Cap (Rtd) Hjh Huraizah Bte Hj Duraman … **1st Appellant**

AND

YB Pehin Datu Singa Menteri Col (Rtd) Mohd Yasmin bin Hj Umar … **1st Respondent**
Major General Dato Paduka Seri Hj Aminuddin bin POKSM Dato Seri Paduka Hj Abidin … **2nd Respondent**
Col (U) Hj Jofri bin Hj Abdullah … **3rd Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 17 of 2011)

Before: Mortimer, P.; Davies and Leonard, JJ.A.
29th November, 2011.

Action in tort arising from actions of defendants in participating in decision to recommend dismissal of plaintiff from Royal Brunei Armed Forces – constitutional questions – decision of His Majesty the Sultan to dismiss the plaintiff – neither the decision nor its correctness capable of being questioned – decision made in exercise of arbitrary discretion – action bound to fail Costs – Attorney-General's right to costs.

Lt. Col (R) Hj Harif bin Hj Ibrahim and Eric Siow Kin Seong of M/S Lt. Col (Rtd) Harif Eric Advocates and Solicitors for the Appellant.
Dato Davinder Singh SC and Awg Ahmad Jefri bin Abdul Rahman of Attorney General's Chambers for the Respondents.

Cases cited in the Judgment:

Malins VC in *In re Tufnell* [1876] 3 Ch. D 164 at 173
Idris bin Ibrahim [2004] JCBD 72
Rex v Archbishop of Canterbury [1903] 1 KB 289

Davies, J.A.:

This is an appeal from a judgment of Findlay JC dismissing an appeal by the plaintiff against a decision of the Senior Registrar on the 13 December 2010 striking out the plaintiff's statement of claim. By the time the matter came before Findlay JC the plaintiff had filed a proposed amended statement of claim and the learned judge rightly proceeded as if the amended statement of claim were the subject of the appeal. The learned judge then, in effect, struck out the proposed amended statement of claim.

There are four plaintiffs with similar causes of action. The learned primary judge was asked to deal with the case of the first appellant on the assumption that the other appellants agreed to be bound by the decision in that case. We were similarly asked to deal with the matter on that basis and we do so.

It is necessary to turn to the proposed amended statement of claim in order to understand the facts and cause of action alleged.

On 8 March 2010 His Majesty the Sultan consented to the appellant's service in the Royal Brunei Armed Forces being terminated. There is not and cannot be any dispute that that *"consent"* was a decision by His Majesty to terminate the plaintiff's service. Her service was then formally terminated on 31 March 2010.

The plaintiff alleges that recommendations made by each of the defendants or by one or more of them, or to which they were parties, resulted in that decision by his Majesty and, consequently, that those recommendations caused her loss. It is for that loss that the plaintiff claims damages against the defendants. The damages claimed are the loss of her salary and other emoluments until completion of full service.

The allegations against the defendants are that they:

wrongfully and with intent to injure the plaintiff by unlawful means conspired and combined together to procure the discharge of the plaintiff from the RBAF, to deprive her of her rights under the RBAF Act, to deprive her of the opportunity to continue her intended career with the RBAF and to deprive her of all accrued and/or future benefits arising from her service thus causing her to suffer loss: paragraph 35;

in the alternative, conspired and combined together wrongfully and with the sole or predominant intention of injuring the plaintiff and/or causing loss to the plaintiff by procuring the discharge of the plaintiff from the RBAF, depriving her of her rights under the RBAF Act, depriving her of the opportunity to continue her intended career with the RBAF and depriving her of all accrued and/or future benefits arising from her service and/or future service with the RBAF, thus causing the plaintiff to suffer damages and/or loss: paragraph 36;

in the alternative, acting in concert or individually, in dealing with the plaintiff exercised powers in excess of the powers vested in them to procure the discharge of the plaintiff from the RBAF, to deprive her of her rights under the RBAF Act and to deprive her of all accrued and/or future benefits arising from her service thus causing the plaintiff to suffer damages and/or lost: paragraph 37;

in the alternative, acting in concert or individually in dealing with the plaintiff exercised their powers in bad faith to procure the discharge of the plaintiff from the RBAF, to deprive her of her rights under the RBAF Act, to deprive her of the opportunity to continue her intended career with the RBAF and to deprive her of all accrued and/or future benefits arising from her service thus causing the plaintiff to suffer damages and/or loss: paragraph 38.

