[2019] JMSC Civ 202

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2019CV03796

BETWEEN	**MAURICE TOMLINSON**	**CLAIMANT**
AND	**MAYOR HOMER DAVIS**	**1ST RESPONDENT**
	ST. JAMES MUNICIPAL COUNCIL	**2ND RESPONDENT**

Constitutional law- Judicial Review- Decision to terminate licence - Whether municipal authority correctly terminated a licence to use premises- Whether interim injunction to be granted- Freedom of expression.

N. Robinson for Claimant/Applicant

Georgia Gibson Henlin QC (by video link) and S. Williams instructed by Henlin Gibson Henlin for Respondents

IN CHAMBERS

HEARD: 14TH OCTOBER, 2019

BATTS J.

[1] The Constitution of Jamaica guarantees equality before the law. It also protects freedom of speech. In doing so the Constitution, our highest law, enshrines fundamental precepts of the rule of law. This case brings to the fore these values. It also invites the court to answer the question, does our society protect the minority against oppression by the majority.

[2] At this interlocutory stage I am not called upon to answer that question definitively. However, as my decision on the interim remedy being sought will give to one party or the other its entire relief, the relative merits of each case will need to be examined. So too will the balance of convenience or relative hardship as I decide how best to do justice.

[3] The matter arose in this way. The Claimant describes himself as a social justice advocate with special focus on the rights of the lesbians, gays, bisexual and transgender (LGBT) community. He is a part of a committee hosting the annual LGBT pride festival in Montego Bay. To that end he applied to the relevant municipal council and obtained confirmation that he would be permitted to use the Montego Bay Cultural Centre for that purpose. The dates and events were confirmed by exchange of email. A public forum was to be held on the topic: "Is Jamaica ready for same sex marriage?"

[4] The Respondents to the application endeavour to deny that there was ever an agreement or a grant of permission. The Respondent asserted that the person with whom the Claimant communicated had no authority to grant such permission. However this effort fails when one considers the exhibits to the affidavit of the Applicant dated 14th October 2019 in particular Exhibit MT5 which is the Respondents website which states in part "All booking rights must be submitted in writing to the Operations Manager Hillary Clarke via email". Her email address is stated. This was the procedure adopted by the Applicant and Miss Clarke had dialogue, exchanged email and ultimately confirmed the reservation by email. Certainly at this interlocutory stage the evidence is more than sufficient to establish a prima facie case that not only was permission granted but that the reservation was confirmed and hence an agreement arrived at. Certainly the Applicant could assert a legitimate expectation to have the use of the facility on stated dates. It was by email agreed that the Applicant would pay on arrival.

[5] Problems emerged when the mayor of the municipality was told that the purpose of the conference was to advance a homosexual agenda, specifically, to discuss "gay marriage". We know this because the mayor was reported as indicating that a conference for that purpose would not be allowed; see paragraphs 9 and 10 of the Applicant's affidavit dated 23rd September 2019. The Applicant was subsequently advised by telephone that the event would not be allowed to take place there. The Applicant says he made attempts to locate other venues but to no avail. He says expenses have been incurred, persons have come from abroad for the event and the organisation would lose credibility if forced to cancel (see paragraph 5 of the Affidavit of the Urgency filed on the 27th September 2019). He approaches the court for an extension of orders made ex parte by my brother judge the Honourable Mr. Justice Morrison.

[6] The Respondents urge me to refuse relief. They allege firstly that the Applicant is guilty of material non disclosure because he failed to tell Morrison J that the event had already been cancelled. Secondly it is asserted that there are rules governing the holding of such events and without the necessary license the Applicant cannot be permitted to do so. Thirdly they rely on ***Miller v Cruikshank*** Civil Appeal No. 19 of 1986 (unreported judgment 5 May 1986) to support an argument that as the Applicant will get its entire remedy it is best the relief be refused. The Applicant they say can hold the event on a later date after the decision by the Full Court. On the other hand if the event is allowed to occur any later victory by the Respondents will be pyrrhic. The Respondents point also to the fact that Morrison J fell into error and exceeded his jurisdiction by in fact granting the entire relief and declarations on the ex parte application. They contend too that the applicant has failed to exhaust all other remedies. Finally the respondents urged that, as there had been no decision made, there is nothing to review. I will treat with each of these formidable points seriatim.

