[2025] JMCA Civ 21

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MISS JUSTICE STRAW JA
THE HON MRS JUSTICE V HARRIS JA
THE HON MR JUSTICE LAING JA

SUPREME COURT CIVIL APPEAL NO COA2024CV00055

BETWEEN	**THE ATTORNEY GENERAL OF JAMAICA**	**APPELLANT**
AND	**PHILLIP PAULWELL**	**1ST RESPONDENT**
AND	**PETER BUNTING**	**2ND RESPONDENT**
AND	**PAULA LLEWELLYN**	**INTERVENER**

Written submission filed by Livingston, Alexander & Levy for the appellant

Written submissions filed by Hylton Powell for the respondents

Written submissions filed by Samoi Campbell for the intervener

11 July 2025

(Ruling on Costs)

STRAW JA

[1] I have read, in draft, the ruling made by Laing JA on costs. I agree with his reasoning and conclusion and have nothing to add.

V HARRIS JA

[2] I, too, have read in draft, the ruling made by Laing JA on costs and agree with his reasoning and conclusion. There is nothing that I can usefully add.

LAING JA

[3] The background to this ruling on costs is set out in detail in the judgment of this court in **The Attorney General of Jamaica v Phillip Paulwell and others** [2024] JMCA Civ 47 and only needs to be briefly stated.

[4] The respondents challenged the constitutionality of the Constitution (Amendment of sections 96(1) and 121(1)) Act, 2023 ('the amending Act'), which increased the retirement age for the Director of Public Prosecutions ('DPP') and the Auditor General from 60 to 65 years. The Full Court, after considering the issues raised before it, found section 2(1) of the amending Act to be valid, the effect of which was to amend section 96(1) of the Constitution. However, the Full Court struck down section 2(2) of the amending Act, declaring it to be null, void and of no legal effect.

[5] The appellant appealed the striking down of section 2(2) of the amending Act, and the respondent filed a counter-notice of appeal seeking to overturn the finding of the Full Court in respect of section 2(1) of the amending Act and to affirm the decision in respect of section 2(2).

[6] Miss Paula Llewellyn KC, the incumbent DPP, was permitted to intervene in the appeal and, through her attorney-at-law, made written and oral submissions at the hearing of the appeal.

[7] The hearing of the appeal took place over five days and, on 20 December 2024, this court made the following orders:

> "1. The appeal is allowed.
>
> 2. It is declared that section 2(2) of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 is a valid constitutional amendment.
>
> 3. Judgment entered for the appellant.
>
> 4. The counter-appeal is dismissed.

5. We affirm the decision of the Full Court that section 2(1) of the Constitution (Amendment of Sections 96(1) and 121(1)) Act, 2023 is a valid constitutional amendment.

6. Accordingly, given the failure of the Full Court to so declare in the proceedings below, and for the avoidance of doubt, it is declared that section 2(1) applies to the incumbent DPP.

7. Costs of the appeal and costs below to the appellant to be paid by the respondents and to be agreed or taxed unless the respondents within 14 days of the date of this order file and serve written submissions for a different order to be made in relation to costs. The appellant shall file written submissions in response to the respondents' submissions within seven days of service upon them of the respondents' submissions. The court will thereafter consider and rule on the written submissions.

8. The court would make no order as to costs concerning the intervener unless within 14 days of the date hereof, the intervener or any other party files submissions for a different costs order to be made.

9. If no submissions are made within the time specified at paras. 7 and 8 above for different costs orders to be made, the orders made herein as to costs shall stand as the final order of the court."

[8] Pursuant to the orders made at 7 and 8, the respondents and the intervener filed their respective submissions in respect of costs on 14 February 2025. The respondents sought to have order 7 vacated and that there be no order as to costs, or alternatively that each party be made to bear their own costs in this court and the court below. The intervener sought to have costs awarded to her. The appellant, in reply, submitted that the court ought not to depart from the general principle of awarding costs to the successful party and should uphold the costs order made on 20 December 2024 in favour of the appellant.

Submissions on behalf of the respondents

[9] Counsel for the respondents, in their submissions, referred to rule 56.15(5) of the Civil Procedure Rules ('CPR'), which prohibits costs orders against unsuccessful applicants

for administrative orders unless the applicants acted unreasonably in bringing the claim or in the conduct of the application.

