JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 39/2006

MOTION NO 7/2018

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**PAUL CHEN-YOUNG**	**1ST APPLICANT**
AND	**AJAX INVESTMENTS LIMITED**	**2ND APPLICANT**
AND	**DOMVILLE LIMITED**	**3RD APPLICANT**
AND	**EAGLE MERCHANT BANK JAMAICA LIMITED**	**1ST RESPONDENT**
AND	**CROWN EAGLE LIFE INSURANCE COMPANY LIMITED**	**2ND RESPONDENT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**INTERESTED PARTY**

Abraham Dabdoub instructed by Dabdoub Dabdoub and Co for the applicants

Michael Hylton QC and Miss Melissa McLeod instructed by Hylton Powell for the respondents

Mrs Nicole Foster-Pusey QC, Solicitor General, and Miss Carla Thomas instructed by the Director of State Proceedings for the interested party

2 July and 31 October 2018

MCDONALD-BISHOP JA

[1] This is an amended notice of motion brought by the applicants for conditional leave to appeal to Her Majesty in Council from the decision and order of this court delivered on 26 April 2018. The motion is brought pursuant to section 3 of The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962, and section 110(1)(a), 110(1)(c) and 110(2)(a) of the Constitution of Jamaica ("the Constitution").

[2] Arising from this notice of motion is a collateral application to discharge or reverse the decision of a single judge of this court who has refused to grant conditional leave to appeal as of right pursuant to section 110(1)(a) of the Constitution. The applicants contended that this court has the jurisdiction to reverse the decision of the single judge and to grant leave pursuant to section 110(1)(a).

[3] The applicants also contended that the appeal lies as of right in accordance with section 110(1)(c) because it is a final decision in civil proceedings on questions as to the interpretation of sections 19, 16(2) and 106 of the Constitution.

[4] Section 110(1) of the Constitution reads:

> "110 – (1) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council as of right in the following cases:-
>
> **(a) where the matter in dispute on the appeal to Her Majesty in Council is of the value of one thousand dollars or upwards or where the appeal involves directly or indirectly a claim to or question respecting property or a**

right of the value of one thousand dollars or upwards, final decisions in any civil proceedings;

(b) final decisions in proceedings for dissolution or nullity of marriage;

(c) **final decisions in any civil, criminal or other proceedings on questions as to the interpretation of this Constitution**; and

(d) such other cases as may be prescribed by Parliament." (Emphasis supplied)

[5] They contended further that, in addition, the appeal lies to Her Majesty in Council pursuant to section 110(2)(a) of the Constitution because the questions involved in the appeal all arise from civil proceedings which, by reason of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.

[6] Section 110(2) reads:

"(2) **An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-**

(a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; and

(b) such other cases as may be prescribed by Parliament." (Emphasis supplied)

[7] The notice of motion is supported by the affidavit of Paul Chen-Young sworn to on 14 May 2018.

[8] The respondents, through Queen's Counsel, Mr Hylton, indicated that they hold no position in respect of the motion because the issues highlighted for submission to Her Majesty in Council do not adversely affect them. Mr Hylton's only suggestion was that in the light of the general wording of the notice of motion, if leave is to be granted, it ought to be limited to specific questions as the court order being challenged relates to other orders which are unrelated to the issues raised by the applicants in their notice of motion.

[9] The motion is, however, strongly opposed by the Attorney General, who stands in the proceedings as an interested third party. She contended, through Queen's Counsel, Mrs Foster-Pusey, the Solicitor General, that the proposed appeal to Her Majesty in Council entails no question that gives rise to an appeal as of right and none that is of great general or public importance or which should otherwise be submitted. Their position is that the motion should be denied.

[10] The basic questions for this court are:

(a) Whether the single judge was correct in ruling that no appeal lies as of right to Her Majesty in Council on the basis of section 110(1)(a), in that there is no final decision in any civil proceedings.

(b) Whether the decision of the court is a final decision on questions as to the interpretation of the Constitution thereby giving rise to a right of appeal on the basis of section 110(1)(c) of the Constitution.

(c) Whether there is a question of great general or public importance or otherwise that arises from the decision of this court that ought to be submitted to Her Majesty in Council, pursuant to section 110(2)(a) of the Constitution.

The relevant factual background

[11] The applicants were the claimants in proceedings commenced in the Supreme Court and heard by R Anderson J in 2006. It is not necessary for the purpose of these proceedings to delve in the facts that generated the issues in dispute between the parties in the claim. It is sufficient to say that R Anderson J delivered his judgment on 4 May 2006 in favour of the respondents. The Attorney General was not a party to those proceedings.

[12] The applicants appealed to this court by way of Supreme Court Civil Appeal No 39/2006 and the appeal was heard by a panel comprising Panton P, Dukharan and McIntosh JJA ("The retired judges"). Following the hearing, the court reserved its decision on 8 November 2013. However, before the judgment was delivered all three members of the panel, eventually retired at diverse dates between 2015 and 2016.

[13] Following on the last effective retirement date, on or around 8 July 2016, the applicants on 20 October 2017, filed a notice of motion in this court and joined the Attorney General as an interested third party. By this motion, the applicants sought orders from the court that the hearing of the appeal by the retired judges be vacated and that the hearing of the appeal be commenced *de novo.* The notice of motion also sought other orders, principally of which was one that the costs of the hearing of the appeal thrown away in 2013 be refunded or paid to the 1st and 2nd applicants by the Attorney General, who was joined as an interested party on the motion for that purpose. They also prayed that the Attorney General stands "the costs of and incidental to this Motion".