[7] On the matter of non-disclosure the Applicant conceded that the committee had initially decided to cancel the conference in the face of hysteria and threats

following the mayor's public pronouncement. However the committee had changed its mind and decided to have the conference on the dates promised, or subsequently. He therefore did not think the fact, of the initial decision to cancel, to be relevant. This submission was supported by paragraphs 18 to 20 of the Applicant's affidavit dated 14th October 2019. I accept the explanation. Furthermore, given the rushed circumstance in which the application had to be made the omission is understandable. A reversed decision to cancel is unlikely to have affected the ultimate result. I therefore would not, for reason only of the failure to disclose that fact, deny a remedy.

[8] As regards the requirement for a permit or other licence this is a red herring. The case concerns permission to use the venue. If other permits are required that is a matter between the applicant and the relevant agency. The evidence does not disclose that the promise of availability or the confirmation of reservation was made conditional on anything other than payment. It is significant that the Respondent's agent even promised to help to promote the events, see email dated 10th September, 2019 exhibit MT2. In any event the municipal rules cited to me contain the following -

> *"3. No person shall operate a place of amusement in the parish of Saint James other than under the provisions of a licence grated to that person in respect of the place of amusement."*

This suggests that as operators of the centre the Respondents in all likelihood had, or ought to have had, their own permit in place.

[9] The suggestion that the Applicants had failed to exercise rights of appeal to the Minister on a refusal, and hence had not exhausted available remedies, is likewise unmeritorious. The fact is that Rule 6 sets out the reasons for and the process by which refusal and revocation of a licence may be done. The

Respondents followed neither the procedure nor relied on either of the stipulated reasons(see Rules 6(1) and 6(2).It ill behoves those who have ignored their own rules to complain that the Applicant did not similarly comply. Particularly, as a revocation in writing would have made reference to the relevant rule or regulation and hence direct the Applicant to the right to appeal to the Minister. In all the circumstances it is not surprising that he came to court post haste. I find there was no viable alternative remedy given the manner of the breach by the Respondents.

[10] The prospect of entire success was an attractive argument. Whichever way I decide this application one party will have obtained a victory insofar as the holding of the event at this time is concerned. The cases indicate that the court should consider the ultimate likely or probable result, as well as the potential impact on each party if the injunction is granted or refused. Importantly however the relevance of a full court determination will remain. This is because such a decision will determine any future use of the facility for this or similar purposes.

[11] The Respondents provided no evidence of hardship or disability they are likely to suffer if the injunction is granted and the event is held there at this time. The mayor's publicly reported statement was not repeated on affidavit. However it is in print before me (see exhibit MT3). He, in that statement, suggested that there will be some cultural damage to the sacredness of the centre. This assertion was not repeated or explained on affidavit. On the other hand the Applicant stated in an affidavit of urgency dated 27 September 2019 that there would be losses, financial and otherwise and a loss of credibility. This can be immeasurable and significant. One need only consider the next occasion he and his committee try to host an event particularly among those who have purchased tickets and perhaps made holiday arrangements to be here. There is no doubt in my mind that greater damage would be caused to the Applicant if the injunction was refused than would be caused to the Respondent if it were granted.

[12] On the question of relative merits, which falls for consideration because the interlocutory relief is in one sense final, the Applicant again prevails. The Respondents it seems to me will have an almost insurmountable task to justify termination of permission on the basis outlined by the mayor in his publicly reported utterances. Those words betray an intolerance for freedom of speech and conscience. These are rights enshrined in the Constitution :

> *Freedom of speech and assembly and equality and discrimination.*
>
> *S. 13 (3)*
>
> *The rights and freedoms referred to in subsection (2) are as follows:-*
>
> *(a) ....*
>
> *(b) ....*
>
> *(c) the right to freedom of expression*
>
> *(d) the right to seek receive, distribute or disseminate information opinions and ideas through any media,*
>
> *(e) the right to freedom of peaceful assembly and association;*
>
> *(f) the right to freedom of thought, conscience, belief and observance of political doctrine;*

[13] Public authorities, and possibly private persons offering public services) (see section 13 (5)), are not allowed to curtail the rights of the citizen. In England the court ordered a municipality to allow a political party with really unpalatable views to hold its convention. In ***Verrall v Great Yarmouth Borough Council [1980} 1 All ER 839,*** a case with facts sufficiently similar to make it relevant, Lord Denning the Master of the Rolls said (at page 844 h to 845 (b):

> *"Tasker Watkins J ordered the new council to perform the contract. He did so because of the importance of freedom of*

speech and freedom of assembly. These are among our most precious freedoms. Freedom of Speech means freedom not only for the views of which you approve, but also freedom for the views of which you most heartily disapprove. This is a land in the words of the poet (Tennyson you ask me why), where –

"A man may speak the thing he will
A land of settled government
A land of just and old renown
Where freedom slowly broadens down
From precedent to precedent."

