representing unclaimed winnings for the period 2008-2010. It contended that the reason for suspension no longer existed; that the GRA could have acted under section 99(3) instead of resorting to immediate suspension; that the appellant had not been in breach of any other provisions of the licence or the Act; that it should have been given an opportunity to furnish an explanation; that it had made a very substantial investment to operate its business; that it

employed 52 people; that it had paid betting tax duties of 12,082,274 Rupees (unclaimed winnings representing less than 14% of that sum) and that the appellant would prevent recurrence of the non-payment, would provide security of 50,000 Rupees and would send a weekly list of unclaimed winnings to the GRA.

11.
The appellant and four other suspended bookmakers sought a meeting with the GRA. The GRA arranged a meeting on 6 May 2011, at which the appellant and the four other bookmakers made representations. As a result of the hearing, the licences of two bookmakers were reinstated. Two others were informed that the GRA was minded to revoke their licences and they were invited to show cause why that should not occur. The appellant was, however, told nothing. The GRA explains its conduct by saying that, having decided not to reinstate the appellant's licence, it had decided not to renew it instead of revoking it. The GRA accepts that none of this was communicated to the appellant and no reasons were given for its decision not to reinstate or not to renew the licence.

12.
Having heard nothing from the GRA, the appellant applied on 14 July 2011 for renewal of the licence enclosing a cheque for the renewal fee. The GRA returned the cheque. It did not seek to give any explanation. In fact due to a postal problem the letter enclosing the cheque was never delivered to the appellant.

13.
On 21 September 2011 the appellant applied for a judicial review.

The judicial review proceedings

14.
It must be said at the outset that the conduct of the appellant and its legal advisers in respect of the judicial review proceedings in the court below was lamentable and justifiably open to severe criticism. The blunderbuss motion paper seeking relief is expressed in wide ranging and unfocused terms purporting to challenge 12 decisions. In its appeal before the Board Mr Godwin, who appeared for the appellant but who it must be stressed had not been instructed in the case in the court below, brought to bear on the core and potentially sustainable challenges in respect of the decision-making process the kind of focus which should have occurred in the court below. The evidence as presented by the appellant could quite easily have been brought together in one properly drafted, concise and complete affidavit. Instead the evidence of Mr Doomun, a director of the appellant, in support of the application was scattered through six inadequately drafted and at times inconsistent and contradictory affidavits. Exhibits were presented piecemeal and on occasion incompletely. The emerging evidence from Mr Doomun over six affidavits led to replying affidavits from Mr Nuchadee, the GRA's Licensing and Inspectorate Officer, seeking to correct factual averments and ensuring the proper exhibiting of complete documentation. The proceedings themselves appear to have been the subject matter of at least 20 mentions in court before the leave application eventually came on for hearing.

15.
The appellant's evidence was not merely presented to the Supreme Court in an untidy and unsatisfactory manner but it was at times positively misleading, whether through mistake and error or through deliberate design. It is difficult not to sympathise with that court's obvious exasperation with counsel's conduct of proceedings, the manner in which the attorney had formulated the affidavits and the way in which Mr Doomum had presented his evidence which failed to tell the whole story accurately at the proper time.

16.
In his first affidavit Mr Doomun at paras 6 to 9 stated:

“6. The applicant gave his written undertaking to comply with the conditions set out in the letter of 11 April 2008 though no details of these rules and/or conditions were communicated to it either in writing or otherwise.

7. On 16 July 2008, the respondent issued the applicant a fixed odds betting licence and handed over to it a set of rules of fixed odds betting approved by its Gaming Board under section 45 of the GRA Act 2007. It is expressly provided at the foot of the licence ‘this licence is subject to the terms and conditions annexed hereto.’ **(Licence dated 16/07/08 – Annex 2)**.

8. The licence was renewed on 16 July 2009. At the bottom of the licence it is expressly mentioned that ‘it issued with a set of conditions annexed hereto.’ **(Licence dated 16/07/09 – Annex 3)**.