[14] When the motion came up for hearing on 27 November 2017, the court advised the parties that the judgment would have been ready for delivery in another week and so the motion was adjourned for hearing on 18 and 19 December 2017.

[15] On 1 December 2017, before the motion to vacate the hearing was heard, a written judgment prepared by the retired judges was handed down by a panel comprising Phillips, Brooks and Sinclair-Haynes JJA. The retired judges' decision was that the appeal was allowed, the decision of the trial judge was set aside, and the matter was to be retried by a different judge of the Supreme Court. The respondents were ordered to pay one half the costs of the applicants in this court and in the court below.

[16] Consequent on this development, on 14 December 2017, the applicants filed an amended notice of motion seeking a declaration that the judgment of the retired judges is "null and void and of no legal effect" because the judges had retired before giving a decision and they had not obtained the permission from the Governor-General to continue in office beyond their retirement age for the purpose of doing so. The applicants contended that this court has the jurisdiction to grant the declarations and to make the consequential orders that they were seeking on the motion, which included an order that the costs thrown away and costs of the motion be borne by the Attorney General. In effect, the applicants' position was (and still remains) that the State should be held liable for the costs incurred by the litigants in the nullified hearing in the proceedings emanating from the motion albeit that the Attorney General is neither a party to the claim nor the substantive appeal.

[17] This amended motion was heard by a panel comprising Morrison P, Phillips and Brooks JJA. On 26 April 2018, the court, as then constituted, handed down its written decision with these orders:

> "(1) The hearing of the appeal, herein, which ended on 8 November 2013, is declared a nullity.
>
> (2) The judgment which was handed down by the court on 1 December 2017 is declared a nullity.
>
> (3) In consultation with the parties, the registrar of this court shall fix a date for the hearing afresh of the appeal.
>
> (4) The freezing order issued by R Anderson J on 4 May 2006 shall stand.

(5) Future payments from the fund created pursuant to the order of R Anderson J made herein on 15 June 2006, may only be made from monies properly placed in the fund pursuant to an order, also made herein by R Anderson J on 15 June 2006.

(6) No order as to costs in respect of the hearing, which has been hereby declared a nullity.

(7) No order as to costs in respect of this application."

[18] The applicants are aggrieved by orders orders (1), (6) and (7), which declared the hearing of the appeal by the retired judges a nullity and that there be no order as to costs for that nullified hearing of the appeal or for the application.

The proceedings for leave to appeal to Her Majesty in Council

The single judge's decision

[19] The applicants' motion for leave to appeal to Her Majesty in Council was first considered by a single judge of this court who, on 25 May 2018, held that the decision of the court in respect of the costs of the 2013 appeal is not a final decision in "civil proceedings" and that the matter should be considered by the full court as to whether leave should be granted under section 110(2)(a). Section 110(1)(a) was the provision relied on before the single judge which related to the court's judgment on the costs issue.

[20] Before this court (as constituted), the applicants applied for the single judge's ruling to be discharged or reversed and for leave to be granted as of right. They contended that the learned single judge was wrong and that this court should set aside

his ruling and grant leave as of right on the basis of section 110(1)(a). Mr Dabdoub, for the applicants, maintained that this court has the jurisdiction to do so.

[21] It is accepted that this court can review the decision of the single judge. The 1962 Order in Council at section 5 empowers a single judge of the court to hear and determine any application to the court for leave to appeal as of right from a decision of the court. The 1962 Order in Council provides, however, at section 5(b) in the terms of a proviso that:

> "... any order, directions or decision made or given in pursuance of this section may be varied, discharged, or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, direction or decision."

[22] There is no question then that this court, in reviewing the single judge's decision, should examine the question as to whether the applicants are entitled to appeal as of right pursuant to section 110(1)(a) as they are contending. It is on this basis that the issue as to whether an appeal lies as of right pursuant to that subsection is considered by this court.

[23] Before us, the applicants advanced their arguments in support of the amended notice of motion filed on 28 July 2018, which was not before the single judge. This amendment was to include section 110(1)(c) as another basis of the application for leave to be granted as of right. Both limbs of the application are considered in turn.

Was the single judge correct to find that the applicants are not entitled to appeal as of right pursuant to section 110(1)(a) of the Constitution?

[24] The applicants contend that the costs involved in the hearing of the appeal in 2013, which has been declared a nullity, is in excess of $1000.00, and that the decision of the court on the issue of costs was made in final civil proceedings, thereby placing the issue to be appealed squarely within the provisions of section 110(1)(a).

[25] The cumulative requirements to be satisfied for leave to be granted pursuant to this subsection were helpfully set out by this court in **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009, and reaffirmed in **John Ledgister and Others v Bank of Nova Scotia Limited** [2014] JMCA App 1. Prior to these cases, this court in **Stanley Parkinson v R** (1976) 16 JLR 393, 395 approved the dicta of Waddington P (Ag) in **R v George Green** (1969) 11 JLR 305, 306 that the phrase "decisions in any civil proceedings" governs the entire sub-paragraph (section 110(1)(a)) and that the right to appeal under that sub-paragraph only lies in respect of civil proceedings.

