



[2019] JMCC Full 5

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. 2018HCV01788

CORAM: The Hon. Mr Justice Bryan Sykes, Chief Justice
 The Hon. Mr Justice David Batts
 The Hon. Mrs. Justice Lisa Palmer Hamilton (Ag)

BETWEEN JULIAN ROBINSON CLAIMANT
AND THE ATTORNEY GENERAL OF JAMAICA DEFENDANT

Constitutional relief – Costs – Whether there should be an Order for costs in Claimant’s favour- Whether no costs should be ordered due to the exceptional public interest and import of the claim – Whether costs should be on a full indemnity basis – Whether certificate for four counsel to be granted.

Michael Hylton QC, Donna Scott-Mottley, Jennifer Housen and Sophia Frazer-Binns instructed by Paulwell Frazer-Binns & Co for the Claimant

Marlene Malahoo-Forte QC, Attorney General of Jamaica, Althea Jarrett, Deputy Attorney General, Marlene Aldred, Deputy Attorney General, Carla Thomas, Assistant Attorney General, Donia Fuller-Barrett, Crown Counsel, Andre Bascoe, Crown Counsel, and Jeffrey Foreman, Crown Counsel for the Defendant

IN OPEN COURT.

Decided : 30th day of May, 2019.

[1] In this matter judgments on liability were delivered on the 12th April 2019. On that date we invited the parties to make written submissions on costs. That was done. We considered the submissions filed and decided, on the 30th May 2019, as follows:

- a) Costs to the Claimant to be taxed if not agreed
- b) Certificate for four Counsel granted.

We promised then to give reasons for our decision and we now do so.

[2] The Claimant, in his submission filed on the 2nd May 2019, urged us to award costs on a full indemnity basis and to allow costs for four attorneys-at-law. He urged us to have regard to the Defendant's failure to heed the Parliamentary Opposition's request that the Bill be referred to a joint select committee. The Claimant argued that the Civil Procedure Rules did not intend to deprive successful litigants of their costs and relied upon *Toussaint v Attorney General of Saint Vincent and the Grenadines [2007] 1 WLR 2825* (a judgment of the Judicial Committee of the Privy Council). The submission for costs on a full indemnity basis, was supported by reference to judgments of Sykes J (as he then was) in *RBTT Bank Jamaica Limited v Y P Seaton et al [2014] JMSC Civ 139* and *Batts J in Port Kaiser Oil Terminal SA v Rusal Alpart [2016] JMCC Comm 10*. In seeking an Order, for costs for four attorneys at law, the Claimant pointed to the complexity of the matter and the fact that the Defendant had been represented by "no less than" seven attorneys at law.

[3] The Defendant in written submissions filed on the 3rd May 2019, argued that there should be no order made as to costs. Costs, it was submitted, are discretionary. The Defendant says that this is not an appropriate case in which to make an order for costs. The matter had been one of exceptional public interest and import. The Defendant invited the court to take the type of "flexible and nuanced approach" advocated by Dyson J in *R v Lord Chancellor ex parte Child Poverty Action Group; R v Director of Public Prosecutions ex parte Bull and Another [1999] 1 WLR 347*. Other cases relied on by the Defendant were; *New Zealand Maori*

Council v Attorney General of New Zealand [1944] 1 AC 466, Branch Development v The Industrial Disputes Tribunal [2016] JMCA Civ 16, and The Queen on the Application of Smeaton (on behalf of the Society for the Protection of Unborn Children) v Secretary of State for Health (Schering Health Care Ltd and Family Planning Association as interested parties) [2002] 2 FLR 146.

- [4] Having reviewed the authorities, we find that, there is no general principle that where matters are of a public interest or brought for the public benefit, there should be no order for costs. The principle, as regards judicial review and other public interest litigation, is that claims ought not to be discouraged. In this regard we are referring to matters brought in the public interest not necessarily matters in which the public have an interest. The two sometimes coincide but do not always. It is that reluctance, to discourage Claimants from applying for judicial review, which motivated Order 56.15 (5):

“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.”

- [5] The rule exists because, if an unsuccessful Claimant is required to pay costs, it may be a disincentive for someone who is considering litigation in the public interest. Manifestly the absence of a similar provision, in relation to a Defendant to the application for judicial review, indicates that for the unsuccessful Defendant the general rule of costs following the event will apply. It is in the public interest that, save for good reasons, a successful Claimant ought to be awarded costs in judicial review proceedings.

- [6] We do not agree that the costs awarded ought to be on a full indemnity basis. The state’s attempt to defend the claim was not so unreasonable as to be regarded as “far - fetched.” It is true the Defendant failed on multiple grounds. It is also true however that not all the sections challenged were held unconstitutional. The

Defendant may reasonably, if erroneously, have hoped to have the unconstitutional provisions severed. The case was complex and explored novel areas of law and our Constitution. The Defendant ought not, in this case and in these circumstances, to be penalised for defending the claim. The application for costs to be assessed on an indemnity basis is therefore refused.

[7] We will however approve a Special Costs Certificate for four attorneys at law. The complexity and novelty of the matter clearly justifies that Order.

[8] In the result, and for the reasons stated, our orders as to costs are as stated in paragraph 1 of this Judgment.

Sykes CJ

Batts J

Palmer-Hamilton J(Ag).