Trinity Term
[2022] UKPC 30
Privy Council Appeal No 0101 of 2019

JUDGMENT

Michael Paul Chen-Young (as Executor of the Estate of Paul Chen-Young (Deceased)) and others (Appellants) *v* Eagle Merchant Bank Jamaica Ltd and 3 others (Respondents) (Jamaica)

From the Court of Appeal of Jamaica

before

L Briggs
L Kitchin
L Leggatt
L Burrows
L Rose

JUDGMENT GIVEN ON
18 July 2022

Heard on 23 June 2022

Appellants
Ransford Braham QC
Abraham Dabdoub

(Instructed by Axiom DWFM Ltd)

Respondents
Michael Hylton QC
Sundiata Gibbs

(Instructed by Myers, Fletcher and Gordon)

Interested Party (Attorney General of Jamaica)
Derrick McKoy QC
Annaliesa Lindsay
Lisa White

(Instructed by Charles Russell Speechlys LLP)

LORD BRIGGS:

1. Between March and November 2013 the Court of Appeal of Jamaica (Panton P, Dukaharan JA and McIntosh JA) heard a lengthy appeal over 18 days against a judgment of the Supreme Court (Anderson J) handed down in May 2006. The Court of Appeal reserved judgment. The Appellants Mr Chen Young and two companies of his had been defendants in the original proceedings.

2. On 1 December 2017, more than four years after the hearing, the same judges of the Court of Appeal purported to hand down their judgment on the appeal, setting aside the Supreme Court's judgment and ordering a re-trial. But by then they had all passed their mandatory retirement ages specified in the Constitution of Jamaica, and had not received permission from the Governor General to continue in office for the purpose of completing outstanding work. After careful deliberation by a differently constituted Court of Appeal, it was held in April 2018 that the December 2017 judgment was therefore a nullity, and a rehearing of the appeal was directed.

3. The Appellants were understandably dismayed that the nullity of the December 2017 Judgment meant that their costs in prosecuting their appeal at the lengthy and expensive hearing in 2013 had been thrown away. They sought from the Court of Appeal an order that their assessed costs should be paid by the State of Jamaica, in the person of the Attorney General, either by way of a third-party costs order or by way of redress for a breach of their constitutional right to an effective and timely appeal. In its judgment declaring the December 2017 judgment void the Court of Appeal held that the Appellants' grievance did not fall within the contemplation of the third-party costs jurisdiction, and that their claim for constitutional redress should be brought before the Supreme Court as a fresh claim.

4. There has been no appeal against the finding that the December 2017 judgment was void. But the Appellants have obtained leave to appeal to the Board on the costs and constitutional redress issues. The Board has been invited to answer the following three questions:

   (i) A. 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) B. 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) C. 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.

The Legal Framework

5. Section 106 of the Constitution of Jamaica ("the Constitution") provides as follows:

> "(1) Subject to the provisions of subsections (4) to (7) (inclusive) of this section, a Judge of the Court of Appeal shall hold office until he attains the age of seventy years.
>
> (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.
>
> (3) Nothing done by a Judge of the Court of Appeal shall be invalid by reason only that he has attained the age at which he is required by this section to vacate his office."

6. None of the judges who delivered the December 2017 judgment availed themselves of s.106 (2). The Court of Appeal held that neither s.106(3) nor the common law principle known as the de facto officer doctrine saved the December 2017 judgment from the invalidity arising from the fact that the three former judges who decided and delivered it were by then no longer judges at all. The most unfortunate result is that the appeal which the Appellants launched, in time, in June 2006 has yet to be heard and determined, some 16 years later. In the meantime the first appellant has sadly died, and his appeal is being continued on behalf of his estate.

7. It is common ground that the Appellants all enjoy rights under the Charter of Rights of the Constitution ("the Charter") which may loosely be described as falling within the concept of access to justice. Specifically, section 16(2) of the Charter provides as follows:

> "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."

8. That is part of a right of due process guaranteed by section 13(2)(r) of the Charter. Section 19 contains the following provisions for enforcement of those rights:

> "(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 other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2)…
>
> (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."

