[2018] JMCA App 21

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 14/2018

APPLICATION NO 68/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA

BETWEEN	**NATIONAL HOUSING TRUST**	**APPLICANT**
AND	**TREEBROS HOLDINGS LIMITED**	**RESPONDENT**

Lord Anthony Gifford QC, Manley Nicholson and Marlon Gregory instructed by Nicholson Phillips for the applicant

André Earle, Peter Mais and Ms Keisha Young-Shand instructed by Earle and Wilson for the respondent

4, 5, 6, 15 June and 27 July 2018

MORRISON P

[1] I have read the draft judgment of Brooks JA. His reasoning and conclusions accord with my reasons for agreeing to the orders that were made. I also agree with his view as to the order for costs.

BROOKS JA

[2] We heard this application on 4, 5 and 6 June 2018. On 15 June 2018 we made the following orders:

"1. The application to set aside the order of [the single judge of appeal] handed down herein on 22 March 2018 is granted.

2. The judgment and orders of [the single judge of appeal] are hereby discharged.

3. It is ordered that:

   a. The order for an injunction imposed by the Supreme Court, restraining the [applicant] from permitting the discharge and/or flow of water onto the respondent's land or onto the roadway adjoining the respondent's property, is stayed pending the hearing of the appeal or further order of this court.

   b. The order for an injunction imposed by the Supreme Court restraining the [applicant] from entering onto or remaining on the respondent's property is stayed, pending the hearing of the appeal, to the extent that it is necessary for the [applicant] to enter the respondent's land for the lawful discharge of its duties under the Flood Water Control Act.

   c. The order of the Supreme Court for costs to the respondent is stayed pending the hearing of the appeal or further order of the court.

4. The question of the costs of this application is reserved for consideration on paper, for which purpose:

   a. the respondent shall file and serve written submissions in respect of costs within seven days of the date hereof; and

   b. the applicant shall file and serve written submissions in reply within seven days of being served with the respondent's written submissions.

5. The respondent's counsel is relieved of the undertaking given to the court on 6 June 2018.

[3] We promised, at that time to put our reasons for our decision in writing. We now fulfil that promise, and make the award in respect of the costs of this application.

The background to the application

[4] In carrying out its mandate to assist in providing housing stock for Jamaicans, the National Housing Trust (NHT) acquired, and sought to develop, a large area of land at Creighton Hall in the parish of Saint Thomas (the NHT land). It produced a subdivision plan to the Municipal Corporation for that parish (then called the Parish Council), wherein it proposed to have the NHT land subdivided into 146 lots. NHT also carried out some infrastructural works for the proposed subdivision.

[5] That infrastructure included a culvert to drain storm water from the NHT land. The culvert was designed to channel the storm water, through a large drain pipe which ran under the parochial road that was adjacent to the NHT land. The drain pipe led to the opposite side of the road where the water would exit the drain pipe unto other land (lot 8). All the land in that section of Creighton Hall generally slopes downward to the sea, which is not far away. The NHT land is, therefore, higher than the parochial road, which is itself higher than lot 8. Other lands lie between lot 8 and the sea.

[6] NHT also did work along the parochial road. It constructed concrete drains and other water channelling structures. Some of those drains channelled water to the area of lot 8 where the drain pipe exited. NHT also built infrastructure on lands that are downhill from lot 8, with the expectation of channelling the water that exited lot 8.

[7] The problem is, NHT does not own or occupy lot 8. It never did. Treebros Limited (Treebros) is the registered proprietor of lot 8.

[8] In times of rainfall, water entered lot 8 according to the design of the works. The water caused erosion to lot 8.

[9] Treebros sued NHT for damages for trespass, nuisance and negligence. It also sought a permanent injunction preventing NHT from permitting the discharge of water upon lot 8, and from entering itself, or by its agents, unto lot 8.

[10] In resisting Treebros' claim, NHT contended, among other things, that Treebros had been in negotiations with it for the construction of a drain through lot 8, as part of the route for the storm water to be taken, through the lands further downhill, to the sea. NHT argued that it had carried out some of its infrastructural work while the negotiations were continuing, and was encouraged, in that regard, by the negotiations and by assurances given by Treebros. NHT contended that although there was no concluded formal agreement, Treebros should not succeed in its claim, because it had agreed for that work to be done. The plan to construct the drain through lot 8 was derailed by a late disagreement over, among other things, the amount of the compensation offered to Treebros, for having the work done on lot 8.

