[2023] JMCA Civ 20

JAMAICA

IN THE COURT OF APPEAL

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

SUPREME COURT CIVIL APPEAL NO COA2022CV00013

BETWEEN	**THE ATTORNEY-GENERAL**	**APPELLANT**
AND	**MAURICE ARNOLD TOMLINSON**	**RESPONDENT**
AND	**THE CHURCHES**	**1ST INTERESTED PARTY**
AND	**JAMAICA COALITION FOR A HEALTHY SOCIETY**	**2ND INTERESTED PARTY**
AND	**LAWYERS CHRISTIAN FELLOWSHIP LIMITED**	**3RD INTERESTED PARTY**
AND	**HEAR THE CHILDREN'S CRY**	**4TH INTERESTED PARTY**

Miss Lisa White and Miss Jevaughnia Clarke instructed by the Director of State Proceedings for the appellant

Ian Wilkinson KC and Daniel Beckford instructed by Wilkinson Law for the respondent

Ransford Braham KC and Miss Shirley Richards instructed by Richards, Edwards, Theoc & Associates for the 2nd interested party and holding for Mrs Caroline Hay KC instructed by Hay Law for the 4th interested party

Wendell Wilkins and Miss Jamila Thomas instructed by Lambie-Thomas & Co for the 3rd interested party and holding for Miss Danielle Archer instructed by Danielle Archer Law Practice for the 1st interested party

27, 28 and 31 March 2023

ORAL JUDGMENT

MCDONALD-BISHOP JA

[1] I have read in draft the judgment of my sister P Williams JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

P WILLIAMS JA

[2] The constitutionality of sections 76, 77 and 79 of the Offences Against the Person Act ('OAPA') is being challenged by the respondent, Mr Maurice Tomlinson ('Mr Tomlinson'), in a fixed date claim form filed on 27 November 2015 against the appellant, the Attorney-General ('AG'). Before filing a defence or an affidavit in response, on 1 November 2019, the AG filed a notice of application seeking a separate trial of a preliminary issue, which it contended related to issues of law only and was dispositive of the entire claim. That issue was whether the constitutionality of the impugned provisions of the OAPA could be enquired into in the light of the savings law clause found in section 13(12) of the Charter of Fundamental Rights and Freedoms ('the Charter') in the Constitution of Jamaica ('the Constitution'). This application was heard by Hutchinson J ('the learned judge'), and on 19 January 2022, she refused it. This appeal explores the correctness of that decision.

[3] At the commencement of the hearing of this appeal, Mr Ransford Braham KC for the Jamaica Coalition for a Healthy Society, the 2nd interested party, made an application for the notice and grounds of appeal to be amended to remove the designation of "respondent" from the parties now named as the 1st to 4th interested parties. Counsel for the AG and the other interested parties had no objection. However, Mr Ian Wilkinson KC for Mr Tomlinson objected on the basis that the interested parties would be making submissions and participating in the appeal and should therefore be subject to costs implications. The court accepted that the parties named then as 2nd to 5th respondents should have been named as the 1st to the 4th interested parties, as that was the basis on which they had applied and been permitted to appear in the claim. We, therefore, granted the application for the amendment and made no order as to the costs of that application.

[4] Based on the grounds of appeal filed and the submissions made by the parties, the sole issue for determination in this appeal was whether the learned judge correctly exercised her discretion when she refused to order a separate trial of the preliminary issue surrounding the interplay between the savings law clause in section 13(12) of the Charter and the impugned sections of the OAPA, especially on her finding that such a trial would involve a determination of questions of fact.

