JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 129/05

BEFORE: THE HON. MR. JUSTICE SMITH, JA.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MISS JUSTICE G. SMITH J.A. (Ag.)

BETWEEN: LOWELL LAWRENCE APPELLANT

A N D FINANCIAL SERVICES COMMISSION RESPONDENT

**Mr. Gordon Robinson** instructed by **Mrs. Minett Lawrence** for the appellant.

**Mr. Patrick Foster Q.C. Solicitor General (Actg.)** and **Miss Danielle Archer** instructed by **Director of State Proceedings** the respondent.

June 9, 10 and 13, and July 18, 2008

SMITH, J.A:

This is an appeal against the decision of the Full Court (Reid, Marsh and D. McIntosh JJ) delivered on the 28th October, 2005, dismissing the appellant's application for judicial review of a decision of the respondent.

The appellant is a trained Financial Representative and businessman. He was at the material time, an employee of MONY Life Insurance Company Ltd. (MONY). The respondent is a statutory body established under the Financial Services Commission Act (FSC Act). One of its functions is to supervise and regulate prescribed financial institutions including insurance companies, with a view to protecting customers of these institutions.

Section 21 of the FSC Act provides:

Section 21 of the FSC Act provides:

> "21. (1) This section shall apply to an offence under any relevant Act, being an offence specified in the Fourth Schedule.
>
> (2) The Commission may give to any person who it has reason to believe has committed an offence to which this section applies, a notice in writing in the prescribed form offering that person the opportunity to discharge any liability to conviction of that offence by payment of a fixed penalty under this section.
>
> (3) No person shall be liable to be convicted of the offence if the fixed penalty is paid in accordance with this section and the requirement in respect of which the offence was committed is complied with before the expiration of the fifteen days following the date of the notice referred to in subsection (2) or such longer period (if any) as may be specified in that notice or before the date on which proceedings are begun, whichever event last occurs."

By virtue of section 70 (2) of the Insurance Act, it is an offence punishable with a fine not exceeding Three Million Dollars or imprisonment for a term not exceeding three years, or with both such fine and imprisonment, for a person to carry on business as an insurance intermediary, unless he is registered under the Act.

In February 2002, MONY submitted an application for registration to carry out insurance business in Jamaica. The application was not approved. In June 2002, MONY submitted applications for 22 sales representatives in its employment, including the appellant. The

respondent did not issue any certificate of registration for the appellant or for any of the other sales representatives of MONY. In 2003, the respondent received reports that MONY was conducting insurance business in Jamaica. Investigations by the respondent confirmed the reports. The investigations also confirmed that sales representatives employed by MONY, including the appellant, had been carrying on business as insurance intermediaries without having been registered under the Insurance Act.

Discussions between MONY and the respondent resulted in an agreement that the respondent would offer the sales representatives the options of paying a fixed penalty in lieu of making recommendation to the Director of Public Prosecutions that the representatives be prosecuted for the breaches.

On April 26, 2004, the respondent wrote to the appellant that it had evidence indicating that he had breached section 70 of the Insurance Act. The respondent intimated to the appellant that it "has decided to offer you the option under section 21 of the FSC Act in lieu of recommending prosecution for your breach of the Act and, if accepted by you, will not commence proceedings to suspend and/or revoke your registration".

The options were explained to the appellant. He was advised that the Fixed Penalty Notice with appropriate instructions would be sent to

him and told that if he had any questions he should contact Mr. Leon Anderson, a senior director of the respondent.

On May 28, 2004, the appellant, through his attorney-at-law, replied to the respondent's letter. The appellant denied breaching any law and complained that the respondent did not supply him with reason for believing that the appellant had committed any offence. The appellant also complained that he was not given "an opportunity of attending a fair hearing by an independent and impartial tribunal of the "evidence" that you say you have". The appellant stated that he would welcome an opportunity to clear his name in a court of law in the event the Director of Public Prosecutions should decide that the "evidence" was sufficient to support a charge. Finally, the appellant demanded the withdrawal of the "offensive and illegal letter" and an apology.