9. Despite the fact it was stated in the licence that it was issued subject to the terms and conditions imposed annexed therein, there was no condition attached to it.”

The exhibited material did not include the 2008 conditions which had indeed been served with the licence and clearly fell to be read with the licence. Their omission made what was exhibited and what was stated in paras 6-9 misleading. The GRA had to produce the conditions in an affidavit in reply, and was able to do so by way of a copy which had been signed for by the appellant’s representative, Mr Aumeer. Even when questioned about the apparent failure to exhibit the original licence conditions counsel in his presentation to the Supreme Court sought to assert that the affidavits were correct and that there had been no imposed conditions. He appeared to suggest that his client did not have the documents relied on by the GRA. He subsequently appeared to resile from this incorrect assertion and to accept that condition 7 did apply since 2008. Later however, when trying to justify his earlier incorrect assertion about the conditions, he sought to explain that the document had been received by Mr Aumeer, who was not the applicant Peerless Ltd. This proposition was entirely unsustainable since it was clear that Mr Aumeer was at the time the lawful agent of the appellant.

17.
Mr Cox QC on behalf of the GRA contended before the Board that a party is under a duty to advance his whole case and make points available to him at the hearing of his application rather than on appeal. He contended that the appellant had, by the time of the hearing before the Board, realised that the appellant’s counsel in the Supreme Court had made a mistake and had failed to put his whole case or the whole of the appellant’s evidence before that court. There the appellant’s counsel had incorrectly put in issue a question of fact, namely whether the appellant had ever received the relevant licence conditions, and had misrepresented his client’s case. Mr Cox contended that it was not open to the appellant on appeal to rectify counsel’s approach in the court below. He argued that quite simply there had been non-disclosure and misrepresentation of highly material documentation. Further, the appellant had in fact not denied that it was bound by the licence conditions in the letters of 25 February and 2 March 2011 and the letters contradicted Mr Doomun’s assertion that the appellant genuinely believed that the original conditions had ceased to apply.

18.
Notwithstanding the unnecessary lack of clarity and distortion of the evidence and the potential for confusion in the way in which the evidence emerged, by the time that the matter reached the Supreme Court at the leave hearing, it was tolerably clear what the factual situation was in relation to the terms and conditions of the 2008 and 2009 licences. In para 3(v) of Mr Doomun’s fourth affidavit

he said that the licence, when issued for the first time in 2008, stated that it was subject to the terms and conditions annexed but that there was no annexure. However, he accepted that a separate set of conditions was communicated. Even in Annex 9 to the first and misleading affidavit of Mr Doomun, being the notice sent by the appellant to the GRA urging reinstatement of the licence, it was stated in paras 5 and 6:

"5. The above named party gave its written undertaking to comply with the conditions set out in 11 April 2008 (sic) though no details of these rules and/or conditions were communicated to it either in writing or otherwise.

6. On 16 July 2008, the GRA issued the above named party a fixed odd betting licence and hand (sic) over to it a set a rules of fixed odd betting approved by its Board under section 45 of GRA Act 2007. It was also issued with a set of conditions attached to the licence made pursuant to section 97 of the Act."

19.
The fact that the appellant was making that case early on in a notice drafted by the attorney makes counsel's submissions before the Supreme Court and the contents of the first affidavit all the more difficult to understand or justify. On the factual front the evidence does clearly show that it is common case that no document containing conditions was in fact sent at the time of the 2010 renewal. Whether that leaves room for reading into the 2010 licence the conditions from past practice or whether it results in no conditions attaching to the licence is a matter for legal debate.

The refusal of leave

20.
The Supreme Court considered that leave should be refused because of the appellant's lack of candour and failure to disclose the full set of conditions at the proper time and because of the appellant's persistence in its denial of knowledge of the conditions. The court refused leave without considering (and thus leaving out of account) the question whether there was any real legal merit in any of the appellant's grounds of legal challenge.