Three things may be noted at this stage about these allegations. The first is that they allege the torts of intentionally causing harm and conspiracy causing loss or damage.

The second is that they all arise from amendments to the statement of claim proposed after the decision of the Registrar. The explanation for these changes is that the statement of claim as originally framed appeared to seek, in effect, an advisory opinion from the court following a judicial review of the defendants' conduct, the plaintiff conceding that a claim for orders based on a judicial review cannot be made in Brunei: Constitution of Brunei Darussalam, section 84C.

And the third and most important thing to note is that the plaintiff does not, in these proceedings, seek to challenge the decision of His Majesty to dismiss her. Nor could she do so and this, we think, is the insuperable obstacle in the plaintiff's path to success because it was his Majesty's decision, not any recommendation of any of the defendants, which has caused the plaintiff's alleged loss and damage.

It is desirable at this point to say a little more about the nature of His Majesty's prerogative powers which, as we will show, include his power to dismiss people from the armed services. Three Articles of the Constitution are relevant to this question. The first of these is Article 70 which provides:

> *"70. Save as is otherwise provided in this Constitution, every person holding office in the public service of the Government shall hold office during His Majesty the Sultan and Yang Di-Pertuan's pleasure."*

The term *"public service"* is not defined in the Constitution but *"public office"* and *"public officer"* are. The former is widely defined to include *"any office of emolument, remuneration or allowance in respect of his service in the Government"* but then excludes certain offices not relevant here. *"Public officer"* means the holder of any public office. We think that an officer of the Royal Brunei Armed Forces comes within the meaning of a *"person holding office in the public service of the Government"*. However, as appears from what we say below, this Article does not confer power on His Majesty. It does no more than declare the existing legal position.

Article 74 relevantly provides:

> *"74 (1) The power to appoint, transfer, promote, dismiss or exercise disciplinary control over public officers is hereby vested in His Majesty the Sultan and Yang Di-Pertuan.*
>
> *……..*
>
> *(3) Nothing in this Article shall affect the provisions of any written law relating to members of the Royal Brunei Armed Forces, Royal Brunei Police Force or the Prison Service of Brunei Darussalam."*

Army officers are on the above definition *"public officers"*. However, sub article (1), though in terms conferring power on His Majesty, is, we think, like Article 70, merely declaratory of the existing law.

There is no provision of any written law which relevantly affects the operation of Article 74. We refer later to section 8 (4) of the Royal Brunei Armed Forces Act only to exclude its relevance.

Article 84 of the *Constitution of Brunei Darussalam* provides relevantly as follows:

"Effect of Constitution on His Majesty's prerogatives

> *84. (1) The Government shall be regulated in accordance with the provisions of this Constitution, and the form of the Government shall not be altered save in pursuance of the powers conferred by Article 85.*
>
> *(2) Nothing in this Constitution shall be deemed to derogate from the prerogative powers and jurisdiction of His Majesty the Sultan and Yang Di-Pertuan and, for the avoidance of doubt, it is declared that His Majesty the Sultan and Yang Di-Pertuan retains the powers to make laws and to proclaim a further Part or Parts of the law of this Constitution as to His Majesty the Sultan and Yang Di-Pertuan from time to time may seem expedient."*

Article 84 (2) does not confer power on His Majesty. On the contrary, it does two things. First, it emphasises that nothing in the Constitution should be construed as derogating from the existing prerogative powers and jurisdiction which His Majesty has. And secondly, it clarifies the nature of some of those powers. The extent and nature of those powers must be found, initially, in the common law.

Under the common law of England the royal prerogative included the power to appoint and dismiss members of the armed forces. Upon appointment they served at the sovereign's pleasure and might be dismissed by the sovereign at any time without notice and without assigning any reason. The nature of this power was discussed by Malins VC in *In re Tufnell* [1876] 3 Ch. D 164 at 173 in the following terms:

> *"It would be a most injurious thing to the public service if the Crown had not the power, which we know it has and exercises constantly, of saying to any naval or military officer misconducting himself, whether in his military or naval, or in his private capacity, simply by notice in the Gazette, that the Crown has no longer occasion for his services. It is an arbitrary power, and one which may be exercised most injuriously to the interests of the officer, but such is the benignity and the conduct of Government and of the Sovereign towards all officers, naval, military, or other, that it is never exercised arbitrarily or improperly, or except on proper occasions, and it is absolutely necessary for the discipline of the army and navy, and for the good conduct of the public service, that such an arbitrary power should exist."*

The principle that the Crown can do no wrong is restated in Article 84B (1) in the following terms:

> *"His Majesty the Sultan and Yang Di-Pertuan can do no wrong in either his personal or any official capacity."*

There is nothing in the Constitution which restricts those prerogative powers.