[26] These cases have established (and there is no need to depart from these principles) that on an application for leave to appeal to Her Majesty in Council, pursuant to section 110(1)(a) of the Constitution, the applicant must show the following: (1) that the decision being appealed is a final decision in civil proceedings; and (2) that the matter in dispute on the appeal is of the value of $1,000.00 or upwards; or (3) that the appeal involves directly or indirectly a claim to or question respecting property of a

value of $1,000.00 or upwards; or (4) that the appeal involves a right of the value of $1,000.00 or upwards.

[27] With regards to the requirement that the decision must be a final decision in civil proceedings, the dicta of Morrison JA (as he then was) in **Ronham & Associates Ltd v Gayle & Wright; Gayle v Ronham Associates & Wright** [2010] JMCA App 17 proves quite instructive. Morrison JA opined at paragraph [21]:

> " [21] …The question whether an appeal is from an interlocutory or final order is one of those old controversies which, happily, may now be considered to be settled, it having been held in **White v Brunton** [1984] 2 All ER 606 that, in considering whether an order or judgment is interlocutory or final for the purposes of leave to appeal under the equivalent English statutory provisions, regard should be had to the nature of the application or proceedings giving rise to the order or judgment and not to the nature of the order or judgment itself. Accordingly, where the nature of an application is such that any order made will finally determine the matters in litigation, the order or judgment is final, thereby giving rise to an unfettered right of appeal. However, if the nature of the application that is before the court is such that the decision on that application, if given one way, will finally dispose of the matter in dispute, but if given the other way, will allow the action to go on, the matter is interlocutory; irrespective of the actual outcome. This approach, known as the 'application approach' (to be contrasted with the 'order approach'), was approved and applied by this court in **Leymon Strachan v The Gleaner Company Ltd and Dudley Stokes** (SCCA No. 54/97, judgment delivered 18 December 1998)."

[28] Brooks JA in **John Ledgister**, by reference to several authorities, stated that this court has established in numerous cases that the "application test" is the appropriate test for determining what constitutes a final decision in civil proceedings. At

paragraph [19] of the judgment, Brooks JA reiterated the dicta of Lord Esher MR in **Salaman v Warner and Others** [1891] 1 QB 734, 735, as "the clearest exposition" on the subject. Lord Esher stated:

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

[29] Having considered the decision of the single judge, the relevant law and the argument of the applicants on this issue, I conclude that the single judge was correct in his ruling that no appeal lies as of right from the decision of the court on the basis of section 110(1)(a). I say so for the following reasons.

[30] While the applicants' disgruntlement with the decision of the court can be accepted as giving rise to a dispute which involves a claim to or question respecting a right of value of $1,000.00 or upwards, it must emanate from a final decision in civil proceedings in keeping with the provisions of the subsection and the relevant authorities from this court.

[31] The proceedings in which the order was made in relation to costs was one in which an application was made for the hearing of the impugned appeal to be vacated, for the judgment based on it to be declared a nullity, and for the hearing of the appeal to commence *de novo*. The application was, in fact, made prior to the delivery of the

judgment but was amended after the judgment of the retired judges was delivered. The application was clearly made not to dispose of the substantive appeal in the civil proceedings but for the hearing to commence *de novo*. The orders granted on the application did not finally dispose of the matter in dispute between the parties in the substantive appeal or in the civil claim in the Supreme Court.

[32] It is clear that the dispute between the parties in the civil proceedings has not been finally disposed of by the decision of the court in respect of which leave to appeal to Her Majesty in Council is being sought in relation to costs.

[33] The applicants' argument to circumvent this conclusion, made through Mr Dabdoub, is that it is the decision concerning the costs of the 2013 hearing which is the subject of the dispute that they wish to take to the Privy Council, and that decision is final. This argument cannot be accepted in the glaring light of the authorities.

[34] After applying the accepted "application test", one is led to the logical and inevitable conclusion that the decision made by the court, which is now being challenged, was not a final decision in civil proceedings within the contemplation of section 110(1)(a) of the Constitution.

[35] The single judge's ruling on this aspect of the application cannot lawfully be disturbed and, accordingly, ought to be affirmed. The application to discharge or reverse the single judge's ruling made on 8 May 2018 is therefore refused.

Whether an appeal lies as of right pursuant to section 110(1)(c) of the Constitution

[36] This subsection requires that for an appeal to lie as of right, it must emanate from final decisions in any proceedings, civil, criminal or otherwise, on questions as to the interpretation of the Constitution. This provision is somewhat wider that 110(1)(a) as it encompasses proceedings other than civil proceedings but it requires nevertheless that the decision in whatever proceedings it may be must be a final decision in the proceedings. So, any proceedings from which a decision on the interpretation of the Constitution arises will similarly evoke a consideration of the question whether it was a final decision in the proceedings in order to give rise to the applicability of this sub-paragraph.

[37] The applicants would have this insurmountable hurdle to overcome in the light of the findings in relation to sub-paragraph 110(1)(a) on the issue as to whether there is a final decision in the proceedings. But quite apart from this requirement, the applicants must also satisfy the court that the decision is on a question as to the interpretation of the Constitution. In my opinion, they have failed to do so.