[10] While acknowledging that the Court of Appeal Rules ('CAR') did not incorporate Part 56 of the CPR, counsel noted that this court has often applied rule 56.15(5) in appeals similar to this one and relied on the case of **Jamaicans for Justice v Police Service Commission and The Attorney General** [2015] JMCA Civ 12 in support of that assertion. Therefore, counsel urged this court to consider this rule in the determination of the question of liability for costs.

[11] Counsel submitted that, in any event, under rule 64.6 of the CPR which sets out the general rule that the unsuccessful party pays the costs of the successful party, the court retains the discretion to deviate from the general rule and to make no order as to costs or an order for each party to bear its own costs, having regard to all the circumstances of the case.

[12] Counsel highlighted several factors warranting a departure from the general rule. Firstly, the respondents' conduct in bringing the claim was reasonable, and neither the Full Court nor the Court of Appeal made any findings to the contrary. Secondly, this was a significant and unusual case that raised important constitutional questions concerning the office of the DPP, which are of general public interest and for which there are no direct case law authorities. Thirdly, although the appellant succeeded on the appeal and the counter-appeal, not all issues were decided in his favour. Further, some grounds were conceded or not pursued by the respondents, saving the court's time. In light of these factors, counsel submitted that the appropriate order is for no order as to costs in both the court below and this court.

Submissions on behalf of the intervener

[13] Counsel for the intervener, in their written submissions, acknowledged that while the general rule is that costs follow the event, section 30(3) of the Judicature (Appellate Jurisdiction) Act gives this court absolute discretion in awarding costs. The case of **Bolton**

Metropolitan District Council v Secretary of State for the Environment; et al (Practice Note) [1995] 1 WLR 1176 ('**Bolton**') was cited as being demonstrative of this. Counsel also submitted that rules 64 and 65 of the CPR are incorporated into the CAR by rule 1.18(1). In particular, counsel referred to rule 64.3 of the CPR, which confirms the court's discretion to award costs requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings.

[14] Relying on **Bolton**, counsel outlined relevant guidance regarding costs for third-party interveners. Counsel summarised the key principles as follows: (i) where multiple parties are represented, the losing party will only be required to pay more than one set of costs if further costs are justified in the circumstances; and (ii) a second costs order may be justified where the intervener raises a distinct issue not addressed by the main parties, or where the intervener has an interest which requires separate representation.

[15] Counsel further argued that in constitutional matters involving public officers courts, in their discretion, often awarded costs to interveners when they: (i) have a direct and substantial interest in the outcome of the case; (ii) assist the court materially in resolving complex legal issues; and (iii) act reasonably and in good faith, even if their personal interests align with one party.

[16] Counsel submitted that while the intervener's position was naturally aligned with the appellant, her submissions were essential to the court's analysis of section 2(2) and its reversal of the Full Court's decision. She provided clarity on the purpose of section 2(2), namely, to preserve the DPP's early retirement rights, so as to harmonise the DPP's rights with those of other public officers under the Pensions Act 2017. It was argued that the intervener provided the court with material demonstrating how early retirement benefits were treated under the amending Act for public officers and sought to justify why she and the Auditor General ought to be similarly treated. It was posited that this participation of the intervener played a critical role in the court's determination that section 2(2) was transitional.

[17] It was also advanced that the intervener had a distinct interest from that of the parties. The appellant was concerned with the broader implications of the legislative amendment and defended the interest of the State and Parliament's authority to make such an amendment. The intervener, on the other hand, addressed the specific impact of the amendment on her office and her pension entitlement, justifying separate representation to protect her distinct interest, which was directly affected by the outcome of the appeal.

[18] Further, it was highlighted that the intervener was permitted by the court to intervene, without opposition, and was successful in defending the constitutionality of the amending Act. Therefore, although not *strictu sensu* (in the strictest sense) a party in the terms of the CPR, she was *de facto* a party to the litigation and qualified as a successful party under the general rule that costs follow the event. Consequently, counsel argued, the intervener ought to be treated equally with a favourable award of costs. Counsel also noted that the intervener incurred significant legal costs to protect her pension entitlements and, by extension, her office's independence.