21.
The duty of candour in judicial review proceedings applies throughout the proceedings. It applies most rigorously in particular in relation to ex parte proceedings where the court does not have the advantage of hearing from the opposing party and where the court must rely on the moving party's good faith in presenting his case fully, honestly and accurately. In Brink's Mat Ltd v Elcombe [1988] 1 WLR 1350 Balcombe LJ stated the purpose of the ex parte principle thus, at p 1358:

"The rule that an ex parte injunction will be discharged if it was obtained without full disclosure has a two-fold purpose. It will deprive the wrongdoer of an advantage improperly obtained. … But it also serves as a deterrent to ensure that persons who make ex parte applications realise that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge-made rule cannot be allowed itself to become an instrument of injustice."

As the final sentence makes clear the court must not lose sight of the need to ensure that justice is done. An overly rigid application of the principle may result in unfairness to a party depending on all the circumstances. Disregarding the merits of the claim may result in injustice.

22.

In R v Bromsgrove District Court, Ex p Kennedy [1992] COD 129, which involved an application to set aside leave on the basis of material non-disclosure, Popplewell J stated that the matter had to be looked at both as to whether there had been material non-disclosure and also as to what the prospects of success were in any event. If the court took the view that at the end of the day the substantive application must fail, then it should say so. By the same token if the prospects of success are good, to terminate the applicant's proceedings by refusal of leave may well deprive the applicant of a remedy for unlawful actions by the respondent.

23.
The considerations which arise in relation to inter partes leave hearings may differ somewhat from those that come into play in ex parte applications. In R v Wirral Metropolitan Borough Council, Ex p Bell (1994) 27 HLR 234 Harrison J had to consider how he should approach a case of material non-disclosure in a judicial review inter partes leave application. In that case the judge found that there had been a serious non-disclosure of a relevant report that should have been put before the court by the applicant. The court, however, considered that no advantage had been obtained by the applicant and in the end there was no prejudice to the respondents. In those circumstances he considered that he should not dismiss the application on the ground of non-disclosure on its own but he considered that in coming to a conclusion as to whether leave should be granted he should bear in mind the non-disclosure when exercising his discretion taking into account the merits of the case. In that case the judge decided that there were insufficient grounds upon which leave should be granted to apply for judicial review. He concluded his judgment stating at p 242:

"If I were to have any doubt about my conclusions on either of the two grounds put forward by the applicant, I would, nevertheless have been influenced in deciding whether or not to exercise my discretion in this case by the non-disclosure of documents which occurred in the manner which I have described. Whilst, as I said, that is not a matter which would have made me dismiss the application out of hand without considering the merits of the application, it is a matter which I would have taken into account upon the general question of the exercise of my discretion."

24.
A refusal to grant leave to apply for judicial review is a final and terminating decision which precludes a party from having the merits of his case considered at a substantive hearing. The power to terminate proceedings without any hearing on the merits is one which should be exercised with considerable caution and in a proportionate way. In its armoury of powers the court has other less draconian ways of marking its disapproval of the conduct of a party and its legal advisers. It can, for example, make a wasted costs order against the legal advisers, it may disallow costs or it may award the costs of the proceedings for the leave application to the respondent even if leave is granted. As noted by Harrison J, it can have regard to the lack of candour when exercising its overall discretion in relation to the question of whether leave should be granted on the merits of the case. Mr Cox accepted that a question of proportionality does arise in such a case and that the lower court did not explore the alternatives to the outright dismissal of the application even before the merits of the case were considered.

The merits of the application for leave

25.
Both in the motion paper and in counsel's submission before the lower court leave to apply was sought in relation to a number of decisions and on a wide range of grounds. In its written case before the Board the GRA rightly identified the weakness and unsustainability of many of the appellant's

