JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 152/2010

APPLICATION NO 2/2016

BEFORE: **THE HON MR JUSTICE BROOKS JA**
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE P WILLIAMS JA (AG)

BETWEEN	**DAVID PREBLE** **(T/a Xtabi Resort Club and Cottages)**	**1ST APPLICANT**
AND	**XTABI RESORT CLUB AND COTTAGES**	**2ND APPLICANT**
AND	**ELITA FLICKENGER** **(Widow of the deceased Robert Flickenger)**	**RESPONDENT**

Miss Danielle Chai instructed by Samuda & Johnson for the applicants

Ainsworth Campbell for the respondent

3 and 12 February 2016

BROOKS JA

[1] This is an application by Mr David Preble and Xtabi Resort Limited ("Xtabi") for an order for Mrs Elita Flickinger to make a payment as security for the costs of her appeal to Her Majesty in Council. They assert that, as Mrs Flickinger resides outside of the jurisdiction, it is necessary for her to give security for the significant costs that are

likely to be incurred in resisting her appeal to the Privy Council. The applicants also state that Mrs Flickinger has consistently asserted impecuniosity and therefore it is imperative that security for costs be given to ensure that they will not be out of pocket after she fails in her appeal, as they expect that she will.

[2] Mrs Flickinger, for her part, contends that her situation is such that an order for the payment of security for costs will result in preventing her from pursuing her right to appeal to Her Majesty in Council. She says that it would drive her from the seat of justice. Mrs Flickinger also asserts, through her counsel, that the sum of £26,665.00 claimed, for security, by the applicants is excessive. Mr Campbell, on her behalf, contends that a more realistic figure would be $171,000.00.

[3] The litigation between these parties has been the subject of several judgments and it is unnecessary to again recount in any detail the facts leading to the present appeal. It will be sufficient to say that Mrs Flickinger had made a claim against the applicants as a result of the tragic death, by drowning, of her husband, on 9 February 1995. Mr Flickinger died at a resort property owned by Xtabi and operated by Mr Preble. On 27 March 2015, this court, by a majority decision, dismissed Mrs Flickinger's appeal from the judgment of the Supreme Court, which was given in favour of the applicants. On 6 July 2015, this court granted Mrs Flickinger conditional leave to appeal to her Majesty in Council from the decision to dismiss her appeal.

[4] Because Mrs Flickinger resides outside of the jurisdiction there were, previous to each of the hearings in the Supreme Court and this court, successful applications made

by the applicants for her to pay in monies for security for costs. The present application is, therefore, consistent with that approach. There is, in addition, the factor that Mrs Flickinger now resides in Greece, with which, the applicants assert, there is no arrangement for the reciprocal enforcement of judgments.

[5] It is, however, to be noted that there is already, in force, an order made for the payment of security for costs. That order was made when conditional leave to appeal was granted. The order was in the maximum sum of $1,000.00 prescribed pursuant to section 4 The Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 (hereafter called the Order in Council).

[6] Section 4 of the Order in Council stipulates the amount to be paid as security for costs. The relevant portion states as follows:

> "4. Leave to appeal to Her Majesty in Council in pursuance of the provisions of any law relating to such appeals shall, in the first instance, be granted by the Court only-
>
> (a) upon condition of the appellant, within a period to be fixed by the Court but not exceeding ninety days from the date of the hearing of the application for leave to appeal, entering into good and sufficient security to the satisfaction of the Court in a sum **not exceeding [$1000.00] for the due prosecution of the appeal and the payment of all such costs as may become payable by the applicant in the event of** his not obtaining an order granting him final leave to appeal, or of the appeal being dismissed for non-prosecution, or of **the Judicial Committee ordering the appellant to pay costs of the appeal** (as the case may be);..." (Emphasis supplied)

[7] This court has no authority to vary any of the stipulations contained in the Order in Council. That restriction was confirmed in **Chas E Ramson Ltd and Another v Harbour Cold Stores Ltd** SCCA No 57/1978 (delivered 27 April 1982). In that case, the court stated at page 3 of the judgment:

> "The Rules governing appeals to the Privy Council were made by Her Majesty by virtue and in the exercise of the powers in that behalf given by an Imperial Statute, the Judicial Committee Act, 1844, 7 & 8 Vict. C. 69, and by and with the advice of Her Privy Council. Amendment of those Rules does not lie within the competence of the Rules Committee of the Supreme Court of Jamaica."

