

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 73/2007

**BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE HIBBERT (Ag)**

BETWEEN	LLOYD DOBSON (THE ADMINISTRATOR AD LITEM OF THE ESTATE OF ABUNA YESEHAQ)	APPELLANT
AND	ETHIOPIAN ORTHODOX CHURCH IN JAMAICA	RESPONDENT

Barrington Frankson and Ms Jodianne Hammit for the appellant

Heron Dale and Miss Joy McLeary for the respondent

3, 4 October and 11 November 2011

HARRIS JA

[1] In this appeal, the appellant challenges the decision of McIntosh Donald J, made on 5 June 2007. The respondent is a hierarchical church (the Church) having its headquarters at 89 Maxfield Avenue in the parish of Saint Andrew. It was designated a corporate body by virtue of the Vesting Act of 4 May 1978. The appellant is the administrator ad litem of the estate of Abuna Yesehaq, a

former archbishop of the Church. For the sake of clarity, Abuna Yesehaq will hereinafter be referred to as the appellant.

[2] The mother church, the Ethiopian Orthodox Church (the EOC), is situated in Addis Ababa, Ethiopia and the Patriarch is its titular head. The Holy Synod, the EOC's primary decision making body, is also in Ethiopia. On 13 May 1992, a meeting was held by the Holy Synod in Ethiopia which the appellant attended. At that meeting an agreement was reached to elect a Patriarch as the seat was vacant. The appellant was one of the signatories to the minutes of the meeting.

[3] On 5 July 1992, the Holy Synod elected Abuna Paulos as the Patriarch internationally, and the appellant was appointed archbishop of the Caribbean and Latin America. However, on 22 September 1992, the appellant announced his independence from the mother church. Since that time he has proceeded as the Church's true representative, has retained control over the Church's property and has been managing and administering the assets of the Church.

[4] On 8 October 1992, Abuna Gabriel was appointed archbishop of the Caribbean and Latin America. On 15 January 1993, he appointed certain persons as trustees and officers of the Church to manage and administer its affairs. The following certificate was issued in support of the appointments:

"I HEREBY CERTIFY that the persons named in this Certificate and set out hereunder shall be appointed to be the holders of the Offices named herein on the 15th day of January, 1993 pursuant to the provisions of the ETHIOPIAN

ORTHODOX CHURCH in Jamaica (Incorporated) and Vesting Act, 1978 viz,

1. Fr. Wolde Dawit Priest-in-Charge
2. Fr. Hermon Dewar Secretary
3. Fr. Cleavan Hamilton Trustee
4. Deacon Ronald Pitt "
5. Paul Aiken Chairman
6. Everald Hemmings Financial Secretary
7. John Sinclair Trustee
8. Claude Pitt "
9. Joseph Lewis Treasurer
10. Delroy Spence Trustee
11. Tsega Zab "
12. Amsale Maryam "
13. Meserete Maskel-Cork "

GIVEN under my hand at Kingston this 3rd day of March, 1993."

[5] The respondent, being aggrieved by the acts and conduct of the appellant, initiated proceedings against him on 26 January 1994 seeking the following:

- "(a) An Injunction restraining the Defendant and his servants and agents from occupying, entering or otherwise interfering with the property of the Plaintiff;
- (b) The Defendant do pay to the Plaintiff damages consequent on the said trespass.
- (c) The Defendant do render to the Plaintiff an accounting of all accounts operated and monies received by him/or on his behalf in the

name of the Ethiopian Orthodox Church in Jamaica.

- (d) Mesne profits
- (e) Such further and other relief as may be just
- (f) Costs."

[6] The evidence on which the appellant relied came from Mr Neville Hay and Miss Judith Thompson. The evidence for the respondent was adduced by Abuna Thaddeus, who succeeded Abuna Gabriel on 7 February 1993, and from Mr Wolde Dawit. In his witness statement, Mr Hay stated that he was a priest, and a founding member of the Church which was established by the appellant in 1970, who was subsequently ordained as the archbishop of the diocese of the western hemisphere. He stated that he, Mr Hay, had been a member of the Board of Trustees of the Church from its inception and was currently chairman of the Board. The Board, he related, did not authorize the commencement of the action, as it was brought by members of Saint Athanasius Society which comprises two priests and a small group of followers comprising 12 persons, who were ex-communicated from the Church in October 1992. He further stated that Hermon Dewar, Abuna Thaddeus, Wolde Dawit, Ronald Pitt, Oswald Stewart and Ernle Gordon are not authorized to give evidence on behalf of the Ethiopian Orthodox Church in Jamaica nor are any of them severally or collectively entitled to possession of any of the Church's property.