[11] The claim was heard in the Supreme Court by Lawrence-Beswick J. In giving judgment for Treebros, the learned trial judge awarded:

a. damages for nuisance;

b. damages for negligence;

c. damages for trespass;

d. interest on the damages awarded;

e. an injunction preventing NHT "from permitting the discharge and/or flow of water onto [lot 8] or onto the roadway adjoining [lot 8], where it would exit onto [lot 8]";

f. an injunction preventing NHT from entering or remaining on lot 8; and

g. costs, which included costs on an indemnity basis.

[12] NHT has appealed from that decision and wishes this court to stay the injunctions and the order for costs pending the hearing of the appeal. A single judge of this court, heard NHT's application in that regard. On 22 March 2018, he refused the application with costs to Treebros.

[13] NHT has now applied to the court to set aside or vary the learned single judge's order. The affidavit in support of the application exhibited, among other things, certain copies of the Jamaica Gazette, which NHT claimed were relevant to the issues to be decided.

The application to discharge or vary the order of the single judge

[14] A significant aspect of NHT's application is that it contends that it has been mandated by an order of the relevant Minister of Government (the Minister), under the

Flood Water Control Act (the Act), to do the very thing that the injunctions proscribe. NHT contends that the learned single judge was wrong to have refused to grant the stay, especially bearing in mind that legal obligation. NHT did not rely on that legislative authority at the trial, although it did bring its existence to the attention of the learned trial judge. It, however, sought to rely on that authority before the learned single judge of appeal.

[15] The question of whether that statutory obligation should be considered and applied, for the purposes of the present application, was a major issue, in submissions before this court.

[16] NHT has, for the purposes of this application, placed before this court a full suite of copies of Gazettes concerning various orders made under the Act. The respective Gazettes show that:

a. the Creighton Hall area of Saint Thomas, including lot 8, was declared a flood water control area for the purposes of the Act, and NHT had been appointed as the undertakers of a scheme in respect of that area (Gazette LN 30A dated 16 February 2015 – it will be referred to below as the "declaration order");

b. the public was given notice of its right to inspect, and object to, the scheme mentioned in the declaration order (Gazette LN 134 dated 13 August 2015 – it will be referred to below as the "notice order");

c. the scheme mentioned in the declaration order was confirmed without modification (Gazette LN 19A dated 25 February 2016 – it will be referred to below as the "confirmation order");

d. a clerical error, which was made in the confirmation order, in respect of the LN number of the declaration order, was corrected (Gazette LN 30E dated 25 February 2016 – it will be referred to below as the "correction order").

The letters "LN" in reference to an LN number, mean "legal notice".

The requirements for NHT to succeed

[17] In order for NHT to succeed in its application before this court it must first show that the learned single judge of appeal erred in the exercise of his discretion by either taking into account matters which he was precluded from considering or failing to consider matters that he was obliged to take into account. Phillips JA explained in **Peter Hargitay v Ricco Gartmann** [2015] JMCA App 44, at paragraphs [44]–[48], the principles which this court should take into account in considering applications such as this. These may be summarised as follows:

a. the relevant rule is rule 2.11(2) of the Court of Appeal Rules (CAR);

b. the principles, dealing with the appellate court's respect for the exercise of a discretion by previous

judges examining the point in issue, set out in the well known cases of **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042 and **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, are applicable;

c. evidence which was not before the learned trial judge or the learned single judge, but has become available by the time of the hearing of the application, may justify the variation or discharge of the learned single judge's order (**Elita Flickenger v David Preble & Xtabi Resort Limited** [2013] JMCA App 13);

d. the consideration of the application is not viewed as an application in the strict sense but, instead, as a review by the court of the learned single judge's decision (**John Ledgister and another v Jamaica Redevelopment Foundation Inc** [2013] JMCA App 10); and

e. the decision of the learned single judge may only be set aside if it is shown, taking into account, if relevant, any "fresh evidence", to have been "demonstrably wrong" in making the order that he or she made.