9. Section 20 of the Charter defines "contravention" as follows:

> "contravention", in relation to any requirement, includes a failure to comply with that requirement, and cognate expressions shall be construed accordingly;"

It is not seriously in dispute that the facts summarised above about the handling of the Appellants' appeal from the judgment in May 2006 disclose a very serious contravention of their guaranteed Charter rights of access to justice. The December 2017 judgment was not delivered by a court established by law, and the period which has now elapsed involves by any standards a serious failure to conclude the appeal hearing within a reasonable time, contrary to s.16(2) of the Charter. All that is in dispute before the Board is the route by which, and the court before which, the Appellants may obtain redress, other than by way of the rehearing which has already been ordered. They have sought to define their loss as the costs thrown away in the (now abortive) appeal hearing in 2013, which they submit should be assessed in the usual way. The Attorney General, who has been joined throughout as an interested party in the Motion to have declared void the December 2017 judgment, and the appeal re-heard, does not admit that this is a case for redress at the expense of the state. Nonetheless the issues of state liability and quantum (whether as third party costs or constitutional redress) remain live, and have yet even to be fully formulated by any pleading on his part, let alone decided at a first instance hearing.

The Facts

10. The most unhappy procedural history of these proceedings is set out in uncontroversial detail in the judgments of the Court of Appeal. It is unnecessary to rehearse that detail for the purposes of explaining the Board's opinion, save to note that the Appellants originally sought a re-hearing of the appeal on the combined ground of delay and the retirement of the relevant judges before the December 2017 judgment was even handed down. Brooks JA (with whom his colleagues largely agreed) opened his judgment, at para 155, by describing this case as:

> "perhaps the most extreme example of the state of crisis which threatens this court".

He continued:

> "There are, however, other cases where the enormous stress of the workload that has been placed on the judges of this court has caused unacceptable delays which jeopardize the status of the court. In the vast majority of cases, the delay cannot be attributed to any of the parties to the appeal. The term 'grotesque', recently used to describe the workload of a court in another jurisdiction, far better resourced than this one is, would easily be applicable to the workload, under which this court has been labouring for at least a decade."

Question C: Third-Party Costs Order

11. Although this issue was raised in the last of the three questions raised by this appeal, the Board finds it convenient to deal with it first. This is because, if the Appellant has a remedy under this jurisdiction, then Section 19(4) of the Charter is likely to mean that constitutional redress would be neither necessary nor appropriate.

12. The ability to make costs orders against persons who are not parties to the litigation in which the costs have been incurred is of comparatively recent origin in the civil procedure of common law jurisdictions. It is now well-established in England and Wales, and the parties were content to assume that it applied also in Jamaica without significant alteration in its terms or purposes, by CPR64.9, which

supplies an appropriate procedure but does not seek to describe the circumstances in which such an order should be made.

13. There is in the present case no jurisdictional or procedural reason why such an order could not be made. The Attorney General was not a party to the litigation leading to the abortive appeal hearing, and was duly notified of the Appellants' desire to obtain such an order by the terms and service upon him of the Notice of Motion, to which he was joined as an interested party. Rather the question is whether this jurisdiction is at all appropriate to be prayed in aid as a means of holding the state liable for costs thrown away in proceedings which, viewed as a whole, amounted to a denial of a Charter right guaranteed by the Constitution.

14. The Court of Appeal thought not, mainly on the ground that third-party costs orders involve the exercise of an exceptional jurisdiction, and that no sufficient exceptionality was disclosed by the facts: see per Brooks JA (with whom his colleagues agreed) at paras 207 to 210, relying upon dicta as to exceptionality in *Aiden Shipping Co Ltd v Interbulk Ltd* [1986] AC 965 and *Dymocks Franchise Systems (NSW) Pty Ltd v Todd and others* [2004] UKPC 39; [2004] 1 WLR 2807. On this appeal Mr Ransford Braham QC for the Appellants submitted that a requirement for exceptionality was easily satisfied on the facts and that, in accordance with the principle established in the Dymocks case, it was just to make an order.