[38] The core argument of the applicants, as embodied in the amended notice of motion, is that the "final decision arrived at in deciding the Motion to vacate involved questions as to and involving the interpretation of Sections 106(2) of the Constitution of Jamaica, Section 16(2) of the Charter of Rights of the Constitution of Jamaica and section 19 of the Constitution". During the course of their arguments, the applicants invoked section 16(2) in advancing their complaint concerning the delay in the delivery

of the judgment and the failure of the retired judges to avail themselves of the provisions of section 106(2) in order to lawfully deliver the judgment. They contend, therefore, that their constitutional right enshrined in section 16(2) had been infringed in the circumstances.

[39] Section 16(2) provides that:

> "In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."

[40] Section 106(2) of the Constitution reads:

> "(2) Notwithstanding that he has attained the age at which he is required by or under the provisions of this section to vacate his office a person holding the office of Judge of the Court of Appeal may, with the permission of the Governor-General, acting in accordance with the advice of the Prime Minister, continue in office for such period after attaining that age as may be necessary to enable him to deliver judgment or to do any other thing in relation to proceedings that were commenced before him before he attained that age."

[41] In response to the applicants' contention that they are entitled to compensation by way of costs for the alleged breach of their constitutional right to a fair hearing, the Attorney General raised section 19(1) to block the application for relief on constitutional grounds in this court.

[42] Section 19 provides:

"19. – (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter to the protection of which the person concerned is entitled.

(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.

(5) Any person aggrieved by any determination of the Supreme Court under this section may appeal therefrom to the Court of Appeal.

(6) Parliament any make provision or authorize the making of provision with respect to the practice and procedure of any court for the purposes of this section and may confer upon that court such powers, or may authorize the conferment thereon of such powers, in addition to those conferred by this section, as may appear to be necessary or desirable for the purpose of enabling that court

> more effectively to exercise the jurisdiction conferred upon it by this section."

[43] It was argued on behalf of the Attorney General during the course of the hearing of the motion to vacate the hearing that the applicants' complaint as to breach of their right to a fair hearing within a reasonable time was not one that could properly be determined in the context of these proceedings. Mrs Foster-Pusey argued that the Court of Appeal only has an appellate jurisdiction in constitutional matters and that the original jurisdiction to hear and determine such matters lies only in the Supreme Court. The learned Solicitor General contended further that the question of whether or not there had been a breach of the applicants' right to a fair hearing within a reasonable time necessitates detailed evidence and information from the body that is said to have committed the breach. She, therefore, urged the court to refuse to grant relief on constitutional grounds given the failure of the applicants to adopt what she called the "correct course" in seeking constitutional relief. The applicants' approach, she argued, had deprived the court and the parties of the benefit of the evidence in relation to the reasons for the delay in delivering the judgment and any mitigating factors so as to determine whether the delay may be justified.

[44] Morrison P concluded, after setting out the provisions of section 19, as urged on the court by the learned Solicitor General, that "substantially for the reasons" advanced by her, the applicants' complaint of a breach of their constitutional right to a fair hearing guaranteed by section 16(2) of the Charter of Rights "is best brought and resolved in the Supreme Court".

[45] Phillips JA also stated:

> "I am in agreement with the submissions of the learned Solicitor General, Mrs Foster Pusey QC, that the applicants' complaint of a breach of their right to a fair hearing within a reasonable time is not one that can properly be determined in the context of these proceedings."

[46] Brooks JA, although recognising that it is "undoubtedly true that constitutional issues have, on occasion, been first raised in cases at the appellate level" did not depart from the line of reasoning that the Supreme Court is best suited to determine the issues that are usually raised in those cases because evidence is usually required, particularly evidence from the party said to have breached the relevant constitutional right. He did not categorically say that this court had no jurisdiction to consider the issue but stated that it should decline jurisdiction to do so because evidence in response to explain the delay was necessary and no such evidence was adduced before the court. He declared: "…section 19 of the Constitution should be followed. The applicants are at liberty to pursue that matter with the Supreme Court if they are so minded".

[47] Mr Dabdoub's argument before us is that the learned Solicitor General wrongly led the learned judges to misinterpret section 19 of the Constitution, thereby leading them in error. According to Mr Dabdoub, the court erred in concluding, in effect, that the claim for the costs thrown away as redress for the constitutional breach should be brought in the Supreme Court. He relied on the portion of section 19(1) which states "without prejudice to any other action with respect to the same matter which is lawfully available". Counsel also argued that this court, having already been seised of the matter, ought not to have concluded that jurisdiction lies in the Supreme Court over a

matter that is within the jurisdiction of the court. His argument is that this court is the proper forum.

[48] In my view, the contention of the applicants that there was a question involving the interpretation of section 16(2) lacks merit. The applicants merely relied on that provision to establish their claim for relief by way of compensation for the costs thrown away as a result of its declared invalidity of the prior proceedings. There is no question involving the interpretation of that provision because it was intended to be merely applied by the court but the court declined to consider the question as to whether that right enshrined in section 16(2) was breached. There is no final decision which involves its interpretation.