[18] If it succeeds in respect of that first hurdle, NHT thereafter has to convince this court that there is a real prospect of its appeal succeeding and that it would create less injustice to grant the application for the stay, than to refuse it. The grant or refusal of applications for stay is guided by which route is the one less likely to result in injustice. The law on the point may be summarised as follows:-

1. The judgment creditor is entitled to the fruits of its judgment.
2. The court will, however, grant a stay of execution of a judgment, pending appeal, if:
    (a) the appellant has an arguable appeal with some prospect of success, and
    (b) the justice of the case requires that a stay be granted.
3. The test as to the justice of the case, includes asking whether any of the parties would be likely to suffer irremediable harm if the stay is granted, or alternatively, if the stay is refused. This question would include considerations such as, whether the appeal would be stifled if the stay is not granted, and whether a successful appeal would be rendered nugatory by a refusal of a stay.

[19] The leading cases in respect of this second hurdle are **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065 and **Combi (Singapore) Pte Ltd v Ramnath Sriram and Another,** Court of Appeal of England and Wales, FC2 97/6273 judgment delivered 23 July 1997. Those principles have been accepted by this court (see, for example, **Paymaster (Jamaica) Limited v Grace Kennedy Remittance Service Limited and Another** [2011] JMCA App 1).

[20] The approach herein will therefore be, firstly, to review the decision of the learned single judge of appeal, and thereafter, to apply the principles regarding applications for stay, to the circumstances of this case.

The decision of the learned single judge of appeal

[21] The learned single judge of appeal carefully assessed NHT's application for the stay of execution. He found:

a. in concurrence with the parties, that there was no appeal from the learned trial judge's finding on the issue of trespass;
b. Treebros did not consent to the nuisance;
c. there was no arguable case that an agreement was concluded between the parties;
d. there was no arguable case in respect of the Gazettes promulgated under the Act:

i. they were not tendered into evidence and therefore could not have been relied upon;
ii. doubt surrounded the identity of the declaration order and;
iii. the provisions of the Act and the Gazettes were not relied upon in the court below;

e. the only arguable issue on appeal was the issue of the indemnity costs;
f. the interests of justice did not favour the grant of the stay.

The issue of giving effect to the Act

[22] It is unnecessary to embark on an extensive review of the careful judgment of the learned single judge of appeal's judgment. It will only be necessary to examine his treatment of the question of the Act. The learned single judge of appeal took the view that the relevant Gazettes, mentioned above, were not properly placed in evidence before the court at first instance. He noted that NHT had even indicated to the learned trial judge that it was not relying on the confirmation Gazette for its submissions, but was only ensuring that the trial court was aware of its existence. As a result, the learned single judge of appeal found, NHT could not rely on the provisions of the Act and of the Gazettes in advancing its appeal.

[23] Whereas it is true that the relevant Gazettes were not properly placed before the learned trial judge, and were not all, or all properly, placed before the learned single

judge of appeal, they have been brought to the attention of this court in this application. They, along with the provisions of the Act, constitute the statutory framework under which lot 8 falls for the purposes of flood water control. The orders contained in the Gazettes became law when they were published therein.

[24] Section 31 of the Interpretation Act makes that point clear. It states:

> "(1) All regulations made under any Act or other lawful authority and having legislative effect shall be published in the *Gazette* and unless it be otherwise provided shall take effect and come into operation as law on the date of such publication.
>
> (2) The production of a copy of the *Gazette* containing any regulations shall be *prima facie* evidence in all courts and for all purposes of the due making and tenor of such regulations.

[25] The effect of section 31 of the Interpretation Act was confirmed by the former Court of Appeal in **Rex v Daniel Lee** (1940) 3 JLR 237. At the time of that case, the equivalent of section 31 was section 8 of the Interpretation Act. Savary J stated that the validity of an order, published in the Gazette, had been raised on appeal. He said at page 238:

> "During the course of the trial the Jamaica Gazette of the 26th August, 1939, which contains the Defence Regulations, and the Jamaica Gazette of the 25th November, 1939, aforesaid were tendered in evidence. By this means the prosecution sought to prove that the Defence Regulations and Order 69 had been duly made. **An attempt was made at the hearing of the appeal to contend that there was no proof of the Defence Regulations having been duly made as the Jamaica Gazette was not the proper means of such proof, but this point was abandoned on the Court pointing out that under section 8 of Cap. 110, the Jamaica Gazette Law,**

the Jamaica Gazette was *prima facie* evidence that the Defence Regulations were made." (Emphasis supplied)

[26] In the present case, the contents of the various Gazettes must be read in conjunction with sections 3, 4 and 10 of the Act. Under section 3, the Minister is empowered to declare, by way of an order, any area to be a flood-water control area. He is required, by the said order, to appoint undertakers of a scheme in respect of that flood-water control area.