grounds of attack. In relation to the initial decision to suspend the licence and to move, without warning, under section 99(4) rather than section 99(3), the Board accepts the GRA's argument that it was not obliged to provide the appellant with any warning. Nor can the appellant demonstrate a failure by the GRA to recognise that it had a discretion. Nor has the appellant laid a basis for establishing irrationality in the decision to suspend. The Board accepts as correct Mr Cox's argument that compliance with condition 7 was not contingent on the establishment of the CEMS or the authorisation of standard software capable of generating a list of payments electronically. The Board sees no substance in the appellant's claim that the GRA was precluded from acting as it did because of prior knowledge of the appellant's failure to comply or that the GRA had given the appellant reason to think that it could continue to withhold unclaimed winnings with impunity. The absence in the 2010 licence of the express warning given to other bookmakers that non-compliance with any condition might entail action from the GRA added nothing to the legal position under the Act, as the appellant concedes. It also rejects the appellant's contention that an immediate suspension was arbitrary. The appellant has not laid a basis for establishing a legitimate expectation nor has it established acquiescence on the part of the GRA such as might preclude it from exercising its statutory power. In relation to the ground that the GRA behaved inconsistently in its treatment of the appellant as compared to other parties, the appellant has not provided an adequate evidential basis to make out that ground of challenge.

26.

In his submissions on the more sustainable grounds of the appellant's judicial review challenge Mr Godwin put at the forefront of his argument the absence of any reasons to explain and justify the GRA's decision to reject the appellant's case that the suspension of the licence should be revoked and of any reasons for its decision to continue the suspension and not to renew the licence.

27.

It is now clear that fairness may require that reasons be given for a decision in a wide range of circumstances. As stated in R v Civil Service Appeal Board, Ex p Cunningham [1992] ICR 816, the form of a determination is part of the procedure of a hearing and is no less subject to the requirements of procedural fairness than any other part. The very importance of the decision in question to the individual may be such that the individual cannot be left to receive an unreasoned decision as if "the distant oracle had spoken" (per Lord Mustill in R v Secretary of State for the Home Department, Ex p Doody [1994] AC 531 at p 565). In the present case the GRA's decisions resulted in the closure of a significant business. One of the objectives laid down in the 2007 Act is to ensure transparency in the gambling industry in Mauritius. Transparency of process calls for reasons to be given for decisions. In the light of the authorities Mr Cox fairly accepted that no reasons had been given and that in accordance with current standards of procedural fairness it was clearly arguable that reasons should have been given. He did seek to argue that it was possible to infer the reasoning process which led to the ultimate decisions not to lift the suspension and not to renew the licence. He pointed to the large amount which the appellant had failed to pay (as compared to the modest maximum fine of 50,000 Rupees for non-compliance); the length of the period of non-compliance from 2008 to 2010; the public interest in prompt payment to the NSF; the damage to public confidence in the integrity of the gambling industry arising from non-payment; the fact that the GRA had to detect non-compliance as opposed to the voluntary disclosure of the breach; and the fact that the breach was a criminal offence. Mr Cox, however, did accept in his written submissions that a conclusion that a decision-maker would probably have reached the same decision would not be a sufficient basis for refusing to grant judicial review.

28.

Weighing in the scales the lack of candour, in the way suggested by Harrison J in Bell, the Board nevertheless concludes that, notwithstanding the appellant's conduct of the proceedings below, there is a sufficiently strongly arguable case to call for the grant of leave to apply for judicial review on the issue of the absence of reasons and on the question of the proportionality of the decision not to renew the licence. The Board thus allows the appeal, sets aside the order of the Supreme Court and grants leave to apply for judicial review on the two grounds which the Board has identified.

Costs

29.

Having refused leave, the Supreme Court made an order for costs against the appellant in favour of the GRA. While the Board considers that the appeal should be allowed and that leave to apply for judicial review should be granted, it has come to the conclusion that it should not interfere with the Supreme Court's decision in relation to the costs in the court below. As the Board has already noted, where there is a failure to disclose relevant material and a lack of candour, the court has a power to disallow costs or make appropriate costs orders to mark its disapproval of the conduct of the party concerned. The Board is minded also to order the appellant to pay the GRA's costs of the appeal in the proceedings before the Board, in that they were necessitated by reason of the appellant's conduct of the proceedings in the court below; but it considers it fair to give the parties an opportunity to make written submissions on the question of the costs before the Board within 14 days, after which it will reach a final decision in relation to the costs of the appeal in the light of those submissions.