15. The Board begins its analysis by noting that two distinct parcels of costs are applied for by the Appellants, to which different principles apply, and which do not appear to have been kept entirely separate either in the submissions or in the Court of Appeal. The first is the costs of the Appellants' Motion for a rehearing of the appeal. The second is the costs of the abortive appeal hearing in 2013. The Attorney General was a party to the Motion, but not to the appeal in 2013. Accordingly the third-party costs jurisdiction only applies (if at all) to the latter.

16. The Court of Appeal made no order as to the costs of the Motion. The Board would not criticise the Court of Appeal for making no order as to those costs against the Attorney General, for the following reasons:

    (i) The Attorney General did not contest either the request for a rehearing of the appeal, or the application to have the December 2017 judgment declared void.

(ii) The Attorney General succeeded in resisting the application for constitutional redress, and the application for a third-party costs order.

(iii) Accordingly, there was no real basis for the exercise of a costs discretion against the Attorney General in relation to the costs of the Motion. He was not in any sense the losing party.

17. Turning to the costs of the abortive hearing in 2013 ("the costs thrown away") the Board considers that the Court of Appeal was entitled to decide that considerations of exceptionality and justice did not warrant a third-party costs order against the Attorney General, for the following reasons:

(i) The Board has sympathy with the Appellants' submission that a simple test of exceptionality would be satisfied, viewed on its own.

(ii) But the Board does not view the third-party costs jurisdiction as an appropriate vehicle for the pursuit of what is in reality and in substance constitutional redress for a denial of access to justice. The third-party costs jurisdiction has emerged as a just means of bringing home costs liability to persons who, while not being parties to a dispute, have nonetheless become involved in it in a way which in justice attracts liability for costs, whether as a funder, an intermeddler or even a party with a real interest in the outcome. The fact that a constitutional guarantee of access to justice has not been fulfilled does not in the Board's view fairly bring the state (represented for this purpose by the Attorney General) within the scope of that jurisdiction.

(iii) Further, the procedure for applying for a third-party costs order under CPR 64.9 is a summary procedure. The Constitution provides its own procedure for obtaining redress for breach, under s.19 of the Charter. For the reasons given below, the Board considers that the Court of Appeal was justified in concluding that the question of redress was not suitable for summary determination by the Court of Appeal and that the appropriate course in this case is to apply to the Supreme Court under s.19.

Question A: jurisdiction and proper forum for constitutional redress

18. The Board does not read the judgments of the Court of Appeal as having decided this question in the negative against the Appellants strictly on a jurisdictional ground: i.e. that it simply lacked power to grant redress. Rather it did so on the

basis that the Supreme Court would be the appropriate forum for the application for redress, on the facts of this case, for the reasons given. The Attorney General did not, when pressed by the Board, go so far as to submit that the Court of Appeal could never have power to grant constitutional redress. But he did maintain that it had no such power on these facts.

19. For the Appellants Mr Braham put forward three bases upon which the Board should conclude that the Court of Appeal had the requisite power. The first was that s.19(1) of the Charter, which confers the requisite power on the Supreme Court, is couched in non-exclusive terms, for which he relied on dicta to that effect in relation to similarly worded provisions in the Bahamas, in *Bowe v R* [2006] UKPC 10, and in the Turks and Caicos Islands, in *Silly Creek Estate and Marina Co Ltd v Attorney General* [2021] UKPC 9, in particular at para 68. Secondly, he submitted that the Court of Appeal enjoys all the powers of the Supreme Court, by R.2.15 of the Court of Appeal Rules 2002. Thirdly, and against the possible counter argument that the rule was dealing only with appellate powers, he submitted that the grant of constitutional redress was ancillary to the decision to declare the nullity of the December 2017 Judgment and order a re-hearing, which were matters dealt with by the court in the exercise of its appellate capacity.

20. Like the Court of Appeal, the Board does not think it helpful to analyse this issue in terms of pure jurisdiction i.e. power. Plainly the Court of Appeal can grant constitutional redress in some circumstances, e.g. when allowing an appeal against a refusal of the Supreme Court to do so. The more difficult question is whether it could do so on an original application, as here, rather than by way of relief on appeal. Equally plainly, an applicant would not be permitted to go straight to the Court of Appeal with an original application, where the Court of Appeal was not otherwise engaged at all with the proceedings. The present case lies somewhere between those two poles, because the Court of Appeal was engaged with the proceedings, in declaring that the December 2017 judgment was void and in ordering a rehearing, although the application for constitutional redress was made for the first time to that court.