[49] The same may be said of section 106(2). The court, in seeking to apply section 106(2), evidently read it in light of section 106(3) and grappled with the meaning of section 106(3) and not section 106(2). Section 106(3) was raised in the course of determining whether section 106(2) rendered the judgment of the retired judges a nullity. The declaration of nullity was based purely on the straight application of section 106(2), which needed no interpretation. In any event, the court applied a meaning to section 106(3), which proved favourable to the applicants and this is not the subject of any application for leave to appeal.

[50] The decision of the court and the proposed appeal that the applicants wish to submit to Her Majesty in Council do not involve the question concerning the interpretation of section 106(2) as contended by them. Therefore, the argument

advanced on behalf of the applicants that the decision involved the interpretation of section 106(2) cannot hold.

[51] The applicants have contended further that section 19 of the Constitution was misinterpreted by the court. It is quite clear that all three judges rested their decision to decline the application for redress for constitutional breach on the basis of section 19, and that the matter would be best addressed in the Supreme Court.

[52] None of the judges, however, has expressly stated, as contended by the applicants, that the court had no jurisdiction to entertain such matters. In fact, apart from Brooks JA, who alluded to the fact that there have been cases in which constitutional issues have been raised at the appellate level, for the first time, there was no clear and definitive comment or ruling on the learned Solicitor General's argument concerning the court not having the jurisdiction to address the issue by virtue of section 19. The majority of the court (Morrison P and Brooks JA) seemed more concerned with the absence of evidence in relation to that allegation of breach of constitutional right to a fair hearing within reasonable time and the lack of opportunity given for the retired judges to respond to the allegation.

[53] So, Mr Dabdoub's argument that the court misconstrued section 19 is not at all borne out from the reasoning of the court as the court did not delve, in any way, into an interpretation of the provisions, to treat with the contention of the learned Solicitor General that this court does not have the jurisdiction to entertain the claim for relief on constitutional grounds. Additionally, there is nothing from the judgment indicating that

the applicants had raised any part of section 19 for the interpretation of the court so that it could be said that the section fell to be construed by the court in arriving at its decision. Queen's Counsel acting on behalf of the applicants at the hearing was seemingly content to rely on cases to demonstrate that the application for redress could be entertained by this court. There was no clear dispute or debate centred around the interpretation of section 19 and, in particular, the phrase being relied on by Mr Dabdoub, which had to be settled by the court. It cannot be said, with any reasonable degree of conviction on my part, that the decision of the court was on a question interpreting or construing section 19.

[54] The court obviously did not base its decision on any question of the interpretation of section 19 but rather on the application of the provisions to the circumstances before it. The allegation of a misinterpretation does not, by itself, render the decision of the court one involving a question as to the interpretation of section 19.

[55] In **Norton Wordworth Hinds and Others v The Director of Public Prosecutions** [2018] JMCA App 10, this court, in determining the ambit of section 110(1)(c), made reference to the dicta of the Privy Council in **Eric Frater v R** [1981] 1 WLR 1468 as to the need for the court, in considering whether leave ought to be granted pursuant to this sub-paragraph, to draw a distinction between the interpretation of the Constitution and its application to the facts under examination by a court. Their Lordships cautioned that "vigilance should be observed" to ensure that claims made by appellants to be entitled to appeal as of right under section 110(1)(c) are not granted "unless they do involve a genuinely disputable question of

interpretation of the Constitution" and not merely contrived for the purpose of obtaining leave to appeal as of right.

[56] Based on this guidance, I cannot say, with any reasonable degree of conviction, that there was a final decision on a question on the interpretation of the Constitution for leave to be granted as of right pursuant to section 110(1)(c).

[57] In fine, the applicants have failed to satisfy me that they ought to be granted leave as of right to appeal to Her Majesty in Council from the decision of the court.

[58] It is incumbent on the applicants, if they are to succeed on the motion, to show that they have satisfied the criteria for leave to be granted pursuant to section 110(2)(a). This now leads to a consideration of that provision.

Whether question(s) raised in the proposed appeal should be submitted to Her Majesty in Council pursuant to section 110(2)(a) of the Constitution

[59] For the applicants to succeed in their motion, they must show that the question involved in the appeal is one arising from civil proceedings that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council. There is no need to establish that it is a final decision as required under 110(1).

[60] The history of this court is replete with decisions in which section 110(2)(a) has been considered and the principles governing its application well defined, circumscribed and established. Indeed, the decisions of the court on what is to be construed as a question, which by its great general or public importance or otherwise ought to be

submitted to Her Majesty in Council, have been clear and consistent. The necessary guidance in treating with this aspect of the motion is therefore obtained from those previous decisions of this court. See for instance, **Georgette Scott v The General Legal** ; **Michael Levy v Attorney General of Jamaica and Another** [2013] JMCA App 11; **Viralee Bailey-Latibeaudiere v The Minister of Finance and Planning and the Public Service and others** [2015] JMCA App 7; **National Commercial Bank Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27 and **Emanuel Olasemo v Barnett Limited** (1995) 32 JLR 470.

[61] In **National Commercial Bank Limited v The Industrial Disputes Tribunal and Peter Jennings,** Morrison P usefully noted at paragraph [33] what is meant by "great general or public importance" in these terms:

> "[33] ...in order to be considered one of great general or public importance, the question involved must, firstly, be one that is subject to serious debate. But it is not enough for it to give rise to a difficult question of law: it must be an important question of law. Further, the question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations; and is of general importance to some aspect of the practice, procedure or administration of the law and public interest..."