On July 1, 2004, the respondent wrote to the appellant setting out the provisions of section 70(1) and (2) of the Insurance Act and informing him of the information it had concerning his contravention of section 70 (1). The respondent enclosed in its letter a Payment of Fixed Penalty Notice for the immediate attention of the appellant. The Notice is reproduced below:

> **"THE FINANCIAL SERVICES COMMISSION ACT**
>
> The Financial Services Commission (Payment of Fixed Penalty) Notice

Pursuant to section 21 (2) of the Financial Services Commission Act in respect of an offence specified in the Fourth Schedule

To: Lowell Lawrence TRN No 100-379-559

Address: 6 Roehampton Mews Kingston 19, Jamaica

YOU ARE HEREBY NOTIFIED THAT

1. The Financial Services Commission has reason to believe that you have committed an offence under the

Insurance Act, 2001

(hereinafter referred to as "the Act") being the offence specified in the Schedule.

2. You are liable to have criminal proceedings taken against you in respect of the offence and, if convicted of the offence, you shall be liable to a fine as set out in the relevant provision of the Act in respect of that offence.

3. Notwithstanding your liability to conviction for the offence, the Commission hereby offers you the opportunity to discharge such liability by payment of a fixed penalty in the amount set out in the Schedule, before the expiration of the period ending on the date set out therein, and if the penalty is paid, then no proceedings shall be taken against you in respect of the offence.

4. The fixed penalty shall be paid to the Collector of Taxes specified in the Schedule and the fourth copy of the notice duly endorsed by the Collector of Taxes in confirmation of the payment of the fixed penalty and the Government of Jamaica Official Receipt from the Collector of Taxes evidencing payment of the fixed penalty, shall be submitted by you to the Commission.

SCHEDULE

Offence: Carrying on or purporting to carry on insurance business as an insurance intermediary, without being registered by the Commission to do so, in contravention of section 70 of the Insurance Act.

Particulars of Offence:

It is the finding of the Financial Services Commission that Lowell Lawrence was engaged in the sale of insurance policies as a sales representative of MONY Life Insurance Company of the Americas, Ltd. without being registered by the Commission to do so. In so doing, Lowell Lawrence has committed an offence under section 70 of the Insurance Act.

Fixed Penalty: One Hundred Thousand Dollars ($100,000.00)

Final Date of payment of Fixed Penalty: July 23, 2004

Collector of Taxes to whom Fixed Penalty is payable: Any office of the Collector of Taxes situated in Jamaica

Acknowledgement of Service:

Endorsement by Collector of Taxes:

Signature of Authorized Officer Financial Services Commission

Date."

The appellant did not pay the fixed penalty and instead sought judicial review of the decision of the respondent. The reliefs sought in the Fixed Date Claim Form were:

> (i) "An order of Certiorari to quash the decision of the Financial Services Commission to offer the appellant (the claimant in the Court below) a fixed penalty under the FSC Act.
>
> (ii) An Order of Prohibition to prevent the defendant (now the respondent) from laying a complaint against the claimant to the Director of Public Prosecutions.
>
> (iii) An order preventing the defendant from suspending, revoking or otherwise interfering with the claimant's registration under the Insurance Act.
>
> (iv) Damages for loss of wages
>
> (v) Damages for interfering with a contract of employment.
>
> (vi) Costs of this application."

The Full Court unanimously dismissed the application for judicial review. Reid, J held that "no relief under any of the stated grounds can be sustained and the application must be dismissed with costs to the respondent." Marsh, J stated that the fixed penalty scheme as contemplated in section 21 of the FSC Act does not require a hearing. He, too, would dismiss the applications with costs to the respondent. McIntosh, J did not mince words; he held that the application was misconceived in all the circumstances and should be dismissed with costs.

## On Appeal

Some eleven (11) grounds were filed on behalf of the appellant.

The grounds of appeal are:-

"1. The Full Court erred in finding (by a majority of 2) that the Appellant was not entitled to a hearing prior to the exercise of the discretion of the FSC, pursuant to Section 21 of the FSC Act, when that decision by the FSC placed the Appellant in jeopardy, without affording him the opportunity to be heard.

2. The Full Court erred in finding that no penalty was imposed and it failed to take into account the reality that a penalty can take other forms than the imposition of a sentence by a Court of Law.

3. The Full Court erred in implying that the Respondent's first letter to the Appellant provided the Appellant with "an opportunity to comment", when in fact that letter constituted the Respondent's offer, arising from the prior exercise of its discretion under Section 21 of the FSC Act; and was written after the Appellant's right to be heard had been denied.