[5] In her reasons for judgment (neutral citation [2022] JMSC Civ 6), the learned judge found that she was empowered to grant an order for a trial on a separate issue pursuant to rules 26.1(2)(g) and 56.13(1) of the Supreme Court of Jamaica Civil Procedure Rules 2002 ('CPR'). Nonetheless, she indicated that granting a separate trial on the preliminary issue was not feasible. She found that a preliminary trial on the issue raised by the AG would not be dispositive of the substantive claim as it would not have analysed the provisions of the Sexual Offences Act ('SOA') that relate to the sentencing regime for offences pursuant to the impugned sections of the OAPA. Additionally, she stated that while at first blush it may appear that discussions surrounding the savings law clause may relate to "pure law", she indicated that pursuant to **Lambert Watson v R** [2004] UKPC 34, evidence may be required (which may be subject to challenge) regarding the discriminatory effects of the law and whether it infringes on specific constitutional rights. She relied on the dicta of Sykes J (as he then was) in **Arthur Baugh v Courts (Jamaica) Limited and another** (unreported), Supreme Court, Jamaica, Claim No CLB099/1997, judgment delivered 6 October 2006, where he said that savings law clauses do not confer perpetual immunity from unconstitutionality on pre-independence laws. Consequently, the learned judge found that "the legal issue is inextricably connected to issues of fact which [Mr Tomlinson] wishes to have considered by the Court as a part of his Constitutional motion".

[6] Although the learned judge accepted that substantially less time and effort would be expended if the parties were to embark upon the trial of the preliminary issue, based on her previous finding that a preliminary trial would not dispose of the substantive claim, she found that there was no basis to support the granting of the requested order. Having

regard to the inability of the parties to agree on the contents of certain competing affidavits that had been filed in the matter, the learned judge did not believe that it was safe to draw conclusions on matters of fact relating to the preliminary issue. The learned judge also found that a determination of the preliminary issue would result in protracted delays for several years and substantial costs, which could be avoided if a single tribunal hears the entire claim. She, thereafter, refused the application, awarded costs to Mr Tomlinson to be taxed if not agreed, granted a stay of the proceedings and gave the AG leave to appeal her decision.

[7] The AG filed an appeal against the learned judge's decision on 2 February 2022. He challenged the decision primarily on the basis that the learned judge erred when she found that issues of fact were inextricably linked to a determination of the preliminary issue and that a finding on the preliminary issue would not be dispositive of the claim. The AG also asserted that the learned judge failed to realise the impact, if any, of the provisions of the SOA, on the question of whether the impugned sections of the OAPA were in force immediately before the commencement of the Charter, required an interpretation of section 13(12) of the Charter. According to the AG, she also failed to sufficiently consider the principles to be applied in determining whether a separate trial should have been held on the preliminary issue.

[8] When exploring the correctness of an exercise of discretion, it is not the appellate court's function to exercise an independent discretion of its own unless it is satisfied that there was a misunderstanding of the law or the evidence, or an incorrect inference had been made based on the existence or absence of particular facts which can be shown to be demonstrably wrong, or the decision is so aberrant that "no judge regardful of his duty to act judicially could have reached it" (see **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042, at page 1046 and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, at paras. [19] and [20]).

[9] On the AG's behalf, Miss Lisa White submitted that the learned judge misunderstood the nature of the application before her and consequently failed to give

appropriate consideration to the principles in **Steele v Steele** [2001] All ER (D) 227 (Apr) relating to trials on preliminary issues. She contended that the law on this area is settled by Jamaica's final appellate court, the Judicial Committee of the Privy Council, in **Lambert Watson v R** and **Jay Chandler v The State (No 2) (Trinidad and Tobago)** [2022] UKPC 19. Accordingly, she argued that the preliminary issue raised is one of law only; it is identifiable; could be determined in isolation; and would be dispositive of the claim. There was, in her view, no need to rely on affidavit evidence to dispose of the preliminary issue. Counsel further contended that the learned judge made inconsistent findings on the question of whether the preliminary issue raised questions of fact or law. Additionally, Miss White stated that by placing reliance on the dicta of Sykes J in **Arthur Baugh**, the learned judge conflated the application for an order that a trial be held on the preliminary issue and the determination of the preliminary issue itself.

[10] Mr Wilkinson argued that the learned judge had correctly exercised her discretion when she refused the application, and so the appeal was without merit. He stated that counsel for the AG had misunderstood the applicability of the savings law clause. He noted that the OAPA was first promulgated in the 19th century. Since then, sexual fluidity and the advent of diseases such as the human immunodeficiency virus (HIV) and acquired immunodeficiency syndrome (AIDS) have raised serious issues as to the applicability of the savings law clause to the offences stated in the impugned sections of the OAPA which affect the sentencing regime under the SOA. He contended that the claim and the preliminary issue raised by the AG relates to both fact and law. He said that Mr Tomlinson's evidence in his affidavits relating to matters such as his personal experiences and the countering views from expert witnesses, opposing his challenge, indicate that there are serious issues joined in the claim that could not be determined in a preliminary trial. He stated that the claim was wider than merely examining the OAPA because it also explored the SOA and the infringement of Mr Tomlinson's constitutional rights. The SOA, he said, "pulls" the OAPA out of the savings law clause, and so that clause is inapplicable. King's Counsel also agreed with the principles outlined in **Steele v Steel**. He

demonstrated how the learned judge had applied each principle and concluded that she could not be faulted for her ultimate decision.