Two aspects of the nature of the power referred to in the above passage should be emphasised. The first is that is an arbitrary power; it is exercisable at his Majesty's will and pleasure, subject to no restrictions or qualifications. And the second is that it is irrefutably presumed to have been rightly exercised.

Nothing in the *Royal Brunei Armed Forces Act* could or, indeed, does purport to qualify or restrict that power. On the contrary, section 3 (2) purports to confer on His Majesty supreme command over the armed forces and section 8, under the heading *"OFFICERS"*, relevantly provides:

> *"8. (1) Subject to the provisions of this section, eligible persons shall be commissioned by His Majesty as officers in the Armed Forces and in the Reserve Regiment.*
>
> *(2) Every commission shall be in such form as His Majesty may approve and with such modifications as circumstances may require and may, if His Majesty deems it expedient, be granted for such a period as may be specified therein.*
>
> *(3) A commission granted in accordance with subsection (2) for a specified period may be extended by His Majesty for such further period or periods as His Majesty may deem it expedient.*
>
> *(4) His Majesty may, without assigning any reason therefor, cancel any such commission.*
>
> *……"*

It follows from what we have said that these sections do not confer any powers on His Majesty. They simply state, for the purpose of clarification, some of those powers relevant to the Armed Forces.

His Majesty, in dismissing the appellant, was not obliged to act on or even consider any recommendations made by any of the defendants or any statements made by any of them. Nor is there any evidence that he did so. But even if there were it would make no difference. It was the exercise of the arbitrary and unquestionable power of the sovereign to dismiss the appellant. And that exercise of power is irrefutably presumed to have been rightly exercised.

Here, the plaintiff must allege, and must have some prospect of proving that one or more of the acts of one or more of the defendants alleged in one or more of paragraphs 35 to 38 of the proposed statement of claim was wrongful and was a cause of her dismissal from the Armed Forces.

For the reasons which we have stated it seems plain to us that she cannot do so. The act which caused her dismissal was the decision of His Majesty to dismiss her. That decision was made in the exercise of His Majesty's arbitrary power, presumed to have been exercised rightly. The plaintiff therefore cannot prove that any wrongful act of any of the defendants procured her dismissal.

There is a decision of the High Court, *Idris bin Ibrahim* [2004] JCBD 72, which is directly in point though what was sought in that case was judicial review of a decision to recommend to His Majesty that the applicant be discharged from the armed forces. It should be pointed out that this case was decided before 29 September, 2004 when amendments to the Constitution, amongst other things, abolished judicial review.

The relief sought in that case was:

1. an order of certiorari to quash the decision to dismiss the applicant from the Royal Brunei Armed Forces; alternatively

2. an order for the applicant to be reinstated as a captain with the Royal Brunei Armed Forces.

The respondents were the present and former commander of the Royal Brunei Armed Forces.

The decision the subject of paragraph 1 was not, as one might expect, the decision of His Majesty to dismiss the applicant. Indeed it could not be. It was the decision of the Board of Executives of the Royal Brunei Armed Forces to recommend to His Majesty to dismiss the applicant.

At the time of that case Article 74 (3) of the Constitution required that, in relation to certain public officers, His Majesty was required to consult and act in accordance with the recommendation of the Public Service Commission. That requirement was repealed by the 2004 amendment. It is therefore unnecessary here to consider, as it was in that case, the effect and application, if any, of that provision. There are now no qualifications to or restrictions upon His Majesty' power to discharge the appellant.

Subject to that requirement, that case was, in relevant respects, on all fours with this one. In that case the learned judge said:

> *"If the decision to make the recommendation were to be quashed, it would not achieve the applicant's object. The discharge would stand, for it is not dependent upon the existence of the recommendation."*

And

> *"In reality, the Applicant was trying to overturn the act of His Majesty the Sultan in discharging him. That act is not justiciable."*

The learned judge's reasoning is equally applicable to this case.

Contrary to what we have just decided, it seems to have been assumed by the judgment of the learned primary judge that one or more acts alleged against the defendants was a cause of the plaintiff's dismissal. The learned judge said:

> *"The appellant is aggrieved by the actions of the respondents that resulted in the appellant's dismissal from the armed forces of Brunei and is seeking relief against the respondents personally."*

Nevertheless it was contended by the respondent and held by the learned judge that the defendants were not liable for those acts. Because of the conclusion which we have reached, it is unnecessary for us to discuss the correctness of the learned judge's conclusion based on this assumption. Nevertheless we will discuss it briefly.