[27] Section 4, among other things, places a duty on the undertaker, in this case, NHT, to do all things required to bring the approved flood-water control scheme into existence. The section states:

> "It shall be the duty of the undertakers of a scheme–
>
> (a) to make such investigations and surveys and do such work as may be necessary for the preparation of, and to prepare and submit to the Minister, a provisional flood-water control scheme in relation to the relevant flood-water control area;
>
> (b) **to do all such acts or things as may be necessary to be done to give effect to any confirmed flood-water control scheme**;
>
> (c) to make such investigations, into any matter affecting or relating to the control of flood-water in the relevant flood-water control area as may be required by the Minister, and to make recommendations to the Minister concerning any such matter if required by the Minister so to do or if the undertakers of the scheme consider it expedient so to do." (Emphasis supplied)

[28] Section 10 gives further authority to the undertakers, including the authority to enter the lands falling within the ambit of the scheme, and carry out work there which will control flood-water. It states:

> "(1) The undertakers of a scheme shall have power, for the purpose of carrying out any of their duties under section 4–
>
> (a) **to enter by their servants or agents upon any land within the relevant flood-water control area and there make surveys, take measurements and levels and do such work as may be necessary or expedient for securing proper control of, or defence against, flood-water in the relevant flood-water control area** or for effecting any purpose ancillary to such control or defence, **and for such purposes the undertakers of the scheme may–**
>
> (i) **alter or regulate the course of any water-course by widening or straightening any portion of such watercourse or by making new channels for water, whether by pipes, drains, sluice-ways or any other means**;
>
> (ii) **bring upon, make or maintain on, any part of such lands any appliances, plant, tools and other things required for the works**;
>
> (b) **to clean any watercourse and clear or remove from any such watercourse or from the banks thereof any vegetation or tree (whether growing or not) and any log, refuse, soil or any obstruction whatsoever which obstructs or impedes, or which may obstruct or impede, the natural flow of water in the watercourse**, and to place or deposit any matter or thing so removed on any land adjacent to the

watercourse, but not beyond a distance of one chain measured from the top of the bank of the watercourse which such land adjoins;

(c) to do all such other acts as may be necessary for the proper and efficient construction, completion, improvement, repair and maintenance of any flood-water control works or for the assumption of responsibility for, or control over, any such works.

(2) Save in the case of an emergency the power of entry conferred by this section shall not be exercised unless–

(a) the prior consent of the occupier of the land has been obtained; or

(b) notice of intention to enter is given in writing to such occupier at least seven days before the date of entry.

(3) For the purposes of this section "emergency" means any emergency caused by flood, hurricane, or any other *vis major* or act of God.

(4) The undertakers of a scheme shall, while carrying out any works of construction, improvement, repair or maintenance, at their own expense take such reasonable steps, whether by fencing or otherwise, as may be necessary to prevent accidents to persons using the land or to any animals upon the land." (Emphasis supplied)

[29] In accordance with those sections of the Act and the declaration order, as has been stated above herein, the Creighton Hall area of Saint Thomas, which includes lot 8, was declared a food-water control area and NHT was appointed the undertaker of a scheme in respect of the area.

[30] Mr Earle, on behalf of Treebros, in effect submitted that there is no proper subsidiary legislation in place to support NHT's claimed appointment under the provisions of the Act. His reasoning for this submission was as follows:

a. the notice order superseded the declaration order; and therefore,

b. the confirmation order, even as adjusted by the correction order, referred to something that did not exist.

[31] Learned counsel is not on good ground on the point concerning the validity of the subsidiary legislation. He is not correct in saying that the notice order replaced the declaration order. The notice order, in addition to repeating precisely, the terms of the declaration order, invited interested persons to inspect, and/or object to any flood water scheme for the area declared a flood water area, for which the NHT had been appointed the undertakers. No place does the notice order assert that it replaces or superseded the declaration order.