[11] Counsel for the interested parties agreed with and adopted the AG's submissions and amplified them where necessary. Mr Braham stated that the learned judge erred when she segregated the challenge to the SOA, as that Act is being challenged due to the requirement to be registered for an offence committed pursuant to the impugned sections of the OAPA. He said it was entirely a question of law as to whether the SOA had modified the existing law, and there were no facts inextricably linked to the determination of the preliminary issue.

[12] Mr Wendell Wilkins for the Lawyers Christian Fellowship Limited, the 3rd interested party, adopted the submissions of the AG and argued that there was an overreach by the learned judge, as she was not required to enquire into whether the preliminary issue itself had merit. Counsel highlighted that the learned judge had incorrectly reasoned that there was a need for evidence and cross-examination at a preliminary stage to determine whether the challenged provisions of the SOA were discriminatory in their application and run counter to the constitutional rights of a specific segment of society. Mr Wilkins submitted that the learned judge took into consideration irrelevant law in arriving at an incorrect conclusion, which tainted how she assessed the remaining issues resulting in her refusing the application.

[13] In response, Miss White submitted that the facts highlighted by Mr Wilkinson concern whether constitutional rights have been engaged and not on the impact of the savings law clause on the impugned provisions of the OPA. She maintained that, in the circumstances, there was nothing to preclude the learned judge from finding, on what was before her, that the preliminary issue was one of law only.

[14] The starting point for a determination of the issues raised in this appeal must be the savings law clause in section 13(12) of the Charter, which provides that:

> "Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to-
>
> (a) sexual offences;
> (b) obscene publications; or
> (c) offences regarding the life of the unborn,
>
> shall be held to be inconsistent with or in contravention of the provisions of this Chapter."

[15] As Jamaica's final appellate court, the Privy Council in **Lambert Watson v R**, and most recently in **Chandler v The State (No 2)**, has maintained that an existing law, the constitutional validity of which is being challenged, is protected and preserved by a savings law clause unless that existing law has been modified or altered by a subsequent amendment. Since sections 76, 77 and 79 were promulgated before the Charter, the AG contends that a determination ought to be made whether those impugned sections are saved from scrutiny by the court as to their constitutionality.

[16] When deciding whether to order a trial on a preliminary issue, the pronouncements of Neuberger J in **Steele v Steele** provide the necessary guidance. Neuberger J outlined 10 factors to be considered, which have been summarised in the All England Reports (Digest) as follows:

> "(1) whether the determination of the preliminary issue would dispose of the case or at least one aspect of it;
> (2) whether the determination of the preliminary issue would significantly cut down the cost and time involved in pre-trial preparation or in connection with the trial itself;
> (3) where the preliminary issue was one of law, whether the court should ask itself how much effort would be involved in identifying the relevant facts;
> (4) if the preliminary issue was one of law, to what extent it was to be determined on agreed facts;
> (5) where the facts were not agreed, the court should ask itself to what extent that impinged on the value of a preliminary issue;

(6) whether determination of the preliminary issue would unreasonably fetter the parties or the court in achieving a just result;
(7) whether there was a risk of the determination of the preliminary issue increasing costs and/or delaying the trial;
(8) to what extent the determination of the preliminary issue might be irrelevant;
(9) whether there was a risk that the determination of the preliminary issue could lead to an application for the pleadings to be amended so as to avoid the consequences of the determination; and
(10) taking into account the previous points, whether it was just to order a preliminary issue."