[62] If the question cannot be said to be of great general or public importance, it can nevertheless be submitted for the consideration of Her Majesty in Council if it is such that it ought otherwise to be submitted.

[63] This court stated in **Emanuel Olasemo v Barnett Limited**, at page 476:

> "Is the question involved in this appeal one of great general or public importance *or otherwise?* The matter of a contract between private citizens cannot be regarded as one of great general or public importance. **If the applicant is to bring himself within the ambit of this subsection he must therefore do so under the rubric 'or otherwise'. Clearly the addition of the phrase 'or otherwise' was included by the legislature to enlarge the discretion of the Court to include matters which are not necessarily of great general or public importance, but which in the opinion of the Court may require some definitive statement of the law from the highest Judicial Authority of the land. The phrase 'or otherwise' does not per se refer to interlocutory matters. 'Or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to Their Lordships Board for guidance on the law**." (Emphasis added)

[64] The questions proposed by the applicants in the amended notice of motion that they say are of great general and public importance or which ought otherwise to be submitted to Her Majesty in Council are set out in the following terms:

> "C. ... [W]hether a litigant who suffers loss as a result of the failure of an arm of the [S]tate (the judiciary) to abide by express constitutional provisions is entitled to be compensated by the State through the Attorney General for Jamaica who was made an interested party to the application and who made lengthy submissions to the Honourable Court of Appeal.
>
> D. ...[W]hether a litigant who has expended costs in the hearing of an appeal is entitled to be paid, by the State, the costs thrown away as a result of the Judgment of the Court being declared a nullity because of the failure by the Judges, who retire pursuant to section 106(1) of the Constitution of Jamaica, to comply with the provisions of Section 106(2) of the Constitution of Jamaica..."

[65] In the written submissions filed on behalf of the applicants and in the oral arguments presented to the court, Mr Dabdoub presented the following issues as those

arising from the decision of the court, which the applicants contend are worthy of Her Majesty's consideration because of their great general or public importance or which otherwise ought to be submitted:

> "(a) What is the correct interpretation of section 19 of the Constitution of Jamaica in respect to [sic] the jurisdiction of the Court of Appeal to hear and determine constitutional issues and give redress for breaches of the Constitution of Jamaica, particularly in a substantive appeal which the Court is seized of. [as amended in oral arguments]
>
> (b) The jurisdiction and power of a division of the Court of Appeal, in a substantive appeal before it, [to] entertain a Motion to declare, null and void, the hearing of the Appeal by another division of the Court of Appeal consisting of Judges who were validly and lawfully appointed and competent to hear the Appeal and reserve Judgment.
>
> (c) The jurisdiction and power of the Court of Appeal to award redress in the form of compensation for costs thrown away to be paid by the State to a litigant arising from the hearing of an appeal in which Judgment of the Court has been declared null and void and of no legal effect by reason of the fact that the Judges who heard the Appeal failed to apply pursuant to section 106(2) for permission to continue in office for the purpose of delivering Judgment.
>
> (d) The jurisdiction and power of the Court of Appeal to deal with the award of redress to a litigant in the form of an order that the [S]tate do pay to the litigant the costs thrown away arising from the hearing of the appeal, in circumstances where it has declared the judgment of a division of the Court of Appeal null and void and of no legal effect."

[66] Having reviewed the decision of the court against the backdrop of the law, and the arguments of the parties, in particular, the applicants, and the Attorney General in response, I do make the following findings based on the reasons I will express.

The jurisdiction of the court to hear claims of breach of constitutional rights

[67] The point raised by the applicants concerning section 19 of the Constitution and the jurisdiction of this court to hear and determine an application for constitutional redress in a matter it is seised of and where the breach alleged arises from the conduct of the case, whilst it is within the jurisdiction of this court, is one which was not definitively addressed in a clear and unequivocal way in the decision of the court. Brooks JA identified as an issue for the court: "the jurisdiction of this court to consider and decide on whether there has been any breach of the constitutional rights of the parties to the appeal". He made no definitive statement of law on this. However, by saying he would decline jurisdiction seems to suggest that he accepted that the court has jurisdiction to do so but that this is not an appropriate case in which the court ought to exercise its jurisdiction.

[68] Both Morrison P and Phillips JA have recorded that Mrs Foster-Pusey had contended that the court was not empowered to be the first to make a determination on the question of whether the applicants' fundamental rights to a fair hearing within reasonable time had been abrogated and to provide redress in respect of same because the court is an appellate court and does not have original jurisdiction as provided in section 19. It is not clear from their judgments whether or not they accepted that aspect of the arguments of Mrs Foster-Pusey.

[69] It seems, given the absence from the court of any definitive statement of law on the matter of the jurisdiction of the court to grant relief in cases raised before it for the first time in respect of matters within its jurisdiction and the evident views of the learned Solicitor General which is rejected by the applicants, that the issue is one that could be submitted to Her Majesty in Council for a definitive statement on the point. The point is of importance beyond the parties and the specific circumstances of this particular case. It could be viewed as one of great general or public importance.