The learned judge relied for his conclusion on Article 84B (2) of the Constitution. This Article provides:

> *"Any person acting on behalf or under the authority, of His Majesty the Sultan and Yang Di-Pertuan shall not be liable to any proceedings whatsoever in any court in respect of anything done or omitted to have been in his official capacity."*

The learned judge said:

> *"On the face of it, those provisions provide, as a matter of law, a complete defence to any action by the appellant. I note that Articles 84B and 84C say that the immunity is **to** any proceedings, not **in** any proceedings. In other words, the law says that the complainant may not take any proceedings, not just that, the complainant having taken proceedings, the officer cannot be found liable.*
>
> *……..*
>
> *The question that arises is: Do the provisions I have mentioned protect the respondents if, as alleged, they were acting together, not objectively and impartially, but motivated unlawfully by personal malice and spite?*
>
> *I have to say that article 84B (2) alone does just that."*

We find it unnecessary to consider the correctness of this conclusion, having decided that the appellant's alleged loss was caused by the decision of His Majesty, in the exercise of his arbitrary and unquestionable power, to terminate her appointment. Nor, in those circumstances, do we find it necessary to decide whether, in any event, these proceedings come within the very wide definition of *"judicial review"* in Article 84C (3)(d) of the Constitution.

The appeal must therefore be dismissed. We turn to the question of costs. Ordinarily these would follow the event. However the appellant submits that:

1. the Attorney–General does not have a mandate to generate such costs; and

2. there is no evidence that the respondents are liable to remunerate the Attorney-General for her work in appearing for them.

By these submissions, as we understand them, the appellant contends that the defendants have no liability to pay costs to the Attorney-General, either at law or generally. We do not think that that contention meets the question whether, in a case such as this, the defendants may claim and recover costs if they win.

In *Rex v Archbishop of Canterbury* [1903] 1 KB 289, in which mandamus had been sought against the Archbishop, the Court of Appeal held that the Archbishop was entitled to costs notwithstanding that he had been represented by the Treasury Solicitor. In explaining his reasons for this conclusion Romer LJ said at 294:

> *".....the Archbishop is being proceeded against under circumstances which might make him personally liable for costs, and, if he succeeded, might entitle him to receive costs from the persons who were proceeding against him. Under those circumstances, the Crown, for what appear good and sufficient reasons, came to the conclusion that it was to the interest of the Crown, that it should, at its own expense, defend on behalf of the Archbishop.*
>
> ……
>
> *Under the circumstances which I have stated, which made the Treasury really liable for the expense of the defence, the solicitor would naturally look, not to the Archbishop personally for costs if he failed but to the Treasury. So it appears to me that, if the Archbishop succeeded, the Treasury solicitor would, as his solicitor, be, in the ordinary course, entitled to receive the costs payable by the other side, if those costs were awarded, and would then have to come down on the Treasury under the indemnity for the difference only between the costs received from the other side and the costs incurred on behalf of the Archbishop."*

So it appears to us that, in this case, if the Attorney-General, for what appeared to be good and sufficient reason, came to the conclusion, that it was in the interest of the Crown that it should, at its own expense, defend on behalf of the defendants, that is sufficient to entitle the defendants to recover her costs. And it seems plain to us that there was such good and sufficient reason.

Mr Siow, for the appellant, sought to distinguish that case on the basis that, there, the plaintiff's proceeding had been against the holder of a public office by virtue of that office whereas, in this case, the proceeding was against the defendants in their personal capacity. In our opinion that is not a valid distinction for it was made plain in that case that, had he failed, the Archbishop would have been remained liable to costs.

We are therefore unable to see any reason to depart from the ordinary rule that costs follow the event. Two further comments are warranted. The first is that, contrary to the submission on behalf of the respondents, we do not think that section 60 of the *Legal Profession Act* Cap 132 has any application here; it applies only where the Government is a party to proceedings. And the second is that we are comforted by the fact that an order for costs was made in *Idris*, a case which we have said is directly in point here.

Orders

1. Dismiss the appeal;

2. Order the appellant to pay the respondents' costs.

Mortimer, P.

Davies, J.A. **Leonard, J.A.**