[17] The learned judge commendably acknowledged the principles in **Steele v Steele** and demonstrated an attempt to utilise those principles in arriving at her decision. As indicated, the learned judge found that a determination of the preliminary issue would not dispose of the whole or part of the case, as aspects of the SOA would need to be analysed. However, at para. 4 of Mr Tomlinson's fixed date claim form, he sought a declaration that should the impugned sections of the OAPA not apply, then the offences stated therein were to be excluded from the first schedule of the SOA and the Sexual Offences (Registration of Sex Offenders) Regulations, 2012. It is evident from Mr Tomlinson's fixed date claim form that any finding related to the SOA is dependent on the constitutionality of sections 76, 77 and 79 of the OAPA. Consequently, the learned judge's finding that the issue relating to the SOA would need to be analysed with regard to consideration of the evidence or facts, and so could not be done in the trial of the preliminary issue, is, in my view, plainly wrong. A determination of whether the existing law in sections 76, 77 and 79 of the OAPA remained in place despite the subsequent provisions in the SOA and whether that existing law is protected by section 13(12) of the Charter, relates to issues of law only.

[18] It seems to me that Miss White was correct in her assertion that the learned judge had conflated the application to hold a trial on the preliminary issue and the determination of the preliminary issue itself. The learned judge indicated that Sykes J in **Arthur Baugh**

made "specific pronouncements on how the application of the savings clause could be viewed as well as the intention of Parliament in respect of this provision". She found that this meant that an examination of the discriminatory effects of the law and whether it contravenes the Constitution needed to be undertaken. There was no reason for the learned judge to refer to Parliament's intention or to enquire into the applicability of the savings law clause at that stage. Consequently, she erred in her consideration of whether the determination of the preliminary issue would dispose of the claim.

[19] In my view, it is pellucid that Mr Tomlinson's claim challenges the constitutionality of sections 76, 77 and 79 of the OAPA. Given the pronouncements by the Privy Council in **Lambert Watson** and **Chandler v The State (No 2)**, a question as to the applicability of the savings law clause in the Charter to these impugned provisions of the OAPA, being laws that predated the Charter, would be dispositive of the entire claim. In any event, according to **Steele v Steele**, if the resolution of the preliminary issue is not dispositive of the claim, it could nevertheless be dispositive of at least one aspect of it. The learned judge had not considered that limb of the principles stated in **Steele v Steele**. It is evident that a determination of the preliminary issue regarding the application of the savings law clause could settle at least one aspect of the claim.

[20] I agree with the learned judge that the time and costs required to address the court on the narrow preliminary issue would be significantly reduced. However, I cannot accept that the mere fact that either party may appeal the order made on the issue, thereby creating protracted delay and costs, would be a sufficient basis to refuse the application. I agree with Mr Wilkins that lower courts should determine matters based on the facts and the law before them and not on whether there would be an appeal from their decisions. Accordingly, the learned judge erred in finding that the determination of the preliminary issue would lead to substantial delay and costs and used that as a basis for refusing the application.

[21] It seems to me the preliminary issues of law to be determined in the instant case do not require a determination of fact, can be isolated, is easily identifiable and may

finally determine the case as a whole (see **Allen v Gulf Oil Refining Ltd** [1981] AC 1001). At para. [50] of her reasons for judgment, the learned judge indicated "the issue is not purely a legal one and requires careful consideration of matters of fact". However, in her conclusion at para. [53], she said "it would be difficult to separate this preliminary issue of law from the claim as a whole". Hence, on the question of whether the preliminary issue raised questions of fact and or law, the learned judge's finding seems to be contradictory.

[22] The learned judge also found that issues of fact arose relating to the discriminatory effect of the law and whether it contravened any constitutional rights. I fail to see how a determination of whether the savings law clause excludes the impugned provisions of the OAPA from scrutiny by the court requires any consideration of those factual issues. Factual issues regarding the discriminatory effect of the impugned provisions of the OAPA, Mr Tomlinson's personal experiences and testimony from expert witnesses would not, in my view, aid in this determination. This is purely a question of law, and so there was no need for the parties to agree to any factual issues. Therefore, the learned judge would have erred when she found that the issue to be determined was "not a purely legal one".

[23] The learned judge failed to consider what effect, if any, a subsequent amendment to Mr Tomlinson's statement of case would have had on the determination of the preliminary issue. However, having made this consideration, I find that given Mr Tomlinson's claim and my finding that the question to be determined relates purely to a legal issue, there would be no impact on a determination of the preliminary issue should his claim be amended, as ultimately, Mr Tomlinson wishes to have these provisions declared unconstitutional.