[70] Even if it is not one of such great importance, as the Attorney General contends, it is one that ought to be considered by the highest court under the rubric of "or otherwise ought to be submitted" under section 110(2). It seems fitting that any alleged breach of an individual's constitutional rights arising from the conduct of cases in the courts by the judiciary, especially at this level, must be made the subject of thorough scrutiny. The allegation is made against the highest court in the country in relation to a matter within its remit. The question arises whether in the circumstances, the court with the jurisdiction or best able to determine the issue is the Supreme Court, which is lower in the hierarchy.

Refusal of claim for costs thrown away to be paid by the Attorney General

[71] In terms of the issue of the refusal of the court to make an order that the applicants are entitled to be paid the costs thrown away and that the costs should be paid by the Attorney General, on behalf of the State, I would allow this issue also to proceed for the consideration of Her Majesty in Council. This issue is inextricably bound up with the issue of redress for the alleged constitutional breach of the right to a fair

hearing within a reasonable time arising from the retired judges' delivering the judgment after they had retired and having failed to act in accordance with section 106(2) of the Constitution.

[72] In coming to a determination not to make an award for the costs thrown away and for it to be made against the Attorney General, Morrison P recognised that the claim for an order for costs thrown away to be paid by the Attorney General hinged on the issue of redress for the breach of a constitutional right. The learned President, in proposing that no order be made, used as his starting point the principle that the award of costs is a matter within the complete discretion of the court. He referenced section 30(3) of the Judicature (Appellate Jurisdiction) Act and rule 1.18 of the Court of Appeal Rules, which allows this court to apply the provisions of part 64 and 65 of the Civil Procedure Rules (the CPR). Having had regard to the general rule relating to an award of costs set out in rule 64.6(1), that the court should order the unsuccessful party to pay the costs of the successful party, he concluded that the general rule did not apply in these circumstances as there was neither a successful nor an unsuccessful party. This, he said, "is because the hearing of the appeal, on the reasoning set out above, has been rendered a nullity by the retirement of the judges, who heard it" (paragraphs [204] –[205]).

[73] In respect of the costs relating to the motion, the learned President said:

> "There was likewise, neither a successful nor an unsuccessful party in the present application. The respondents did not contest this aspect of the application, and so would not be ordinarily liable for the costs thereof." (paragraph [206])

[74] The President, in dealing with the applicants' contention that the Attorney General should be liable to pay the costs thrown away, concluded that (i) although the Attorney General contested the application for an order for costs, she would not ordinarily be liable to costs, as she was joined as an interested third party; (ii) although the motivation for joining the Attorney General was largely to render her liable for the costs, that liability would have been "resultant on an order for redress for a claimed breach of the applicants' constitutional rights. That claim has not been resolved in this application…"; and (iii) there are no exceptional circumstances in the case which would make it just to award the costs against the Attorney General in these proceedings, pursuant to rule 64.9 of the CPR.

[75] Brooks JA, for his part, similarly, stated:

> "[233] The costs thrown away are not the fault of either party. None should be called upon to pay the other in that regard. Nor should the Attorney-General, who was not a party, be called upon to shoulder the costs of either party. A payment by that official could only arise if there has been a court order that the constitutional rights of one party or the other has been breached. That is an order to be made by the Supreme Court, after due consideration of the case. There has been no court order to that effect.
>
> [234] The appropriate order therefore should be that there should be no order as to costs of this application and that each party should bear its own costs thrown away by virtue of the previous hearing having been declared a nullity."

[76] Phillips JA said she was content to agree with her brothers.

[77] The order that was ultimately made was that there be no order as to costs in respect of the nullified appeal proceedings and the motion which was heard.

[78] It is accepted that the issue of an award of costs lies within the discretion of the court. It is also established that the discretion must be exercised judicially. One of the arguments of Mr Dabdoub, which he phrased as an observation, but which cannot be overlooked, given what I would regard as the novel and unusual circumstances of this case, is that the order in relation to costs "seems to be an effort on the part of the Learned Judges to excuse and/or absolve the retired Judges from any blame in not delivering a timely judgment".

[79] I will make no comment on this expressed observation of counsel. I will say however that, given the peculiar circumstances from which these proceedings emanate, the issue as to the liability for costs thrown away in these circumstances and the liability, if any, of the State which was joined as an interested party for such costs to be recovered, seems an issue that ought to be subjected to the consideration of the highest court of the land. It is intimately connected and inextricably bound up with the question of the jurisdiction of the court to grant redress by way of compensation in costs for an alleged constitutional breach in respect of a matter before it and so both issues should, in my view, travel together for determination.

[80] The input and final word of Her Majesty in Council on such important matters touching and concerning the execution of the judicial role within our constitutional framework, which guarantees certain rights and freedoms to every individual in Jamaica, can only be of significant value to the administration of justice. As Brooks JA commented at the start of his judgment at paragraph [155], "[t]his case is perhaps, the most extreme example of the state of crisis which threatens this court".

[81] The finding that the circumstances are not so exceptional so as to make it just for the Attorney General to pay the costs as an interested party is something worthy of consideration by the highest court and would serve to settle the jurisprudence on this question, once and for all, for the guidance of the court and litigants on similar matters which are now, increasingly, being brought to the court.

[82] Furthermore, this issue too, even if not of great general or public importance, certainly falls within the "or otherwise" rubric in section 110(2) which renders it suitable to be submitted to Her Majesty in Council.