4. The Full Court erred in finding that the Respondent's assertion that it had "obtained evidence to indicate" a breach; was sufficient to satisfy the statutory requirement that the Respondent must have "reason to believe" that a breach had been committed.

5. The Full Court erred in finding that there was no error of law on the face of the record despite the several obvious, and patent errors in the letter by which the Respondent communicated its decision to the Appellant; which decision was the subject of their review.

6. The Full Court erred in finding that there was no error of law on the face of the record or that the Respondent had not exceeded its jurisdiction when in fact the Respondent had embarked upon an adventure in which it had no jurisdiction whatsoever by Statute or otherwise. Those provisions of the FSC Act pursuant to which the Respondent has purported to act herein were not brought into operation before the Respondent's purported exercise of discretion under section 21 of the FSC Act nor were they brought into operation at the time of the commencement of these legal proceedings and they were still not in operation when the Full Court's decision was made. In fact, at all material times when the Respondent purported to exercise supervisory authority over the insurance industry, it acted without any statutory or other jurisdiction whatsoever. This was still the position when this action was filed and when it was decided by the Full Court.

7. The Learned Judge of the Full Court the Honourable Mr. Justice D. McIntosh, erred in finding that a hearing had been granted to the Appellant, in that his employer had been given a hearing. In making this finding, the Learned Judge also erred in finding that : (a) the employer was acting as agent of the Appellant; and (b) 'it would seem that the Appellant was kept abreast of the hearing and the resulting agreement' when the affidavit evidence showed clearly that the employer was acting on its own behalf; and further that the Appellant did not find out about the meetings between the Respondent and the employer until after the Respondent had made the decision which was the subject of the judicial review. Further, a finding that an employer is the agent of the employee is contrary to the norm and is wrong in law.

8. The Full Court erred in finding that there was no legitimate expectation based on the conduct of the Respondent, when the evidence in this regard was overwhelmingly in favor of the Appellant's position.

9. The Full Court erred in using the analogy of a traffic ticket as was the case in ***McCutcheon vs City of Toronto et al*** 147 D.L.R.(3rd) 193 as this is a wholly inapplicable analogy for the reason that, inter alia, a traffic offence is a strict liability offence, but the offence under the

Insurance Act, which the Respondent alleges was committed by the Appellant, is one requiring mens rea.

10. The Full Court erred in finding that section 21 of the FSC Act and particularly the provision for a fixed penalty was not unconstitutional despite the fact that:

(a) It is an attempt by the Legislature or, alternatively, by the Respondent, to usurp the role of the Judiciary within whose sole purview is vested, pursuant to the principles of Separation of Powers as enshrined in the Constitution, the power to impose a penalty for a criminal offence;

(b) It is an attempt by the Legislature, or alternatively, by the Respondent, to usurp the role of the Judiciary within whose sole purview it is, pursuant to the principles of Separation of Powers enshrined in the Constitution, to pronounce on the guilt or innocence of a citizen accused of a criminal offence;

(c) The provisions of section 21 of the FSC Act and particularly the purported power to "offer" the payment of a fixed penalty as an alternative to criminal prosecution is in breach of Section 94 of the Jamaica Constitution (Order in Council) 1962 ( "The Constitution") in that it would tend to

derogate from the authority therein given to the Director of Public Prosecutions;

(d) It is an attempt by the Legislature or, alternatively, by the Respondent, to compulsorily take from the Applicant his property or his interest in property to wit the emoluments, contracts and other benefits associated with his employment contrary to the provisions of section 18 of the Jamaican Constitution.

11. The Full Court erred in ordering costs against the Appellant when no express finding that the Appellant had acted unreasonably in making the application or in the conduct of the application, was made pursuant to Rule 56.15 of the CPR. To the contrary, the evidence showed that the Appellant's Attorneys-at-Law had written twice to the Respondent in an attempt to avoid litigation; and further no delay or other unreasonable conduct on the part of the Appellant or his Attorneys-at-Law was apparent or alleged".

It seems to me that these grounds may be classified into issues as follows:

1. The right to a fair hearing - Grounds 1, 2, 3, 7 and 9.
2. The jurisdiction of the Commission and error on the face of the record- Grounds 4, 5, and 6.