[24] In all the circumstances, it is just to order a determination of the preliminary issue. In the light of the foregoing, the learned judge would have erred in exercising her discretion to refuse the application. The order she made on 19 January 2022 ought to be set aside. Although the AG did not request this, in my view, given the implications for a

whole or a part of the claim, the substantive claim should be stayed pending a determination of the preliminary issue.

[25] Regarding the issue of costs, the learned judge had awarded costs to Mr Tomlinson to be taxed if not agreed. Miss White urged the court to set aside the learned judge's award of costs and make no order as to costs of the appeal and in the court below, regardless of the outcome of the appeal, as she saw no basis to depart from the general rule that costs are not awarded in constitutional claims. She also contended that the matter involved a consideration of the savings law clause, and that the appeal was critically necessary based on all the circumstances. Mr Wilkinson submitted that costs in this court and the court below should be awarded to Mr Tomlinson, regardless of who wins, as the AG had filed the application for a preliminary trial at the last minute. He also believes that, by filing this appeal, the AG has behaved unreasonably, as it has delayed the hearing of the substantive claim and resulted in additional costs to Mr Tomlinson.

[26] Part 56 of the CPR governs an application for administrative orders. Rules 56.15(4) and (5) of the CPR state that:

> "(4) The court may, however, make such orders as to costs as appear to the court to be just including a wasted costs order.
> (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.
> (Part 64 deals with the court's general discretion as to the award of costs, rules 64.13 and 64.14 deal with wasted costs orders.)."

[27] Pursuant to Part 64 of the CPR, the general rule is that the unsuccessful party pays the costs of the successful party. This general rule is also subject to the court's discretion to order otherwise, and rule 64.6(3) directs the court to have regard to all the circumstances in deciding who should be liable to pay costs having regard to the factors stated in rule 64.6(4).

[28] I disagree with Mr Wilkinson that the belated filing of the application for a preliminary trial demonstrates conduct that is sufficiently unreasonable to warrant a costs order being made against the AG. It is to be noted that subsequent to the commencement of proceedings on the fixed date claim, several parties applied to be named as interested parties. One of those applications had to be finally determined by this court, which contributed to a delay in the progress of the substantive claim.

[29] I agree with Miss White that the application and this appeal were, indeed, necessary given the implication the preliminary issue may have for the whole or part of Mr Tomlinson's claim. There was, therefore, no reason to depart from the general rule that no order for costs be made against an applicant for an administrative order. Consequently, in my view, the learned judge erred when she awarded costs to Mr Tomlinson in the application below. I would, therefore, set aside her costs order and make no order for costs in the appeal and the court below.

[30] In all the circumstances, I would make the following orders:

1. The appeal is allowed.
2. The decision of Hutchinson J made on 19 January 2022 is set aside.
3. A separate trial is to be held to determine the preliminary issue of whether the constitutionality of sections 76, 77 and 79 of the Offences Against the Person Act can be enquired into in the light of the savings law clause in section 13(12) of the Charter of Fundamental Rights and Freedoms in the Constitution of Jamaica.
4. The trial of the preliminary issue is to be held as soon as possible on a date to be fixed by the Registrar of the Supreme Court.

5. The trial of the substantive claim is stayed pending a determination of the trial on the preliminary issue.
6. There shall be no order as to costs of the appeal and in the court below.

SIMMONS JA

[31] I, too, have read the draft judgment of my sister P Williams JA. I agree with her reasoning and conclusion.

MCDONALD-BISHOP JA

ORDER

1. The appeal is allowed.
2. The decision of Hutchinson J made on 19 January 2022 is set aside.
3. A separate trial is to be held to determine the preliminary issue of whether the constitutionality of sections 76, 77 and 79 of the Offences Against the Person Act can be enquired into in the light of the savings law clause in section 13(12) of the Charter of Fundamental Rights and Freedoms in the Constitution of Jamaica.
4. That trial of the preliminary issue is to be held as soon as possible on a date to be fixed by the Registrar of the Supreme Court.
5. The trial of the substantive claim is stayed pending a determination of the trial on the preliminary issue.
6. There shall be no order as to costs of the appeal and in the court below.