The nullification of the hearing conducted by the retired judges

[83] Mr Dabdoub raised the issue of the propriety of the court's order declaring the hearing of the appeal by the retired judges a nullity. This was not part of the amended notice of motion for leave to appeal. He was, however, allowed to argue this point. I find it rather curious that the applicants would be taking issue with the order of the court declaring the hearing a nullity. Whether the hearing was vacated or nullified, the effect would have been the same. It could not stand once the judgment was set aside for the hearing to recommence before a fresh panel. The contention that the court had no jurisdiction to nullify the hearing rather than vacating it would only be for academic purposes as it would yield the applicants no benefit whatsoever because they had already secured an order that the judgment is null and void and that the hearing be commenced afresh. There is no application for leave to appeal that finding. Once the judgment of that retired panel of judges was set aside, then a new hearing must ensue before a differently constituted panel. I see nothing of great general or public

importance or otherwise for this issue to be submitted to Her Majesty in Council for consideration.

Conclusion

[84] In the final analysis, I am satisfied that the criteria laid down under section 110(1)(a) and (c) of the Constitution for conditional leave to be granted as of right are not satisfied by the applicants.

[85] I am, however, of the view that the applicants have satisfied the criteria for an appeal to be made to Her Majesty in Council pursuant to section 110(2)(a) in relation to the following questions:

(1) Whether the Court of Appeal has the jurisdiction and, if so, whether it is the proper forum to hear and determine an allegation of breach of the constitutional right to a fair hearing within a reasonable time of a party to an appeal, which is raised for the first time during the course of the appeal and which relates to the conduct of the case on appeal by judges of the court, who had retired before judgment was delivered and who failed to obtain an extension of time for the purpose of delivering the judgment in accordance with section 106(2) of the Constitution.

(2) Whether a litigant who has incurred costs in the hearing of an appeal, which has been nullified as a result of the failure of the presiding judges to comply with the provisions of section 106(2) of the

Constitution, consequent on their retirement, is entitled to be paid, by the State, the costs thrown away as redress for breach of the Constitution.

(3) Whether the Attorney General should, on behalf the State, pay the litigants in the appeal who has incurred costs, the costs thrown away arising from the nullified hearing of the appeal in circumstances in which the Attorney General was not a party to the substantive proceedings but was joined as an interested party on the motion for the hearing to be vacated and the judgment declared a nullity.

[86] For the reasons stated above, I would grant conditional leave for the applicants to appeal to Her Majesty in Council pursuant to section 110(2)(a).

F WILLIAMS JA

[87] I have read in draft the judgment of my sister, McDonald-Bishop JA. I agree with her reasoning and conclusion and I have nothing useful to add.

PUSEY JA (AG)

[88] I too have read in draft the judgment of my sister, McDonald-Bishop JA. I agree with her reasoning and conclusion and I have nothing to add.

MCDONALD-BISHOP JA

ORDER

1) The application for the discharge or reversal of the single judge's order made on 25 May 2018, refusing to grant leave for the applicants

to appeal as of right to Her Majesty in Council from the decision of this court made on 26 April 2018, pursuant to section 110(1)(a) of the Constitution, is refused. The order of the learned single judge is affirmed.

2) The application for conditional leave to appeal to Her Majesty in Council as of right from the decision of this court made on 26 April 2018, pursuant to section 110(1)(c) of the Constitution, is refused.

3) Leave to appeal to Her Majesty in Council from the decision of this court made on 26 April 2018 is granted, pursuant to section 110(2)(a) of the Constitution, in respect of the following questions:-

    (i) Whether the Court of Appeal has the jurisdiction and, if so, whether it is the proper forum to hear and determine an allegation of breach of the constitutional right to a fair hearing within a reasonable time of a party to an appeal, which is raised for the first time during the course of the appeal and which relates to the conduct of the case on appeal by judges of the court, who had retired before judgment was delivered and who failed to obtain an extension of time for the

purpose of delivering the judgment in accordance with section 106(2) of the Constitution.

(ii) Whether a litigant who has incurred costs in the hearing of an appeal, which has been nullified as a result of the failure of the presiding judges to comply with the provisions of section 106(2) of the Constitution, consequent on their retirement, is entitled to be paid, by the State, the costs thrown away as redress for breach of the Constitution.

(iii) Whether the Attorney General should, on behalf the State, pay the litigant in the appeal who has incurred costs, the costs thrown away arising from the nullified hearing of the appeal in circumstances in which the Attorney General was not a party to the substantive proceedings but was joined as an interested party on the motion for the hearing to be vacated and the judgment declared a nullity.

4) Leave to appeal is granted on the following conditions:-

a) The applicants shall within 30 days of the date of this Order enter into good and sufficient security in the sum of $1000.00 for the due prosecution of the appeal and payment of all such costs as may become payable by the applicants in the event of their application for final leave to appeal not being granted, or of the appeal being dismissed for want of prosecution, or of the Judicial Committee ordering the applicant to pay costs of the appeal; and

b) The applicants shall within 90 days of the date of this Order take the necessary steps to procure the preparation of the record and the dispatch thereof to England.

5) The costs of and incidental to this motion shall await the determination of the appeal to Her Majesty in Council.