[19] Finally, counsel contended that the intervener's participation advanced matters of public interest. Counsel argued that costs ought to be awarded in public interest litigation to prevent discouraging public officers from intervening in constitutional challenges that affect their roles. In the instant case, denying the intervener an award of costs would undermine the public interest in safeguarding independent constitutional offices. Counsel commended for the court's consideration the case of **R (on the application of Unison) v Lord Chancellor** [2017] UKSC 51 ('**Unison**'), which he admitted not being directly on point but which he submitted emphasised access to justice, fairness and the public value of litigation.

[20] In conclusion, counsel submitted that the circumstances justify awarding costs to the intervener.

Respondents' submissions in response to the intervener

[21] In response, counsel for the respondents acknowledged that the issue of costs is ultimately within the discretion of the court, but emphasised the general rule that interveners are not entitled to costs. Counsel referenced the case of **Canadian Union of Postal Workers v Her Majesty in Right of Canada** 2017 ONSC 6503 to support this position and argued that the present case did not warrant a departure from that general rule. Counsel noted that the sole issue raised by the intervener concerned section 2(2) of the amending Act and whether it was enacted to preserve her right to early retirement and her pension benefits, a relatively minor issue in the appeal, accounting for only five of the 276 paragraphs in the judgment.

[22] It was further argued that the intervener's submissions did not significantly influence the court's ruling on section 2(2), which was primarily determined by the appellant's case. Counsel likened the intervener's role to that of an *amicus curiae* (a friend of the court), which provides assistance to the court but typically does not receive costs. The Bahamian case of **Donna Dorsett-Major v The Director of Public Prosecutions & The Attorney General of the Bahamas** BS 2022 CA 139 was referred to for guidance on cost implications for an *amicus curiae*.

[23] Counsel also argued that the intervener's intervention in the proceedings was purely personal, aimed at protecting her pension benefits, rather than serving the public interest. Counsel contended that the issue did not concern or impact the public interest or even the independence of the office of the DPP; therefore, it would not support any argument that the court's decision on costs, as it relates to the intervener, will influence future public interest intervention. He distinguished the case of **Unison**, noting it concerned the fairness of fees for proceedings before an employment tribunal and the effects on access to justice and public perception, unlike the intervener's personal pension concerns. Accordingly, he argued that the intervener's reliance on **Unison** to support the public value of litigation was misconceived.

[24] For these reasons, counsel concluded that no order as to costs should be made in respect of the intervener.

Appellant's reply submissions to the respondents' submissions

[25] Counsel for the appellant noted that applications for relief under the Constitution are governed by part 56 of the CPR but conceded that rule 56.15 is not applicable to costs orders made in the Court of Appeal by virtue of rule 1.18(1) of the CAR, which expressly incorporates Parts 64 and 65 of the CPR but not Part 56.

[26] Nevertheless, it was argued that the factors identified in Part 56 and in the authorities that considered that section, for example, the hopelessness or otherwise of the claim, are legitimate matters to be considered in determining what is an appropriate costs order in this appeal. Counsel relied on **Danville Walker v The Contractor General** [2013] JMFC Full 1(1A) ('**Danville Walker**') to illustrate the application of these principles.

[27] It was submitted that the court should have regard to all the circumstances, including the conduct of the parties before and during the proceedings. The court should also consider whether a party has succeeded only in respect of some issues; whether it was reasonable to pursue a particular allegation and/or raise a particular issue, as well as the manner in which a party has pursued his/her case.

[28] Regarding costs in the court below, it was argued that the claim and the respondent's conduct in advancing it were unreasonable, and the court should treat this as an exception to the general rule that the unsuccessful party pays the costs of the successful party.

[29] It was argued that a contrasting position should be adopted in respect of the appeal, and this court ought not to depart from that general principle. It was further argued that although the court below found for the respondents on the interpretation to be placed on section 2(2), the court did so on the basis of an argument that was not advanced by any party. It was highlighted that, in the counter appeal, the respondents advanced and argued

all the substantive points that had failed in the court below and were similarly unsuccessful in this court.

[30] In these circumstances, the appellant submitted that it would be unjust and unfair to make no order as to costs or alternatively to make an order for each party to bear their own costs, and the court should uphold the costs order made on 20 December 2024.

Analysis

[31] Rule 1.18(1) of the CAR expressly incorporates Parts 64 and 65 of CPR but not Part 56. Rule 64.4 of the CPR provides as follows:

> "64.4 The court hearing an appeal may make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal."