[7] He stated that on 21 September, 1992 a resolution was taken by the Ethiopian Orthodox Church in the western hemisphere in which it denounced the enthronement of a new Patriarch which had been done contrary to the laws of the Ethiopian Orthodox Church. The Church, on 16 January 1993, by resolution, supported that, which was passed on 21 September 1992. The Jamaican Church, he disclosed, remains under the legal synod of the Ethiopian Orthodox Church.

[8] The dispute as to enthronement is an ecclesiastical matter to be ultimately decided by the Holy Synod, he asserted. He declared that the Church recognizes Abuna Merkorious as Patriarch and Abuna Yesehaq as its archbishop. To be accepted as a bishop by the Church, it is a requirement that that person must be in possession of letters from Abuna Merkorious, he declared. The Church has disassociated itself from Abuna Paulos' appointment as it does not place itself under his illegal administration.

[9] He also related that the Church's property is owned by Jamaicans who are its members and it is administered by the Board of Trustees which is elected by the General Council. He stated that the General Council is composed of officers and delegates from all the branches and that through the succession of the Board of Trustees, all properties owned by the Church are secured with the Church in Jamaica and "preserved for the next generation of members".

[10] He related that the appellant established the teachings of the Ethiopian Orthodox Church in the United States of America, Canada, Africa and the West

Indies. However, prior to his death he requested that he be buried in Jamaica and in keeping with that request, his body is now interred at the Headquarters of the Ethiopian Orthodox Church at No. 89 Maxfield Avenue.

[11] Miss Thompson stated that she is the church's secretary. The evidence contained in her witness statement is essentially similar to that of Mr Hay so it will be unnecessary to outline it.

[12] Abuna Thaddeus' evidence, in his witness statement, is that Jamaica and the United States previously fell under the archdiocese of the western hemisphere but the Holy Synod in July 1992 divided the western hemisphere into three separate dioceses, viz, archdioceses of United States and Canada, Europe and the Caribbean and Latin America of which the Church is a part.

[13] He stated that the appellant refused to accept the appointment as archbishop of the Caribbean and Latin America and was suspended by the Holy Synod. He was eventually ex-communicated by the Church, he having disassociated himself from the Patriarchate of the EOC. He stated that on 16 January 1993, Abuna Gabriel, by the authority vested in him by the Holy Synod and the Church's Constitution, appointed a number of persons to the Church. These appointed persons, he disclosed, have been recognized by the Holy Synod as the Church's legitimate representatives.

[14] It was also stated by him that on 12 May 1994, he visited Jamaica in order to carry out pastoral duties but was unable to conduct services at Maxfield Avenue. Arrangements were made for him to perform the duties at St Mary's Anglican Church, Molynes Road but on arrival there, he found the church in a state of disarray. He was informed by Mr Dawit and others that the appellant's supporters had invaded the church and assaulted its worshippers. He went on to relate that he returned to Jamaica in 1995 but was also unable to carry out his pastoral duties from 23 to 30 January at the Church's headquarters.

[15] The evidence of Mr Dawit, in his witness statement, is that the archdiocese of the western hemisphere came into operation in 1979 at which time the appellant became archbishop. Thereafter certain administrative changes were carried out by the Holy Synod in Addis Ababa which included the election and enthronement of a new Patriarch and the restructuring of the archdiocese of the western hemisphere. At a meeting convened by the Holy Synod in December 1991, to which all archbishops and bishops were summoned, several resolutions were passed and a committee was appointed to review the EOC's structure. Since then the EOC re-organized the structure of its churches in the western hemisphere which was then divided into three archdioceses, namely, the archdiocese of the Caribbean and Latin America, which replaced the former archdiocese of which the Church was a member, the archdiocese of Europe and the archdiocese of the United States and Canada.

