

Horace Fraser

Appellant

v.

**(1) Judicial and Legal Services Commission
(2) Attorney General**

Respondents

FROM

**THE COURT OF APPEAL OF
SAINT LUCIA**

REASONS FOR DECISION OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON COSTS

Delivered the 3rd December 2008

Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Mance

[Delivered by Lord Mance]

1. Following the hearing of this appeal on 28 January 2008, the Board on 6 May 2008 advised Her Majesty that the appeal in this matter should be allowed, the decision of the Court of Appeal set aside and the decision of Shanks J restored, varied only so far as to order that both the Commission and the Government are liable to the appellant for the damages awarded under s.91. The Board further determined that as between the Commission and the Government the Commission shall bear

and pay any such damages. The present judgment addresses the issue of costs, on which the parties have exchanged written submissions.

2. By the submissions lodged on his behalf, the appellant seeks (1) indemnity costs against the Government and the Commission jointly, but (2) an order that the Government should pay the appellant and recoup itself from the Commission, and (3) an interim payment. He seeks this both in the Privy Council and in respect of the courts below.

3. The respondents resist the making of such orders on various bases. These include inter alia objections relating to the suggested existence of a purported contingency fee agreement and the application of the indemnity principle.

Issues (1) and (2) in the Privy Council

4. Leaving such fundamental objections aside, the appellant is on the face of it entitled to a costs order. However, the Board sees no reason for this to be on an indemnity basis. Any such order should be for costs on the standard basis. The respondents had respectable arguments. Indeed, they won in the courts below and the second respondents (the Attorney General) had the support of the decision of the Court of Appeal of Saint Christopher and Nevis given on 14 January 2002 in *Angela Innis v. Attorney General of Saint Christopher and Nevis*.

5. The Board also sees force in the respondents' submission that some deduction should be made from the appellant's costs to reflect the very late (and apparently inefficient) preparation and, after counsel were instructed at the last minute, restructuring of the appellant's case (see Annex A pp1-2 of second respondents' submissions). But the Board would not put this deduction above 10%.

6. As to issue (2), The Board considers that any costs order should be against the first and second respondents, jointly and severally, leaving the appellant to enforce as he may be advised. As between the first and second respondents, the first respondent ("the Commission") accepts that costs follow the event so that it should bear the costs, subject only to its argument that there should be a deduction of say 20% because the second respondent (the Attorney General) lost the Government's argument that it had to follow the Commission's view (see the Board's judgment on the appeal, para. 20). By the same token however the Attorney General accepted, indeed positively argued, that lower judicial officers had the claimed constitutional protection, while the Commission argued the contrary and sought to uphold the decision of the respective Courts of Appeal in this and the *Angela Innis* cases. In these circumstances, the Board considers that the Attorney General should recover all the costs,

including any paid to the appellant in the same way as it has recovered a full indemnity in respect of the damages payable to the appellant.

Issues (1) and (2) in the courts below

7. The Board would make similar orders. However, it would appear that the costs should prima facie be on the scale of prescribed costs set out in Appendix B of Annex 1 to the second respondents' further submissions, unless the court concludes under rule 65.6(2)(b) of the Eastern Caribbean Supreme Court Procedure Rules that costs so calculated would be "substantially inadequate taking into account the nature and circumstances of the particular case". The Board leaves all such questions to the costs judge.

Issue (3): interim order – Privy Council and courts below

8. The Board declines to make any interim order for costs. Quite apart from the suggested issues relating to the indemnity principle (which the Board addresses below), the costs bills submitted in relation to both solicitors and counsel appear to the Board to be on their face out of any proportion to the issues, their complexity and the time which can or should reasonably have been occupied addressing them. The issues, although important constitutionally, were not of the most complex and they did not require or receive extensive research. Submissions on Monday 28 January 2008 only took only about two-thirds of the sitting day.

The indemnity principle – the courts below

9. The appellant was represented below by a Mr Leonard Ogilvy, whose local practising certificate as a solicitor is said to have been obtained by fraudulent misrepresentation of his status in England and Scotland and to have been subsequently set aside accordingly. The respondents raise an issue as to whether the appellant was or is liable to pay Mr Ogilvy any or if any what costs for his services, and on what basis, and accordingly as to what if any costs are recoverable from the respondents, and refer to *Agassi v. Robinson* [2005] EWCA Civ 1507; [2006] 1 WLR 2126. That issue will be for determination by the costs judge.

The indemnity principle – costs in the Privy Council

10. A notice dated 17 January 2008 of a contingency fee agreement likewise dated 17 January 2008 was given on Friday, 25 January in respect of the hearing before the Privy Council on Monday, 28 January. Counsels' fee notes in the lump sums of £100,000 and £50,000 were submitted on 2nd February. CT Emezie's fee-note (stated to be an estimate only) for the period January 2006 [sic] to 30 May 2008 totals (excluding counsels' fees) £326,300, of which £40,000 is said to relate to "costs in

Lower Court". It has subsequently been denied on behalf of the appellant that any contingency fee agreement was concluded. There are potential issues as to whether or not a contingency fee agreement was concluded and/or whether any such agreement complied with the regulations and/or as to the application of the indemnity principle in the circumstances, the resolution of which may determine whether the appellant can recover any and if so what part of the costs award to which he is otherwise be entitled in respect of his success before the Board. All such issues will also be for determination by the costs judge.

Order

11. The Board orders accordingly that
 - a. The respondents must jointly and severally pay to the appellant 90% of his recoverable costs of this appeal on the standard basis, such costs to be taxed if not agreed.
 - b. The first respondent must indemnify the second respondent against the second respondents' costs of this appeal on the standard basis, including any sum or sums which the second respondent has paid or will hereafter pay on account of the appellant's said costs.
 - c. The respondents must jointly and severally pay to the appellant 90% of his recoverable costs in the courts below, such costs to be assessed if not agreed in accordance with the Eastern Caribbean Court Civil Procedure Rules 2000.
 - d. The first respondent must indemnify the second respondent against the second respondent's costs in the courts below on the standard basis, including any sum or sums which the second respondent has paid or will hereafter pay on account of the appellant's said costs in the courts below.
 - e. The issues regarding the application of the indemnity principle identified in paragraphs 9 and 10 above are for determination by the costs judge when ascertaining what, if any, are the appellant's recoverable costs.