[32] The orders serve different purposes under the Act. The declaration order is required by section 3 of the Act, to identify the flood-water control area and to give notice of the appointment of the undertakers. Section 6 of the Act requires the undertakers, so appointed, to publish a notice of the existence of the scheme, its availability for inspection and the right of any interested person to object to the scheme.

[33] It is for that reason that the confirmation order in this case refers to both the declaration and notice orders, notwithstanding the errors in reference to the relevant Gazettes containing those orders. The confirmation order refers to:

(a) the declaration order published as Gazette LN 194A (the correct reference should have been LN 30A; the latter is the legal notice (LN) number, while 194A is the page number); and

(b) the notice order published in Gazette as LN 100 (the correct reference should have been LN 134; the latter is the legal notice (LN) number, while 100 is the Gazette number).

Those were clerical errors. The correction order cured the error in respect of the reference to the declaration order. The result is that the confirmation order, as corrected, confirmed that the contents of the declaration order had come into force.

[34] Mr Earle also contended that NHT, having informed the learned trial judge that it was not relying on the Act, cannot properly, in this court, resile from that position. On this point, it must be noted that the Act and the Gazettes, containing the respective orders, are now properly before this court, and in this exercise, the court is entitled to take them into account. The reasoning in **Elita Flickenger v David Preble & Xtabi Resort Limited** and **Peter Hargitay v Ricco Gartmann**, cited above, demonstrates, in part, that this court may consider matters that were not before the learned trial judge or the learned single judge of appeal.

[35] Section 5 of the Jamaica Gazette Act stipulates that the publication of an official appointment in the Jamaica Gazette must be taken into account. Although the style of the draftsman requires close and careful reading, section 5 of the Jamaica Gazette Act has that effect. Section 5 states:

> "**A document purporting to be the Jamaica *Gazette*, and** to contain a notification of any proclamation, act, or notice made, done, or given by the Queen, her heirs or successors, or **to contain a notification of any appointment by the Queen, her heirs or successors, or by the Governor-General or by a Minister, of any person to any office in Jamaica**, or to contain a notification of any act, order, commission, direction, resolution, notice, by-law, ordinance, rule or regulation done, made, issued, given, sanctioned, confirmed, approved, or allowed by a Chamber or House of the Legislature, or both, or by any executive authority of Government under any Statute or Law passed or to be passed, or to contain a notice of any kind required to be inserted in the Jamaica *Gazette* by any Statute or Law passed or to be passed, **shall be *prima facie* evidence in all Courts and in all legal proceedings** of the fact that such proclamation, act, or notice was made, done, or given, or that such appointment was made, or that such act, order, commission, direction, resolution, notice, by-law, ordinance, rule, or regulation, was done, made, issued, given, sanctioned, confirmed, approved, or allowed or that such notice so required to be inserted in the Jamaica *Gazette* was given by the persons, at the time, in the manner and terms, and to the extent stated or appearing in such document, and that all such matters as stated or appearing in such document were duly published in the Jamaica *Gazette*. This section shall apply to documents purporting to be the Jamaica *Gazette*, whether published before or after the twentieth day of March, 1873." (Emphasis supplied)

[36] In **Rex v Cecil Swimmers and Pearline Bennett** (1949) 5 JLR 155, Carberry J, in delivering the judgment of the former Court of Appeal, addressed the matter of the non-production of a Gazette at first instance. He said, in part, at page 165:

> "The only point taken on appeal with regard to this [offence] was that the Gazettes containing the orders in question were not put in evidence. This point was not taken in the Court below, everybody apparently, having overlooked the matter....
>
> If the point about the non-production of the Gazettes had been taken in the Court below, it would have been the duty of the Resident Magistrate to permit the prosecution to re-open its case for the tender of the necessary exhibits. We are satisfied that the conviction is otherwise in order... In the circumstances of this case, the conviction and sentences for this offence will not be disturbed."