[32] The principle that the successful party is generally entitled to costs is set out in rule 64.6(1) of the CPR. Rules 64.6(2), (3) and (4) provide additional guidance. These provisions are as follows:

> "64.6 (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.
>
> (Rule 65.8(3)(a) contains special rules where a separate application is made which could have been made at a case management conference or pre-trial review.)
>
> (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.
>
> (4) In particular it must have regard to -
>
> (a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);

(d) whether it was reasonable for a party -

(i) to pursue a particular allegation and/or

(ii) to raise a particular issue;

(e) the manner in which a party has pursued -

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue;

(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim."

[33] In **Jamaicans for Justice v Police Service Commission and The Attorney General**, [2015] JMCA Civ 12 this court made an order that there be no order as to costs. The appeal had its genesis in an application by Jamaicans for Justice, a non-governmental organisation dedicated to promoting citizens' rights, for orders of *certiorari* and *mandamus* directed to the Police Service Commission. The application was made in respect of the decision made by the Police Service Commission to recommend to the Governor-General that a particular Superintendent of Police should be promoted to the rank of Senior Superintendent.

[34] Morrison JA (as he then was) suggested the following approach:

> "[138] I would therefore propose that both the appeal and the counter-notice of appeal should be dismissed. In making no order for costs in the court below, the learned judge no doubt had in mind rule 56.15(5) of the CPR, which states that –
>
> > 'The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.'
>
> [139] This rule is not one of those made applicable to appeals to this court by virtue of rule 1.1(10) of the Court of Appeal Rules, 2002. However, I would also propose that, in keeping with the spirit of rule 56.15(5), there should be no order as to the costs of the appeal."

It cannot reasonably be deduced from this decision that the court was suggesting the application of a similar approach to that declared in rule 56.15(5) of the CPR in all constitutional claims, without more. However, the basis for a similar approach in appropriate cases is evident.

[35] In **Danville Walker**, the Full Court examined the issue of whether costs should be awarded to the Contractor General who appeared at the renewed application for leave to bring judicial review proceedings and successfully opposed the grant of that leave, notwithstanding that the rules do not compel his attendance at the application for leave stage. The issues of whether there were exceptional circumstances for not awarding costs against the applicant and the reasonableness of the actions of the Contractor General were considered in the context of the particular facts of that case and are not of much assistance for our purposes. However, Sykes J and Straw J (as they then were) made the point that there are unique characteristics of judicial review that operate to limit costs, foremost among these is the fact that judicial review allows the ordinary citizen to curb excessive power by the executive arm of government. Straw J, at para. [31], succinctly explained the rationale for the special treatment of judicial review proceedings as follows:

> "… In short, judicial review is a simple avenue for the individual with a legitimate complaint against state action to have access

> to the courts. It is for this reason that the courts have always taken care to ensure that [it] does not discourage parties by the threat of costs orders if they are unsuccessful in their application."

[36] There are obvious parallels between judicial review proceedings and challenges to the constitutionality of legislation, and this provides the basis for this court to adopt the approach of Morrison JA of honouring the spirit of rule 56.15(5) of the CPR in the particular circumstances of this case.

[37] In interrogating the issue of whether the respondents acted unreasonably in pursuing the claim, it is acknowledged that the appellant was successful in its appeal and the respondents were unsuccessful in their counter-appeal. However, there are offsetting considerations that weigh heavily in the scales.

[38] Firstly, the facts of the case were novel. Whereas there were similarities between some elements of the case and authorities that were produced to the court, none of the authorities were on all fours. By way of illustration, the case of **Whitfield v Attorney General** (1989) 44 WIR 1, which was submitted for this court's consideration, concerned the extension of the tenure of the Chief Justice of the Bahamas beyond the constitutional retirement age of 65 years. Article 96(1) of that state's Constitution, and the proviso thereto, permit the Governor-General, acting on the recommendation of the Prime Minister after consultation with the Leader of the Opposition, to allow a justice who attains that age to continue in office until a later age not exceeding 67 years as may have been agreed between them. The issue of what constitutes "consultation" and "agreement" weighed heavily in that case. Absent from the case was the additional issue of whether there were two "extensions", which occupied this court.