3. Legitimate Expectation – grounds 8

4. The Constitutionality of section 21 of the FSC Act – ground 10

5. Costs – Ground 11.

**The Fair Hearing Issue**

As Mr. Foster. Q.C. for the respondent said, the core issue that the Full Court had to decide was whether or not the appellant was entitled to a fair hearing before the FSC issued the Notice offering the appellant the opportunity to pay the fixed penalty pursuant to section 21 of the FSC Act. The fixed penalty is set out in the 4th Schedule of the FSC Act. It is the contention of counsel for the appellant that before such notice was issued the appellant should have been given a hearing. Mr. Robinson, for the appellant, in his written and oral submissions argues that the purported authority to make an offer to a suspected person, for the discharge of potential criminal liability given to the respondent by section 21 of the FSC Act, involves a decision by the respondent that it has "reason to believe" a person has committed an offence. He submits that such decision which "is bound to, and does in fact affect the livelihood of the affected party is not one that can be taken without first giving the affected party an opportunity to be heard, having been notified of the particulars of the charges to be made against him." He referred to dicta of Lord Morris and Lord Wilberforce in ***T.A. Miller v Ministry of Housing and Local Government*** [1968] !WLR 992.

Mr. Foster Q.C., for the respondent submits that the Full Court was correct in finding that there is no merit in this contention. He contends that given the nature of the fixed penalty payment provided for in section 21 of the FSC Act, a person exercising the option to pay a fixed penalty or of facing prosecution is not entitled to a hearing before exercising that option .

In my view, Mr. Foster is right. The basis for issuing the Fixed Penalty Notice is having "reason to believe" that the person has committed an offence. The use of the words "has reason to believe" in section 21 clearly indicates that a hearing is not contemplated. The exercise of the discretion does not involve a decision to do anything which would adversely affect any vested interest of the appellant. For the Commission to have "reason to believe" that a person has committed an offence, does not require a judicial determination of the person's rights. Procedural fairness is generally required whenever the exercise of a power adversely affects an individual's rights protected by common law or created by statute. The Fixed Penalty Notice under section 21 (supra) offers the person on whom it is served "an opportunity to discharge any liability to conviction". It is for the benefit of that person who may choose to reject it as indeed the appellant did. In my judgment the exercise of the Commission's discretion to make the offer to the appellant is not amenable to judicial review. The appellant's right to a fair hearing would

only arise after he has been charged – see section 20 (1) of the Constitution.

In any event, as Reid J held, the appellant was in fact given the opportunity to explain or comment when the respondent wrote to him on April 26, 2004. Instead of using the opportunity to make written representations, the appellant's attorney-at-law, as Reid J stated, retorted with a "gratuitous rebuke".

**The Exercise of the Commission's Discretion and Error on the Record**

Counsel for the appellant contends that the Full Court erred in holding that there was a basis for the exercise of the Commission's discretion pursuant to section 21(2) FSC Act. It is the contention of counsel that the respondent went beyond its jurisdiction and erred in law in deciding that it had "evidence of an offence" rather than "reason to believe" that an offence had been committed.

In the letter of April 26, 2004, the respondent stated that it had "obtained evidence to indicate" that the appellant had breached section 70(1) of the Insurance Act. Counsel contends that the FSC Act only requires the Commission to "have reason to believe" that an offence has been committed. The letter as worded, counsel argues, points to a conclusion of guilt. This, he contends, is an error of law on the face of the record. The exercise of the Commission's discretion to offer the appellant

the opportunity to pay a fixed penalty was based on this error, counsel argues.

Counsel also complains that the letter dated April 26,2004 contains a threat to commence proceedings to suspend and/or revoke the appellant's registration.

Section 21 (2) of the FSC Act invests the Commission with the discretion to offer the person who, it has reason to believe, has committed an offence, an opportunity to pay a fixed penalty in discharge of his liability.

Whereas the letter of 26th April, 2004 refers to the respondent's "decision to offer," it is the Notice itself at paragraph 3 which states that the "Commission hereby offers". This Notice in my view, supersedes the April 26 letter. Thus, even if there were errors in the letter (and I am not saying there are) these errors are of no moment in proceedings for judicial review of the commission's exercise of its discretion. The court will only quash a decision if the error of law was relevant to the decision making process – See ***Anisminic Ltd. v The Foreign Compensation Commission et al*** (1969) 1 All ER 208.