[16] On 11 September 1992, the appellant was appointed archbishop of the Caribbean and Latin America but he refused to take up the office to which he had been appointed. He instead, continued to pass himself off as the archbishop of the western hemisphere which had been abolished. On or about 23 September 1992, he declined to acknowledge the teachings and culture of the EOC by declaring his independence of the EOC's administration. As a consequence, on 25 September 1992, the Holy Synod rescinded his appointment and on 8 October 1992, appointed Abuna Gabriel, in his stead, who was subsequently succeeded by Abuna Thaddeus.

[17] The appellant persisted in passing himself off as representing the Church despite an order of a Court in New York suspending him from portraying himself as the Church's representative. He, the appellant, appointed a number of purported officials, acting on his behalf and in his name. Members of the Church have been denied access to the Church and/or have been forcibly removed there from, or have had to flee by reason of threats from the appellant and his followers. On 31 December 1992, Abuna Gabriel came to Jamaica to perform pastoral duties but was denied access to the Church's premises.

[18] On 27 September 1992, the members of the Church assembled to discuss developments of the Church, which assembly was disrupted by supporters of the appellant. He went on to state that one of the appellant's supporters issued

threats against him and others acted in a violent and menacing manner towards him.

[19] He further stated that Archbishop Gabriel appointed the Board of Trustees for the Church and by letter dated 15 January 1993, he informed the President of the Jamaica Council of Churches. By letter dated 16 January 1993, he advised the Prime Minister of Jamaica and the Minister of Foreign Affairs, of these appointments.

[20] He stated that on 3 March 1993 members of the said corporate body met and decided on changes in its Constitution and issued a Certificate of Appointment confirming its decision. On 17 March 1993 a certificate under the seal of the corporate body and over the signature of the Priest in charge, the General Secretary and Chairman of the Board of Trustees regarding the appointments of certain officers was prepared and lodged in the Island Record Office.

[21] The appellant, he declared, continues to retain exclusive and unauthorized use of the Church's funds and operate its bank accounts. He, as well as his representatives have also undertaken unauthorized construction on the Church's property and have threatened to undertake further construction work on it. He further stated that the appellant and his followers persist in using the Church's property and operate its bank account without properly accounting to the trustees of the corporate body.

[22] The learned judge, after concluding that the persons named in the Act are the lawful trustees of the Church, entered judgment for the respondent and ordered the following:

- “1. that the defendant, his agents and/or servants hand over to the claimant all property in their possession or control belonging to the Ethiopian Orthodox Church in Jamaica, forthwith.
2. that an injunction is hereby granted restraining the defendant, his servants and/or agents from occupying, entering or otherwise interfering with the property of the Ethiopian Orthodox Church in Jamaica, that the defendants, his servants and or agents do nothing to prevent or interfere with persons who wish to worship in the Ethiopian Orthodox Church in Jamaica.
3. That costs be to the claimant to be taxed if not agreed on 15/6/07.
Defendant’s application for stay of execution refused.”

[23] The following are the grounds of appeal:

- “(i) The Learned Trial Judge erred and/or misdirected himself in law when he expressed the view that the issue is a simple matter in that persons who belong to any society who do no [sic] adhere to the rules of the Administration would not, should not and indeed cannot call themselves a part of that organization. The Learned Trial Judge ought to have confined his approach to the fact that the Ethiopian Orthodox Church in Jamaica was a Corporation sole having been established by Act 11 of 1978. The Church was established as an autonomous congregation with respect to matters of administration and finance and Archbishop Gabriel did not have the legal

authority to disband the Board of Trustees which had been elected and was in place since the date of incorporation and which was in existence by virtue of succession.

- (ii) The Learned Trial Judge erred in law when he refused to accept the legal position of the church in each country as the sole controlling body in matters pertaining to finance and property.
- (iii) The Learned Trial Judge erred in law when he came to the view that the Board of Trustees must be comprised of people chosen through the relevant Archbishop.
- (iv) The Learned Trial Judge fell into error and was wrong in law when he came to the view that the Certificate of Appointment dated the 3rd day of may, [sic] 1993 was duly executed and registered in Accordance with Section 4 of Act 11 of 1978 and that persons named therein must be the "Lawful Trustees" of the Ethiopian Orthodox Church in Jamaica and the persons entitled to hold property on behalf of the Ethiopian Orthodox church.
- (v) That the claim herein was not instituted and/or commenced by the lawful Board of Trustees of the Ethiopian Orthodox Church in Jamaica."