21. None of the appellants' three grounds affords a certain route to a conclusion that the Court of Appeal has an original (rather than appellate) jurisdiction to grant constitutional redress. The reference to other means of obtaining relief in s.19(1) of the Charter is explicable as a reference to other forms of procedure, rather than to a straight claim for constitutional redress in a different court, and the Bowe and Silly Creek cases arose on very different procedural facts where the State was already the respondent to the original application before the first instance court. The conferral by the Court of Appeal Rules of the powers of the Supreme Court

may easily be read in context as concerned with the court's appellate role. Finally the Board is not satisfied that the application in the present case was truly ancillary.

22. But nonetheless the wide varieties of case in which the question may arise do not lend themselves to any clear-cut jurisdictional categorisation. Far better is it to treat the question, as did the Court of Appeal, as one of discretion, in identifying which, as between the Court of Appeal and the Supreme Court, was the appropriate forum for the pursuit of the application for constitutional redress otherwise than by way of an appeal, on the particular facts of this case.

23. Once the question is identified as a matter of discretion rather than power, then that is a discretion vested (in this case) in the Court of Appeal, with which the Board should not lightly interfere. But in fact the Board agrees with the Court of Appeal, albeit for slightly different reasons than those upon which it mainly relied.

24. The main ground for the Court of Appeal's view that the application should be made to the Supreme Court was that it was likely to involve a factual investigation into the circumstances of the delay, and the failure to obtain permission to continue to act, with which the Court of Appeal would be ill-equipped to deal. The Board is not convinced that the outcome is likely to be dependent upon the resolution of issues of fact, and a request to the Attorney General to identify what those factual issues might be fell on dry ground.

25. Nonetheless there are other solid reasons why this application should be made, in the first instance, to the Supreme Court, even though the alleged contravention of the Charter occurred while the proceedings were pending in the Court of Appeal. The first is that the application is a novel one, not covered by previous Jamaican authority, which may well give rise to important issues of responsibility and causation. Should the state be liable for an apparent judicial failure to obtain permission from the Governor General to continue to act? What effect may that have upon judicial independence? And what causative role did the delay following the 2013 appeal hearing have in it ultimately becoming abortive, following judicial retirement? These are important questions which may have repercussions in a wide variety of other cases in Jamaica.

26. The second reason flows from the first. If this is likely to be an important case in Jamaica, then it is appropriate for it to be given full treatment at first instance, so that (if appealed) the Court of Appeal has the benefit of a first instance judgment as the basis for its deliberations. By contrast, if the original application is made to the Court of Appeal, it will have no appellate function, and the only appellate tribunal

will be the Board. But important issues about constitutional redress should if possible be considered by the local courts, both at first instance and on appeal.

Question B: are the appellants entitled to redress in the form of payment of their costs thrown away, in the circumstances of this case?

27. The Board's conclusion that the Court of Appeal was right to require this question to be determined by the Supreme Court at first instance makes it wholly inappropriate that the Board should now decide the question itself. If it was inappropriate for the Court of Appeal to decide it, then it would be doubly inappropriate for the Board to do so, otherwise (of course) than after a second appeal following determination in the Supreme Court and then in the Court of Appeal.

28. The only consideration which might be said to point the other way is the extraordinary duration of this litigation, and the interests of the parties in avoiding yet further delay and cost. But the question of constitutional redress is well outside the main-stream of this litigation. There still awaits a re-hearing of the appeal and, possibly, a re-trial at first instance. There is no reason why those processes need to await the outcome of the claim for constitutional redress. In fact it would in the Board's view be better if the main focus of the parties' efforts lay in progressing (including if possible settling) the main-stream of this litigation.

CONCLUSION

29. For the above reasons the Board will humbly advise Her Majesty that this appeal should be dismissed.