Paragraph 1 of the Notice states that the respondent has reason to believe that the appellant has committed an offence under the

Insurance Act. The schedule states the offence and the particulars of the offence. The particulars of the offence are stated as follows:

> "It is the finding of the Financial Services Commission that Lowell Lawrence was engaged in the sale of insurance policies as a sales representative... without being registered by the Commission to do so..."

In the light of the foregoing it is difficult to understand the complaint of the appellant. It is clear that the Commission, in coming to a belief that the appellant was in breach of the Insurance Act, made no error of law. I should add that the complaint in ground 6 was considered by the court recently and dismissed. The court found that the FSC (Insurance Services) (Validation and Indemnity) Act 2006 retrospectively validated the acts done in good faith by the Commission from December 2001. In my view this ground has no merit whatsoever.

**Legitimate Expectation**

The appellant contends that he had a legitimate expectation, that he would have been allowed to continue his commercial activities without any need for any registration under the Insurance Act.

The basis for the appellant's expectation is stated at paragraphs 4 and 16 of his affidavit dated July 14, 2004:

> "4. At all material times, I continued in the course of my employment without interference or hindrance by the Respondent and it was also my belief (arising from representations and assurance by my employer) that the Respondent had not rejected the said applications for registration. At no time during the period February 2002 to October 2003 did the Respondent notify me of a refusal of my application, or of any problem whatsoever with my application."

Paragraph 16 reads:

> "That I am advised by my Attorneys and do verily believe that my activities were commenced lawfully prior to the introduction of the new legislation, that I have a legitimate expectation of being registered under the Act unless the respondent can make a fresh allegation of wrong doing unrelated to my continuing employment to MLICA, which was not unlawful at the time of the introduction of the Act, Further, if there is any allegation of wrongdoing, whether linked to my continuing employment or otherwise, I expect to be given an opportunity to respond to any such allegations before any adverse action is taken against me."

What is clear from the above paragraphs is that the appellant was aware of the requirement for registration as indeed an application for registration was submitted on his behalf. The evidence is that the application for registration was not approved. The appellant nonetheless settled insurance policies. This was in breach of the Insurance Act.

I must confess my inability to understand how legitimate expectation can arise in such circumstances. The appellant's expectation was clearly not legitimate. The claim of the appellant that he has

legitimate expectation for procedural fairness is entirely baseless. Legitimate expectation, cannot be in conflict with the law.

Where a person has no legal right to a benefit or privilege as a matter of private law, he may have a legitimate expectation of receiving such benefit or privilege and if so, the courts will protect his expectation by judicial review as a matter of public law – see ***Council of Civil Service Unions (CCSU) et al v Minister for the Civil Service*** [1985] 1A.C. 374 at 401A. For the appellant to establish substantive legitimate expectation he would have to show an express promise or undertaking given by or on behalf of the Commission that was not in conflict with its statutory duty. In my view he has failed so to do.

**The Constitutionality of Section 21 of the FSC Act**

Mr. Robinson for the appellant submits that the provision of section 21 of the FSC Act derogates from the jurisdiction of the Courts to impose sentences for criminal liability and is therefore unconstitutional. Although the phrase used in section 21 is "offers of fixed penalty", he contends that the inescapable fact is that the basis of the process is an assumption that a criminal offence has been committed. This situation, he contends, "cannot with any degree of rationality be equated to the issue of a traffic ticket."

Mr. Foster for the respondent submits that section 21 of the FSC Act does not in any way breach the separation of powers principle as the fixed penalty scheme is optional and does not involve a judicial determination of guilt or innocence.

In my view, Mr. Foster's submission is valid. The fixed penalty payment system contemplated by section 21 of the Act gives the appellant the opportunity to voluntarily participate in a process with a view to obviating the necessity to launch a prosecution against him for an offence under the Act. It places no legal obligation on him to make any payment. If he refuses the option and is charged, he would have to be taken before a court of law and would be entitled to raise the full panoply of his rights and any relevant defence.