[37] The Act, being legislation, and the orders contained in the Gazettes, promulgated in pursuance of the Act, being subsidiary legislation, having been brought to the court's attention, cannot be ignored. The absence of the subsidiary legislation, in part or otherwise, before the learned trial judge or the learned single judge of appeal is immaterial for the present purposes. The subsidiary legislation allows NHT, as the appointed undertaker, in accordance with the provisions of the Act, to enter the land and take such steps as the authorized flood-water control scheme allows.

[38] The court is required to give effect to the intention of Parliament (see **Sussex Peerage Case** (1844) 11 Cl and Fin 85 at page 143; (1844) 8 ER 1034 at page 1057). Unless the court rules that the legislation it has under consideration is unconstitutional, the court should not find itself to be in conflict with the legislature.

[39] NHT, similarly, does not have the authority to decide whether or not it will rely on the statute, where the statute requires it to carry out a duty. It is obliged by the statute to do what is required, by law, to ensure safety to life and property.

[40] Without ruling definitively on the point, it would seem that the injunctions that were granted in this case are in conflict with the Act and the orders published in the Gazettes. They seek to prevent the NHT from doing what the legislature has authorized, indeed, required NHT, to do. That would be a significant and arguable issue for the court to decide on appeal. In this regard, and for those reasons, the court disagrees with the learned single judge of appeal, recognizing that it may have material before it that he may not have had before him.

[41] Although it is recognized that, in the circumstances of this case, the legislative strictures would have an effect on the decision whether to grant or refuse the stay of execution, the court must also consider the justice of the case.

[42] The practical application of those principles would therefore include a consideration that the situation, pending appeal, would be that the Act and the orders contained in the Gazettes should be allowed to have their intended effect. This does not mean that NHT is entitled to do whatever it wishes in the interim. It must abide by the parameters of the approved flood-water control scheme that has been approved by the Minister.

[43] Treebros, in the meantime, has the protection of the provisions of the Act. NHT, emergencies excepted, must either obtain Treebros' consent, or give written notice,

before entering lot 8 (see section 10(2) of the Act). In addition, separate and apart from any orders already made for damages, Treebros would be entitled to compensation for any damage done pursuant to any future entry by NHT, in pursuance of the approved flood-water control scheme (see section 12 of the Act).

[44] The observations made above are, admittedly, more appropriate to a possible conflict between the Act and the subsidiary legislation, on the one hand, and, on the other, the injunction preventing entry onto lot 8. It may also be said that such a conflict would arise in respect of the injunction seeking to prevent NHT from allowing water to enter lot 8. If the approved scheme is designed for water to be run from higher elevations, through lot 8, to lower-lying property, the validity of an injunction, which is in conflict with the intent of the scheme, would necessarily be an issue for assessment on appeal.

Costs

[45] Counsel were asked to make submissions in respect of the award of costs in respect of this application. Mr Earle submitted that costs should be awarded to Treebros, despite the fact that the stay was granted. Learned counsel contended that NHT's conduct of the litigation justified a departure from the usual order made in interlocutory applications such as these, namely, that costs would be costs in the appeal. He submitted that there was authority for the court, in the exercise of its discretion regarding the award of costs, to depart from the usual order. He cited, for support, rule 64.6 of the CPR, **R (on the application of Srinivasans Solicitors) v Croydon County Court and another** [2013] EWCA Civ 249 and **Otkritie Capital**

International Ltd and another v Threadneedle Asset Management Ltd and another [2017] EWCA Civ 274.

[46] Mr Earle contended that at the trial, before the single judge of appeal and before this court, NHT has adopted an approach of ambush, resulting in unnecessary expense and the waste of time. On two of these occasions, Mr Earle submitted, NHT produced Gazettes at the very last minute, namely:

a. during submissions at the end of the trial; and

b. during Treebros' submissions at the hearing of this application;

[47] Learned counsel also argued that NHT provided misleading evidence concerning the Saint Thomas Municipal Corporation's approval of NHT's development of the NHT land. Mr Earle argued that NHT's representative asserted that the design of the surface water management for the development had been approved by the Municipal Corporation, when in fact only conditional approval had been granted.

[48] Finally, Mr Earle contended that the financial impact on Treebros was considerable and damaging. He pointed to the evidence of Treebros' director Mr David Williams that the litigation had affected Treebros' finances as well as the health and finances of its directors.