[8] After reviewing a number of cases on the issue, the court concluded its judgment as follows:

> "These cases show that **this Court has no power to extend the time fixed by Sections 3 and 4 (a) of the Jamaica (Procedure in Appeals to Privy Council) Order in Council 1962 governing the application for leave to appeal.** The respondent's objection in limine was well taken, and the applications [for permission to appeal to the Privy Council] were refused..." (Emphasis supplied)

[9] A similar stance was taken by their Lordships in the appeal from the decision of this court in **Crawford and Others v Financial Institutions Services Ltd (Jamaica)** [2003] UKPC 49. The Board was considering the revocation by this court of the grant of conditional leave to appeal to Her Majesty in Council. The basis for the revocation was that the appellants had failed to satisfy an order that they pay to the respondents the respondents' costs at first instance and on appeal to this court. Their Lordships ruled that, where the appeal lies as of right, this court had no authority to

impose any condition, other than those imposed by section 110 of the Constitution and the provisions of the Order in Council.

[10] Lord Hutton, in delivering the opinion of the Board, said at paragraph 17 thereof:

> "...Section 110(1)(a) of the Constitution gives the petitioners an appeal as of right to the Judicial Committee and the Jamaica Appeals Procedure Order lays down a code whereby leave to appeal is given by the Court of Appeal and which gives power to the Court of Appeal in granting conditional leave to impose certain conditions, to grant a stay of execution of the judgment appealed from, and to rescind conditional leave to appeal on failure by the appellant to apply with due diligence for final leave to appeal. **Their Lordships are of opinion that the Court of Appeal is not entitled to exercise its inherent power to impose further conditions or to make further orders which restrict the right of appeal given by section 110(1)(a).** The observation of Lord Hoffmann in the *Electrotec Services* case [1998] 1 WLR 202, 206H in relation to the Constitution of Grenada is equally applicable in the present case:
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> > "the recoverability of costs by a successful litigant is not a universal requirement of justice and, as Sir Vincent Floissac CJ observed in the Court of Appeal, the Constitution appears to give priority to the free availability, in the designated cases, of the right to appeal to Her Majesty in Council." (Emphasis supplied)

The general tenor of their Lordships' judgment was that there should be no judicial attempt to restrict the right of appeal given by section 110(1)(a) of the Constitution.

[11] In the present application, the applicants initially referred, as authority for the order that they sought, to a rule of the Privy Council. Rule 37 of the Judicial Committee (Appellate Jurisdiction) Rules 2009 (hereinafter called the 2009 rules) speaks to the authority to grant security for costs. It states:

"37 - (1) Where the Judicial Committee grants permission to appeal an order for security for costs may be made by the Judicial Committee or by the Registrar.

(2) **Where permission to appeal has been granted by the court below, security for costs of the appeal shall be a matter for that court.**" (Emphasis supplied)

[12] The question to be determined at this stage is whether rule 37 of the 2009 rules superseded section 4 of the Order in Council. The 2009 rules form a schedule to The Judicial Committee (Appellate Jurisdiction) Rules Order 2009 (hereinafter called the 2009 Rules Order). Like the Order in Council, the 2009 Rules Order is a legislative instrument of the United Kingdom. It is capable of amending or revoking the Order in Council. In fact, it states that it partially revokes the Order in Council. At section 5, it states, in part:

"**Partial revocations**

5. The instruments listed in column 1 of the following table (which have the references listed in column 2) are revoked only and in so far as they relate to the **powers of the Judicial Committee of the Privy Council and the procedure to be adopted by it with respect to proceedings before it.**

Column 1	Column 2
...	
[The Order in Council]	S.I. 1962/1650

..." (Emphasis supplied)

[13] Section 5 of the 2009 Rules Order does not seem to be applicable to section 4 of the Order in Council as the latter section does not speak to the powers of the Judicial

Committee or to the proceedings before it. Section 4 speaks to a point in time before the proposed appeal becomes "proceedings before" the Privy Council.

