JAMAICA

IN THE COURT OF APPEAL

MOTION NO 8/2016

SUPREME COURT CIVIL APPEAL NO 70/2015

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**NATIONAL COMMERCIAL BANK JAMAICA LIMITED**	**APPLICANT**
AND	**THE INDUSTRIAL DISPUTES TRIBUNAL**	**1ST RESPONDENT**
AND	**PETER JENNINGS**	**2ND RESPONDENT**

Gavin Goffe and Adrian Cotterell instructed by Myers Fletcher & Gordon for the applicant

Douglas Leys QC, Douglas Thompson and Miss Kenika Brissett for the 2nd respondent

10 March 2017

MORRISON P

[1] As is well known, section 110(2)(a) of the Constitution of Jamaica ('the Constitution') provides that an appeal shall lie to the Privy Council, with the leave of this court, "from decisions of the Court of Appeal in any civil proceedings, where in the opinion of the [court] 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 ..."

[2] On 11 November 2016, this court dismissed the applicant's motion, made pursuant to section 110(2)(a), for conditional leave to appeal to the Privy Council ('the application') from the decision of this court given in the matter of **National Commercial Bank v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA Civ 24. As regards the costs of the application, the court ordered as follows:

> "The applicant shall have 14 days from the date of this order to submit in writing why costs should not follow the event. If no such submissions are received then the applicant shall pay the 2nd respondent's costs of this application, to be taxed if not sooner agreed."

[3] On 25 November 2016, in keeping with the court's order, the applicant filed written submissions in support of its position that this court should make no order as to costs of the application.

[4] The applicant relies on rule 1.18(1) of the Court of Appeal Rules 2002 ('the CAR') and Parts 64 and 65 of the Civil Procedure Rules 2002 ('the CPR'). By virtue of the former, the latter are made applicable to the award and quantification of costs on an appeal to this court, "subject to any necessary modifications...". The applicant relies in particular on rule 64.6 of the CPR, which provides that:

> "(1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.
>
> (3) In deciding who should be liable to pay costs the court must have regard to all the circumstances."

[5] The applicant draws attention to the fact that, among the factors identified in CPR 64.6(4) as matters to which the court should have regard in deciding who should be liable to pay the costs of any proceedings, is "whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings" (CPR 64.6(4)(b)). And further, that CPR 64.6 (5) provides that the orders which the court may make under this rule include an order "that a party must pay ... a proportion of another's party's costs" (CPR 64.6(5)(a)).

[6] Against this background, the applicant submits that the 2nd respondent was unsuccessful on the main thrust of the arguments he advanced in opposing the application, in that the 2nd respondent's counsel devoted the greater part of his written submissions and oral arguments to the contention that this court did not have the jurisdiction to grant leave, because the court's judgment from which it was sought to appeal was not a 'decision' within the meaning of section 110(2)(a) of the Constitution. In this regard, the applicant points out that, of the 11 pages containing his written submissions, the 2nd respondent dealt with this unsuccessful argument on all of seven

of those pages. On the other hand, the 2nd respondent devoted only two pages, as an alternative submission, to the issue upon which the court ultimately based its decision to refuse leave, that is, the question of whether the criterion of great general or public importance had been met. And further still, the 2nd respondent dedicated the remaining pages of his written submissions to a third – also unsuccessful - argument concerning the manner in which the applicant formulated the supposed questions of public importance. In other words, the applicant submits, because "the vast majority of the 2nd Respondent's time and resources were poured into arguments that were quite clearly bound to fail", the applicant should not bear those costs.

[7] The applicant also makes reference to the decisions of this court in **Viralee Bailey-Latibeaudiere v The Minister of Finance and Planning and the Public Service, The Financial Secretary, The Public Service Commission and The Attorney General of Jamaica** [2015] JMCA App 7; and **Georgette Scott v The General Legal Council (Ex – Parte Errol Cunningham)** (SCCA No 118/2008, Motion No 15/2009, judgment delivered 18 December 2009). In both cases, the applicant points out, no order for costs was made in consequence of unsuccessful contested applications for conditional leave to appeal to the Privy Council.