[49] The usual order for costs in applications of this nature is that costs would be costs in the appeal. The reason for this approach is that the application:

a. is an interlocutory one; and,

b. there is no party which is obviously at fault, such as in applications for extension of time or relief from sanctions.

The usual order is occasioned by the fact that the court would not know what the final outcome of the appeal will be. Further, granting costs to a successful party in an interlocutory application may result in inconsistency and injustice, if that party is, ultimately, the unsuccessful party on the determination of the appeal.

[50] Mr Earle is correct in his submission that the court has a discretion as to whether it should depart from granting the usual order in respect of costs. The authorities that he cited in his submissions, demonstrate that, depending on the circumstances of the case, the court may order even a successful party to pay the costs of the event. One of the reasons for that departure being unreasonable conduct by that party.

[51] Learned counsel is, however, not on good ground in his submission that this case deserves that departure. In this case, although it cannot be denied that NHT produced the various relevant Gazettes at late stages and in a piecemeal fashion, it also cannot be said that the conduct was so egregious that it deserved a departure from the usual order for costs. Treebros would have been aware, from the submissions stages of the trial, of the existence of the confirmation order. It should not have been taken by surprise by the production of the declaration, notice and confirmation orders in this court. Additionally, the production of the correction order was only made necessary when it was noted that there was an error in the confirmation order. It did not take the

case any further, although it did deprive Treebros of the opportunity of taking a minute technical objection.

[52] A second reason for disagreeing with Mr Earle is that it will have been noted that the status of the approval by the Saint Thomas Municipal Corporation did not feature in the reasons for the decision in respect of this application.

[53] Thirdly, although it is said that Treebros has had its financial resources depleted there was however no link made between those considerations and Treebros' involvement in the litigation. Nor was any connection made between the way NHT conducted the litigation and Treebros' finances. It is also noted that NHT has paid to Treebros, certain amounts of the damages that were awarded to it. That payment will no doubt assist in financing the resisting of the appeal.

[54] Finally, the financial and health considerations of Treebros' directors cannot be taken into account in determining whether or not to grant costs to one party or the other. It would be a very long stretch indeed to state that the litigation had caused Mr Williams to have suffered a heart attack, but outside of medical evidence, that would be mere conjecture.

[55] There is therefore no compelling reason to award costs of the application to Treebros. It is at the conclusion of the appeal, that the issue of costs will be finalized. The successful party would be the party awarded the costs. It would be inconsistent and unjust, if NHT, just as an example, were successful on appeal in respect of the

injunctions, yet it would have had costs awarded against it in the application for stay in respect of those injunctions.

[56] The usual order should be made.

Summary and conclusion

[57] The grant of the stay of the injunctions was based on the premise that they seemed to be in conflict with the Act and the subsidiary legislation affecting the control of flood-water in the Creighton Hall area. The Act and the subsidiary legislation were not given sufficient consideration by either the learned trial judge, albeit being led to that position in part by NHT, or by the learned single judge of appeal. It is accepted that this court may have had before it Gazettes, containing orders made pursuant to the Act, which were not before either the learned trial judge or the learned single judge. Nevertheless, this court must give effect to the Act and the subsidiary legislation. There seems therefore to be arguable issues for the purposes of an appeal.

[58] The grant of a stay, although required by the existence of the Act and the subsidiary legislation, would not do irremediable harm to Treebros. NHT, even on Treebros' account, would be able to pay compensation for any damage done in the event that the stay should not have been granted and secondly, the protection of life and property would be more safeguarded by a grant of a stay.

[59] On the issue of the grant of costs, whereas NHT had asked for a stay of the indemnity aspect of the costs associated with the trial, the order for the stay of execution did not make any distinction between standard and indemnity costs.

[60] There is no reason to depart from the principle that costs of this application should be made on the usual basis.

[61] It is for those reasons that I agreed with the orders made as mentioned above, and agree that costs of the application should be costs in the appeal.

MCDONALD-BISHOP JA

[62] I too have read, in draft, the judgment of my brother Brooks JA. His reasoning and conclusions are in accord with my reasons for agreeing to the orders that were made. I also agree with the order that costs should be costs in the appeal.

MORRISON P

Further order

Costs of the application to be costs in the appeal.