[39] Ultimately, this court decided that concerning section 2(2), the Full Court erred in their interpretation and by their conclusion that its effect was to give the incumbent DPP an improper extension of her tenure. However, in assessing whether the respondents acted unreasonably in their constitutional challenge, it cannot be discounted that three experienced judges of the court below agreed with the respondents that section 2(2) was

unconstitutional. In that respect, it cannot reasonably be said that the respondents' position was legally hopeless. Although this court did not find any merit in the various elements of the respondents' submissions, the points raised demanded careful analysis and the application of intellectual vigour.

[40] Secondly, the issues in this case attracted a significant amount of public interest. The litigation had the effect of settling the construction to be placed on legislation, which was not as patently clear as it could have been. In that regard, the respondents' constitutional challenge enured to the public benefit.

[41] I also did not find anything egregious in the manner in which the respondents conducted their responses to the appeal and their counter-appeal. By way of example, in dealing with the issue of whether section 2 was enacted for an improper purpose, the respondents presented their legal arguments in a dispassionate, finely balanced manner devoid of any overly partisan political colour.

[42] As regards the intervener, it is well settled and accepted that this court, in its discretion, may award costs in her favour. However, as her counsel quite correctly acknowledged, her position was "naturally aligned with the appellant".

[43] I do not agree with the submission advanced on the intervener's behalf that the intervener had a distinct interest from that of the parties or that her active participation advanced matters of public interest. In my opinion, whereas the intervener had a personal interest in the construction to be placed on section 2(2), it was inextricably bound up with the broader implications of the legislative amendment. In defending the interest of the State and Parliament's authority to make such an amendment, the appellant was, as a consequence, protecting the intervener's interests, including the impact of the amendment on her office and her pension entitlement. I have concluded that there was no unique position advanced by the intervener that required separate legal representation.

[44] I noted that Mr Douglas Leys KC, during his presentation to the court on behalf of the intervener, focused heavily on the implications of the repeal of the Pensions Act 1947

for the intervener's and the Auditor General's ability to seek approval for early retirement. It was argued that this option was lost on the repeal of that Act. The court accepted that it was at least arguable that on the repeal of the Pensions Act, the entitlement of the incumbent DPP to this benefit became uncertain, but did not find it necessary to decide the point because this was not material to this court's finding that the Full Court erred in finding that section 2(2) of the amending Act was invalid and to be struck down as unconstitutional, null, void and of no legal effect. The essence of our finding was that section 2(2) did not create a second extension regime because the intervener benefitted from the increase in the retirement age to 65 years by the application of section 2(1) of the amending Act.

[45] In construing section 2(2), we concluded that "elect to retire" as used in the section was to be construed to mean elect to retire for early retirement and at para. [228] of the substantive judgment, we stated that "… [s]ection 2(2) seeks to capture the unique position of the incumbent DPP. She was free to remain until 65 years or choose to retire before that age, having passed the 60-year mark prior to the passing of the amending Act". This conclusion flowed organically from our primary conclusion that the intervener benefited from the extension of her retirement age to 65 by the operation of section 2(1). The construction we placed on section 2(2) of the amending Act was consistent with the submissions of the appellant that it was transitional, applied to the intervener alone and implemented out of an abundance of caution to ensure that her rights, particularly in respect of pension, were preserved. Notably, Mr Leys initially advanced the position that section 2(2) was not transitional, although he subsequently conceded that it was. Therefore, the court's position on the meaning of section 2(2) was not wholly due to the adoption of the submissions made on behalf of the intervener.

Conclusion

[46] For these reasons, after considering the written submissions of the parties on costs and on further analysis and reflection, I would propose that our initial position on the costs order be re-evaluated as I am of the view that an appropriate order in all the circumstances is that there be no order as to costs in this court and in the court below. I am of the opinion

that this will do justice between the parties and will not discourage parties who, in the public interest, reasonably challenge the constitutionality of legislation.

[47] I would, therefore, declare as final orders pursuant to the original orders 7 and 8 at para. [276] of the substantive judgment that:

1. Each party to bear its own costs incurred in the appeal and in the court below.

2. In respect of the intervener, there shall be no order as to costs.

STRAW JA

ORDER

[48] Pursuant to the original orders 7 and 8 at para. [276] of the substantive judgment the following are declared as final orders:

1. Each party to bear its own costs incurred in the appeal and in the court below.

2. In respect of the intervener, there shall be no order as to costs.