[8] However, I am bound to say at once, naturally with respect, that I find neither case of great assistance on the point, the court not having indicated in either of them the considerations which informed the decision to make no order as to costs. Perhaps the only point of significance to be gleaned from the **Viralee Bailey-Latibeaudiere**

decision is that, in that case, both the applicant and the respondents applied unsuccessfully for leave to appeal to the Privy Council under section 110(2)(a), therefore suggesting that the court's decision to make no order as to costs might have been a reflection of the fact that, in the result, neither side had prevailed. But, in any event, costs being ultimately a matter for the discretion of the court in the light of the particular circumstances of each case, the fact that the court made no order as to costs in these cases cannot without more advance the applicant's position in this case.

[9] The applicant makes two final points in support of its submission that there should be no order as to costs. First, that although the 1st respondent did not participate in these proceedings, the application concerned "the legality of the 1st Respondent's award and questioned the very essence of the 1st Respondent's jurisdiction, as opposed to personal rights claimed by [the 2nd respondent]". In these circumstances, since the applicant's objective was to impeach the 1st respondent's award, "[p]rimary responsibility for defending that decision would fall on it, and not on the 2nd Respondent". And second, that the application, which was supported by reasonable arguments, was made by the applicant "in a genuine effort to seek clarity from Her Majesty in Council".

[10] In considering the issue of what order to make in relation to the costs of this application, I think it is important to maintain focus on what the application was about. The applicant sought leave to appeal to the Privy Council on the ground that the proposed appeal gave rise to questions of great general or public importance. The 2nd

respondent opposed the application, maintaining that (i) the court had no jurisdiction to make the order; (ii) the application was not put forward in proper form; and (iii) no questions of great general or public importance were raised by the proposed appeal. As the applicant correctly observes, the 2nd respondent prevailed on point (iii), but not on points (i) and (ii).

[11] In these circumstances, while I accept that it might be possible to say that, in a sense, the 2nd respondent succeeded on one issue but failed on the others, it seems to me that to view the matter in this way is to mischaracterise the true essence of the application. For, irrespective of the ground of opposition which ultimately prevailed, the fact is that the applicant failed to obtain the leave which it sought to appeal to the Privy Council. So the situation is therefore, in my view, plainly distinguishable from the case of, say, a personal injury claim, in which the defendant succeeds in establishing that the claimant was to an extent contributorily negligent: in such a case, upon the claimant's damages being reduced to the extent of the contribution, one can readily see that it might be possible for the defendant to argue that, for the purposes of determining the appropriate costs award, he had succeeded on a particular issue, even if he had not been successful "in the whole of the proceeding". However, in the instant case, the applicant has received no part of what it sought on the application. Put the other way, the 2nd respondent has achieved his objective, which was to prevent the applicant obtaining leave to appeal to the Privy Council.

[12] In these circumstances, I find it difficult to discern a basis upon which to deprive the 2nd respondent of the costs of successfully resisting the application. In so saying, I have not lost sight of the applicant's additional points, relating to the fact that the 2nd respondent was, in effect, fighting the absent 1st respondent's battles and the sincerity of the applicant's desire to seek clarity from the Privy Council on the various issues in the case. But these considerations cannot, in my judgment, serve to displace the 2nd respondent's *prima facie* right to his costs as the successful party to the application.

[13] In the result, I would award the 2nd respondent his costs of the application, such costs to be taxed if not sooner agreed.

MCDONALD-BISHOP JA

[14] I have read the ruling prepared by the learned President on the matter of costs. I agree with it and have nothing to add.

P WILLIAMS JA

[15] I also agree.

MORRISON P

ORDER

Costs of the application for conditional leave to appeal to Her Majesty-in-Council to be paid by the applicant to the 2nd respondent, such costs to be taxed if not agreed.