One of the cases relied on by Mr. Foster is the Canadian case of ***McCutcheon v Corporation of the City of Toronto et al*** 147 D.L.R (3rd) 193. In that case M was ticketed for traffic offences. Under the relevant statute she could pay a penalty out of court as stipulated in the Act within a certain time, in which event there would be no further proceedings against her. If the penalty were not paid, M would be liable to conviction and the payment of penalty. M challenged the law on several grounds, including one that it was inconsistent with the Charter of Rights which was

supreme and which enshrines the presumption of innocence. The court held that there was no merit in M's contention as:

> "The sliding scale scheme has nothing to do with the presumption of innocence. It is a convenient way for a traffic violate to avoid being charged. Anyone can refuse to pay anything pursuant to the scheme and await the service of the summons. At that time, the full panoply of defence rights come into play, including the presumption of innocence. Accordingly, there is no infringement here of the rights of the accused to be presumed innocent"

In the instant case the payment of a fixed penalty does not arise from a criminal charge and does not result in a conviction of the appellant. It is therefore not a sentence within the contemplation of the Constitution. As was said in the ***McCutcheon*** case the notification of the breach and the invitation to pay the penalty was not a charge but was a preliminary administrative step that could lead to a charge.

As Mr. Foster submits, correctly in my view, the process under section 21 is administrative in nature and is not a judicial process.

Counsel for the appellant also contends that section 21 is unconstitutional in that it fixes a mandatory sentence. Reference was made to ***Hinds v The Queen*** [1977] A.C. 195 and ***Lambert Watson v The Queen*** P.C Appeal No. 36 of 2003 delivered July 7, 2004.

In ***Hinds*** their Lordships held that Parliament had no power to transfer from the judiciary to the Review Board the discretion to determine the severity of punishment to be inflicted in an individual member of a class of offenders. That would certainly be in breach of the separation of powers principle. In the instant case the Commission was not given any power to determine the severity of the penalty. The penalty is fixed by statute. As regards the constitutionality of a fixed penalty their Lordships quoted with approval the following statement of the Supreme Court of Ireland in ***Deaton v Attorney General and the Revenue Commissioners*** (1963) I. R. 170:

> "There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule, which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case... The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts..."

Both on high authority and on principle a fixed penalty is not per se incompatible with a person's right to a fair hearing pursuant to section 20 (1) of the Constitution or with the constitutional principle of Separation of Powers – See ***Lambert Watson v The Queen; Dodo v State*** (2001) 4 L.R.C. 318; ***R v Carnegie et al*** SCCA Nos. 44/2000, 43 and 64/2001 delivered

November 2003 and ***R (on the application of Anderson) v The Secretary of State for the Home Department*** (2002) 4 All ER 1089 at 1100. It should be noted that in ***Lambert Watson v The Queen***, their Lordships' Board went against mandatory death sentence and not fixed penalty per se.

In any event the fixed penalty referred to in S. 21 (2) of the FSC Act is not a sentence. It is not imposed in criminal proceedings. The appellant is given a choice. He may choose not to pay it. Thus, as Mr. Foster submitted, the cases of ***Hinds and Watson*** relied on by the appellant are of no assistance as they deal with penalties imposed in criminal proceedings

The appellant also contends that section 21 of the FSC Act constitutes a breach of his right not be compulsorily deprived of his property under section 18 of the Constitution. I find it difficult to see how the offer of an opportunity to someone to discharge his liability to conviction of an offence could possibly constitute a compulsory deprivation of property. The appellant's contention that the Act is unconstitutional in that it makes no provision for previous unregulated service providers to continue their operations pending registration is untenable. It is not true to say that the insurance industry was unregulated before the FSC Act 2001. Further, the unchallenged evidence of Ms. Janice Holness, an attorney-at-law and Chief Investigator

of the Commission, is that pursuant to the Act, the respondent allowed a period of transition for persons who were registered under the old Act to be registered under the new Act.

## Costs

Rule 56.15 (5) provides:

> "(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."

The appellant has failed to satisfy us that the Full Court wrongly exercised its discretion in ordering costs against him.

Appeal dismissed. Costs of the appeal to the respondent to be taxed if not agreed.

**COOKE, JA:**

I agree.

**SMITH, J.A. (Ag):**

I agree.

**SMITH, J.A:**

**ORDER:**

The appeal is dismissed. Costs of the appeal to the respondent to be taxed if not agreed.