[24] Mr Frankson submitted that the learned judge, by applying ecclesiastical principles, erroneously arrived at his decision. In order to determine the persons who are entitled to administer the affairs of the Church and control its assets, one must be guided by the Act establishing the Church and the relevant rules, he argued. The appellant, he contended, remained a member of the Church, and the head administrator, and the respondent had not presented any evidence to

show otherwise. Neither the rules of the mother church nor the Act make provision for that church to exercise control over the Board of Trustees in the management of the corporation established in Jamaica, he argued. The Board of Trustees, he submitted, which took office at the time of incorporation, is the only legally appointed Board of Trustees, it having continued in succession up to the time of the purported appointment of a new board.

[25] In paragraphs 5, 6, 7 and 8 of his written submissions, which he adopted, the following is stated:

5. Section 3(1) of the Act provides the evidence as to who were the persons forming the Board of trustees upon incorporation which included the Defendant and two (2) of the witnesses who gave evidence on the Defendant's behalf. There is evidence which supports the Appellant's contention that the Board of Trustees continued in succession up and until the Respondents [sic] filed a Certificate of Appointment pursuant to the appointments made by Abuna Gabriel.
6. There is no evidence presented at the hearing by the Respondents that the Board of Trustees committed any improper or illegal acts with reference to the said corporate church in violation of its by-laws that would warrant disturbing control over the said corporate church properties, as such control existed prior to the alleged discharge of the Appellant. The mere fact that a minority group within a corporation is unhappy with the legal acts of the majority, does not give license, as in the within matter, to transfer corporate control of bank accounts from the majority group to the minority group. If this were true, a minority group within a Corporation could effect

tumultuous change without legal cause.' (See pg. 145 of the Record of Appeal) It is submitted that this is what the Respondents are seeking in the case at the bar, but this cannot be justifiably accomplished.

7. There is no evidence that the Board of Trustees must be comprised of [sic] people chosen through the relevant Archbishop whom the Appellant and his followers have rejected.
8. Based on the evidence given by both sides and applying the principles of law and avoiding questions regarding 'religion', it is submitted that by the act of incorporation the Ethiopian Orthodox Church in Jamaica was established as an autonomous congregation with respect to fiscal matters and administration and the Archbishop did not have the legal authority to disband the Board of Trustees which was duly elected. It is further submitted that the purported election of the new Board of Trustees was not in conformity with the Act of Incorporation and the by-laws. (See pages 13-14 of the Record of Appeal). "

[26] Mrs McLeary adopted a written submission, which states, among other things, that the learned judge was correct by finding in favour of the respondent. The Act, she argued, specified named individuals to occupy various offices and it also states the manner of succession of the members of the Board of Trustees. She submitted that the Act did not establish the Church, as the preamble shows that the incorporation was for the purpose of the management of the affairs of the Church and for the purpose of the Church being amenable to the laws of Jamaica.

[27] In the written submissions it is stated that the preamble recognizes the Church as a part of the EOC and the Act provides for the property of the Church to be held by trustees in perpetual succession. The Act did not specify rules dealing with succession, accordingly, the Church established a Constitution in this regard. Mrs McLeary further submitted that there was schism in the Church and by article 4 of the Constitution; the archbishop was entitled to appoint a Board of Trustees, which Board, being properly constituted, was entitled to control the assets of the Church and administer its financial affairs.

[28] The issue for determination is centered around a narrow point, the resolution of which is anchored on the question as to which of the two contending parties is endowed with the right to control, manage and administer the property and the affairs of the Church. This leads us to first direct our attention to the Vesting Act of 1978. By virtue of a preambular provision in the Act, the Jamaican church is regarded as a part of the EOC "For propagation of the Gospel of Christ and the dissemination of the teachings and culture of the Ethiopian Orthodox Church in Addis Ababa, Ethiopia". The preamble also recognizes that all real and personal property in Jamaica is held in trust for the Church.