[14] Miss Chai, on behalf of the applicants, when she appeared before this court, did not pursue the initial position advanced by the applicants. In fact, after reviewing **Crawford and Others v Financial Institutions Services Ltd (Jamaica)** she asked to be allowed to withdraw the application. It was decided that although she was correct to have sought to withdraw the application there was merit in providing guidance to the profession on the point.

[15] There is a principle, used in the interpretation of statutes, which stipulates that where the provisions of a later statute conflict with the provisions of an earlier one, the later provisions should prevail. That principle was tersely stated in **South Eastern Drainage Board v The Savings Bank of South Australia** [1939] 62 CLR 603. The High Court of Australia, on an appeal from the Supreme Court of South Australia, said at page 616:

> "If there is an inconsistency between one statute and a later statute, the later statute prevails."

It is important to note however, that there must be an inconsistency between the two statutes for that principle to operate.

[16] There is another tool, used in the interpretation of statutes, which is of greater assistance in this context. It is the principle that a later statute, which is general in its provisions, cannot abrogate an earlier statute that is specific in its terms. The Earl of

Selbourne referred to that tool for the construction of statutes in **Mary Seward v The Owners of the "Vera Cruz"** (1884) 10 App Cas 59. He said at page 68:

> "Now if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, **you are not to hold that earlier and special legislation indirectly repealed, altered, or derogated from merely by force of such general words, without any indication of a particular intention to do so....**" (Emphasis supplied)

[17] The principle has been confirmed in later cases including **Mixnam's Properties Ltd v Chertsey Urban District Council** [1963] 2 All ER 787. Diplock LJ, as he then was, at page 799 supported the principle by referring to the **"Vera Cruz"**. He said about the principle:

> "It is indeed an illustration of the converse of the familiar maxim generalia specialibus non derogant [general things do not derogate from special things], which is illustrated by such cases as *Seward v The Vera Cruz (Owner)* and *Bishop of Gloucester v Cunnington*. The cases which I have cited are all illustrative of the general rule of construction applicable to all statutes **that the legislature is presumed not to have intended to make any substantial alteration in the law beyond the immediate scope and object of the statute.**" (Emphasis supplied)

The decision of the Court of Appeal was upheld in the House of Lords in **Chertsey Urban District Council v Mixnam's Properties Ltd** [1965] AC 735.

[18] In **Pattinson and Another v Finningley Internal Drainage Board** [1970] 1 All ER 790, Bean J, after referring to a number of authorities, stated at page 793:

> "So one sees that as a general principle, special Acts are not repealed by general Acts unless there is some express reference to the previous legislation or unless there is a necessary inconsistency in the two Acts standing together...."

[19] In the present case, it is the earlier Order in Council, which is specific, and the later 2009 Rules Order, which is general. In the former, section 4 stipulates a maximum sum which this court may stipulate for security for costs. In the latter, rule 37 leaves the matter of security for costs to the discretion of this court. It, however, does not speak to the sum which the court is entitled to prescribe. To say that, "security for costs of the appeal shall be a matter for that court" is not sufficiently precise to allow for section 4 to be deemed overruled. Rule 37 of the 2009 rules is too general in its terms to be capable of being said to revoke section 4 of the Order in Council.

[20] On the basis of the above analysis, the present application for security for costs should therefore be refused. Mrs Flickinger's appeal to Her Majesty in Council is as of right, pursuant to section 110(1)(a) of the Constitution. There is no authority for this court to order the payment, as security for costs, of a sum greater than that stipulated in section 4 of the Order in Council. Neither the 2009 Rules Order, nor rule 37 promulgated thereunder, being general in their import, may impliedly revoke the provisions of section 4 of the Order in Council.

SINCLAIR-HAYNES JA

[21] I have read in draft the judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

P WILLIAMS JA (AG)

[22] I too have read in draft the judgment of Brooks JA and agree with his reasoning and conclusion.

BROOKS JA

ORDER

1. The application for the payment of monies as security for costs is refused.

2. The respondent shall be entitled to one-third of her costs to be taxed if not agreed.