That was said in the context of a country with no written constitution and therefore no entrenched guarantees of certain freedoms. How much more should it apply here.

[14] Just as in the ***Verrall*** case, the Applicant, on the evidence before me, adopted the advertised procedure to reserve the meeting place. Ms. Clarke in the ordinary way, and with full information about the topic for discussion and the event to be held, confirmed the reservation. The Applicant expended money and made plans in reliance on that representation and promise. It would be wrong, in the absence of good reason, to allow the public authority to resile from its bargain. Moreso, because the mayor has publicly stated his reasons. These reasons run contrary to our Constitutional rights. Jamaica is also a land where," a man may speak the thing he will".

[15] There were other suggested bases to justify termination of permission. Chief among these was an alleged want of authority in the person with whom the Applicant was corresponding. It is not denied that Mrs Clarke held the position in the Respondent's organisation alleged. It is therefore more probable than not that at trial an ostensible authority will be established. In any event on the

evidence before me, (see the website page referenced above) there is prima facie evidence of an actual authority.

[16] In the final analysis the evidence, at this interlocutory stage, is highly suggestive of an arbitrary act. The summary termination of permission earlier given was it seems motivated by a desire to prevent the freedom of expression about ideas the mayor and council found repulsive. Those ideas may indeed be repulsive to a great many Jamaicans, perhaps even to myself. However that is not a basis to deny the use of a public facility to the citizen. There is no evidence they intended to conduct "gay" marriages or to utilise the premises for debauchery or buggery or any illegal act. There is in short no evidence before me at this interlocutory stage to justify a reversal of the decision to grant permission or to cancel the reservation. The weight of legal authority therefore suggests that the merits or ultimate resolution will favour the Applicant.

[17] It was suggested there was no reviewable decision. This submission fails. The Applicant was informed of the decision by telephone. It is evidenced also by the mayors reported statements. On the evidence there was a decision to no longer allow the Applicant to use the premises. That decision is reviewable. `

[18] The Respondent has asked me, by Notice of Application filed 11th October 2019 to set aside Morrison J's order because he granted a final relief on the ex parte application. The Applicant endeavoured to resist by urging that if this was so the Applicant ought to have appealed. It has always been my understanding that exparte orders can be set aside or varied without appeal. I agree that it is inappropriate for one judge at first instance to overturn the decision of another. However, where the judge who made the original order is unavailable or it is otherwise impracticable to have him hear the matter, another judge can in the interest of justice be asked to reconsider it. In this regard I agree with the formulation and approach of Rattray J in ***Petrojam Limited v Industrial***

Disputes Tribunal & Anor [2018] JMSC Civ 166 at paragraphs 54 and 55 of his unreported judgment dated 14th December 2018.

[19] In this regard it is manifest that, in making the orders he did, my brother Morrison J fell into error. The application was for leave to apply for judicial review and interim relief. Declaratory judgments as to rights are not normally, or at all, the subject of interlocutory remedies. It is clear therefore that those aspects would need to abide a trial and/or a hearing of argument from both sides. The Greeks tell us that even Homer nodded and so I will not hesitate to make an order that will correct the situation. The fact that Morrison J granted leave to apply for judicial review is indicative that his orders were intended to be interlocutory not final.

[20] The reasons stated above explain the orders I made on the 14th October 2019. I set them out in full below.

1. Application dated the 11th October 2019 to discharge ex parte Orders of Morrison J is refused, in reference to Paragraph 1, 2 and 7.

2. The application to set aside is granted in relation to Paragraphs 3, 4 and 5.

3. It is hereby ordered that the Respondents permit the applicant to host their events at the Montego Bay Cultural Centre on the 16th, 18th and 19th October, 2019 on condition that the agreed consideration is paid.

4. No Order as to Costs

5. Applicant's attorney to prepare, file and serve the Orders.

6. Leave to appeal granted.

David Batts
Puisne Judge