[29] Section 3(1) of the Act expressly nominates certain persons as trustees, and also gives the right of perpetual succession. It reads:

"3(1) The following persons, that is to say, Abba
Laiké M. Mandefro, Head Administrator of the

Ethiopian Orthodox Church in the United States of America and Jamaica, Archdeacon, Hermon Dudley Dewar of No. 12 Wild Street in the Parish of Kingston, Priest in Charge, Errol Joseph Anderson of No. 3 West Road, Mona in the Parish of Saint Andrew, General Secretary and Haughton Alexander Brown of No. 162B King Street in the City and Parish of Kingston, Treasurer and Deacon and Cecil George Gordon of No. 28 Maiden Lane in the City and Parish of Kingston, Chairman of the Board of Trustees, Neville Delroy Hay of No. 10 Dillon Avenue in the Parish of Saint Andrew and Neville Lloyd Manning of No. 25 Baker Street in the Parish of Saint Andrew, Trustees and their successors for the time being in the respective offices aforesaid are hereby declared, constituted and appointed a Corporate Body to have continuance forever and perpetual succession by the name of 'The Ethiopian Orthodox Church in Jamaica' and possessed of a Corporate Seal and by that name may sue and be sued in all Courts in this Island."

[30] Section 3(4) makes provision for the lodging of a certificate under the seal of the corporation, in the Island Record Office or the Office of Titles in respect of the appointments made under section 3(1). The section states:

"(4) Upon recording in the Island Record Office or the lodging in the Office of Titles of a Certificate under the Seal of the Corporation of the appointment of any person to any of the offices mentioned in Subsection (1) of this section the persons named in such Certificate shall be deemed to be holders of the Offices named therein until the recordings or lodging of a Certificate of the appointment of another person to such office."

[31] Section 4(1) speaks to the vesting of the Church's property in the corporation. It provides:

"4(1) All lands and hereditaments and all goods, chattels and personal property in Jamaica which are now legally or equitably the property of the Church or

are held in trust for the purposes of the Church are now held or possessed on behalf of the Church by the Official Members and Ministers or Members of the Church or any of them or by any person holding under such Officials, Members and Ministers or Members of the Church or any of them are hereby transferred to and vested in the Corporation their successors and assigns for the same estate and interest to which the same were respectively held by or vested in the said grantees hereinbefore named at the time of the passing of this Act subject to all trusts, mortgages charges, rights, reservations or encumbrances if any affecting the same or any part thereof."

[32] Section 5 governs the powers of the corporation. It reads:

"5 - The Corporation shall have the following powers:-

- (a) To acquire, hold, purchase, receive, lease, possess and enjoy any lands and hereditaments whatsoever in fee simple, leasehold or for any other estate or interest therein, and all other property, real or personal or mixed;
- (b) To give, grant, let, charge, improve, manage, develop, exchange, lease, mortgage, sell, convey, assign, dispose of, turn to account, or otherwise deal with, all or any of the property, both present and future, so held or vested, or any part thereof;
- (c) To borrow, raise or secure the payment of money in such manner as may be thought fit and in particular by the issue of debentures or script charged upon all or any of the property, both present or future, held by or vested in the Corporation and to redeem and pay off such securities;
- (d) To appoint an Attorney or Attorneys of the Corporation either generally or for a limited

period, and for such purposes and with such powers as may be stated in the Power of Attorney and to revoke any such appointment;

- (e) To make such rules and by-laws as they shall think fit in order to carry out the purpose of the law."

[33] The learned judge, after finding that the facts upon which the parties relied were essentially undisputed, narrated an outline of the relevant facts. He found that the appellant accepts that ecclesiastical disputes must be settled by the Holy Synod but refused to acknowledge that the Holy Synod had the authority so to do and yet he disassociated himself from the duly elected archbishop. He went on to say:

"Conveniently, the defendant forgets that this Board of Trustees must be comprised of people chosen through the relevant Archbishop whom the defendant and his followers have rejected.

Instead the defence prays in aid that the question of the church's property must be settled by the law of this country.

Act 11, of 1978 by virtue of which the Ethiopian Orthodox Church in Jamaica was incorporated does speak to a Board of Trustees in section 3. It also speaks to this Board enjoying perpetual succession and it speaks to provisions for the recording of the appointment to the board.

There is in evidence a certificate of appointment dated the 3rd May 1993. This certificate has been duly executed and registered in accordance with section 4 of the Act. The persons named therein must be the 'Lawful Trustees' of the Ethiopian Orthodox Church in Jamaica and the persons entitled

to hold property on behalf of the Ethiopian Orthodox Church.”

[34] As rightly submitted by Mrs McLeary, the preamble to the Act recognizes the Church as a division of the EOC. The preamble also recognizes that the Church’s real and personal property should be held in trust. By section 3(1), certain persons were specifically appointed to undertake the job of trustees of the corporation. The section further prescribes that the trusteeship should devolve by way of succession and such succession continue in perpetuity. It cannot be overlooked that section 3(4) validates the appointment of the trustees on the recording of a certificate with either of the two relevant authorities.

[35] The appellant contends that the line of succession was unbroken as the appellant had been a member of the Church at the time of incorporation, he having established the Church. There was no dispute as to who established the Church. The conflict relates to the question as to who are the trustees by virtue of the Church’s incorporation. The appellant refused to recognize Abuna Paulos as Patriarch, he being the supporter of Abuna Merkorious, who was no longer Patriarch. He was present at the meeting of the Holy Synod in May 1992 when the consensus was that a new Patriarch would be elected due to a vacancy in the seat. He was a signatory to the agreement. He was aware that in July 1992 Abuna Paulos was elected Patriarch by the Holy Synod and in October 1992 Abuna Gabriel was appointed Archbishop of the Caribbean and Latin America in his place, his appointment having been rescinded by the EOC. The appellant

acknowledged that the Church remained under the legal synod of the EOC. He was not unmindful that ecclesiastical matters are settled by the Holy Synod, the principal decision making body of the EOC, and that the local Church is bound by the Holy Synod's decisions. It is indeed mystifying that he, in defiance of the Holy Synod's edicts, had been holding himself out as the archbishop of the western hemisphere which had been abolished by the Holy Synod.

[36] Interestingly, he contends, through his witnesses, that the dispute before this court which is ecclesiastical should be settled by the Holy Synod. The dispute with which the court is confronted is not ecclesiastical in nature, nor did the learned judge so find. It is a legal dispute as to who are the members of the Board of Trustees within the meaning of section 3(1) of the Vesting Act. The words of this section of the Act are plain and unambiguous. They do not lend themselves to any interpretation as to the legislative intent. The section clearly and unequivocally makes provision for the nomination of certain persons to perform duties as trustees of the corporation and it expressly stipulates that succession of the trusteeship shall be in perpetuity.

[37] At the time of Archbishop Gabriel's appointment to the Board of Trustees, the Church was undergoing a period of schism. There was great discord and disharmony between the appellant, his supporters, on the one hand, and the appointees of Abuna Gabriel and other members of the Church on the other hand. In such circumstances, the Constitution of the Church makes provision for

the manner in which the appointments under section 3(1) should be made. Under article 4 of the Constitution, the Board of Trustees may be elected by the congregants of the Church but in adverse and extenuating circumstances the archbishop is permitted to appoint the Board of Trustees. It reads:

“The Board of Trustees shall be constituted of not less than five (5) and not more than thirteen (13) members. They shall be elected by the Assembly of Parishioners or appointed by the Archbishop for the Church in Jamaica in adverse and extenuating circumstances.”

[38] There being schism in the Church, Archbishop Gabriel, being fortified by the provisions of article 4, was correct in making the appointments in keeping with the Act and the Church’s Constitution. Having made the appointments, he issued a certificate in accordance with section 3(4) which was duly recorded at the Island Record Office. We are in agreement with the learned judge that the persons named in the certificate are the proper parties to hold the Church’s property in trust. As the trustees, they are entitled to control, regulate, manage, direct and administer the affairs of the Church in accordance with sections 4(1) and 5 of the Act. The commission of wrongful acts by the appellant, his persistent interference with the right of enjoyment of the Church’s property and its assets by the respondent, would no doubt cause great inconvenience and irreparable harm.

[39] The appeal is dismissed. The order of the learned judge is affirmed. The costs of the appeal are awarded to the respondent to be agreed or taxed.

DUKHARAN JA

[40] I have read in draft the judgment of my sister Harris JA and agree with the reasoning and conclusion. I have nothing to add.

HIBBERT JA

[41] I too have read the judgment of Harris JA and agree with her reasoning and conclusion.

HARRIS JA

ORDER

The appeal is dismissed. The order of the learned judge is affirmed. The costs of the appeal are awarded to the respondent to be agreed or taxed.

