

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 117/2004

**BEFORE: THE HON MR JUSTICE MORRISON JA
 THE HON MR JUSTICE DUKHARAN JA
 THE HON MISS JUSTICE PHILLIPS JA**

**BETWEEN NATIONAL TRANSPORT CO-OPERATIVE APPELLANT
 SOCIETY LTD**

AND THE ATTORNEY GENERAL OF JAMAICA RESPONDENT

The appellant relied on submissions made at the substantive appeal

Written submissions filed by the Director of State Proceedings for the respondent

9 March 2012

MORRISON JA

[1] This is the court's third judgment in this appeal, the previous ones having been delivered in [2010] JMCA Civ 48 and [2011] JMCA Civ 34. The extended background to the matter is fully set out at paras [8] – [30] and [1] – [6] of my judgments in the former and the latter respectively, and I do not propose to rehearse its long history here, save as may be necessary to make this judgment intelligible.

[2] The matter was remitted to this court by the judgment of the Privy Council delivered on 26 November 2009 ([2009] UKPC 48), for the determination of issues relating to the quantum of damages due to National Transport Co-operative Society Ltd ('NTCS') as a result of an arbitration award ('the award') handed down in its favour on 2 October 2003 by arbitrators ('the arbitrators') appointed by the parties pursuant to an arbitration agreement between them. The Privy Council awarded NTCS 60% of its costs before the Board. However, it set aside all the orders previously made for costs in this court, the Supreme Court and in the arbitration, with a direction that this court should deal with these costs.

[3] The remitted appeal first came on for hearing before this court on 27, 28, 29 and 30 September 2010, when the court reserved its ruling on related preliminary issues concerning the admissibility of certain evidence and the scope of the Privy Council's ruling. On 20 December 2010, the court issued a ruling on these issues ([2010] JMCA Civ 48).

[4] The matter next came on for hearing on 28, 29, 30, 31 March and 1 April 2011, when the court reserved its decision on the quantum of damages due to NTCS pursuant to the award. By its judgment handed down on 30 September 2011 ([2011] JMCA Civ 34), it was ordered that the respondent ('GOJ') should pay to the appellant ('NTCS') the sum of \$1,852,172,012.07, together with 50% of the interest calculated at 6% per annum on that amount, from 29 November 2004 until the date of the judgment.

However, on the application of counsel for GOJ, the question of costs was reserved, pending the receipt of further submissions from the parties.

[5] At a case management teleconference held on 15 December 2011 (at which GOJ was represented by the learned Solicitor-General, Douglas Leys QC, Mrs Michelle Champagnie and Miss Renee Morgan and NTCS by Patrick Bailey), I gave directions that: (i) GOJ should file written submissions on costs on or before 13 January 2012 and (ii) NTCS should reply, if necessary, on or before 20 January 2012. Pursuant to these directions, written submissions were filed on behalf of GOJ on 12 January 2012, while NTCS indicated that it would stand by the submissions that had previously been made on its behalf at the substantive hearing.

[6] Before us on 1 April 2011, NTCS submitted that (i) costs should be awarded to it in the Supreme Court and this court on the same basis upon which it had been awarded its costs in the Privy Council, that is, 60%; (ii) the costs of the arbitration should be ordered to be paid by GOJ, on the basis that NTCS succeeded before the arbitrators on all matters placed before them; and (iii) the costs of the present proceedings before this court should be ordered to be paid by GOJ.

[7] On behalf of GOJ, it was submitted that the order for costs made by the Privy Council should not be treated as a precedent for costs to be awarded in the Court of Appeal and the Supreme Court, since the circumstances under which the costs order was made in the Privy Council differed significantly from those in the lower courts.

[8] In respect of the hearing before Brooks J in the Supreme Court and the previous hearing before this court, GOJ submitted that the costs orders made in its favour in both courts should remain undisturbed. The basis of this submission was that the Board considered that both tribunals had come to the correct conclusion in rejecting the arguments put to them on behalf of NTCS, but allowed NTCS' final appeal on a basis not argued on its behalf.

[9] In respect of the costs of the arbitration proceedings, GOJ submitted that each party should bear its own costs, since the two points on which the Board found for NTCS were not found by the arbitrators, but were based on new arguments.

[10] And finally, in respect of the costs of the current proceedings before this court, GOJ submitted that the costs in connection with the determination of the preliminary issues and the costs in connection with the general issue should be dealt with separately. In relation to the preliminary issues, GOJ's submission was that the parties should bear their respective costs as a result of the fact that the Board's referral had created "a peculiar situation which had to be resolved", but upon which the parties were unable to agree. By agreement between the parties, the preliminary issues therefore had to be determined by the court and in the result neither party ultimately prevailed fully. In relation to the court's final order made on 30 September 2011, on the other hand, GOJ submitted that costs should follow the event and that NTCS was therefore entitled to an order in its favour, such costs to be taxed if not agreed.

[11] Taking these submissions, all of which I have found to be very helpful, into account, I have come to the view that the proper order for costs in the circumstances of this matter should be as follows.

[12] Firstly, as regards the arbitration proceedings, I would order that NTCS should have the costs of those proceedings, on the basis that the arbitration, which was fought by GOJ with unremitting vigour at every step of the way, was an absolutely necessary step in order for NTCS (a) to establish its right arising out of the cancellation of the franchise agreements (in respect of which it has ultimately prevailed, albeit on a different legal basis from that originally postulated); and (b) to have its losses quantified (in respect of which the arbitrators' determination has remained without serious challenge by GOJ and basically intact through all subsequent stages of the proceedings).

[13] Secondly, as regards the costs ordered in favour of GOJ by both Brooks J in the Supreme Court and this court on appeal, I would leave those orders undisturbed, essentially on the basis advanced by GOJ, which is that it has now been accepted that the conclusions at which both those courts arrived were correct in the light of the issues that were before them and so far as they went.

[14] And lastly, as regards the costs of the current proceedings, I was initially attracted by GOJ's submission that the costs in connection with the determination of the preliminary issues should be treated differently, for substantially the reason put forward

by GOJ, that is, that the necessity for such a determination had only arisen as a result of the "peculiar situation" created by the Board's ruling. However, it seems to me on further reflection that what really - and primarily - necessitated that stage of the current proceedings was in fact GOJ's insistence that the effect of the Board's ruling was that it entitled it to, in effect, reopen the question of quantum of damages by calling further evidence on the point. GOJ having lost on that point, it therefore seems to me that there can be no basis for treating the costs of that aspect of the proceedings in any different way. I would accordingly order that the costs of the current proceedings should follow the event and that NTCS' costs must be paid by GOJ, on the basis that, in a contest in which GOJ maintained initially that NTCS should be awarded nominal damages only and, at the end of the day, that an award of not more than \$52 million plus interest should be made, NTCS has clearly prevailed.

[15] I would therefore propose the following order for costs:

- (i) GOJ is to pay NTCS' costs of the arbitration proceedings, such costs to be agreed or taxed;
- (ii) NTCS is to pay GOJ's costs of the proceedings before the Supreme Court in Claim No. HCV 01969 and before this court in SCCA No. 117/2004, such costs to be agreed or taxed;
- (iii) GOJ is to pay NTCS' costs of this appeal, such costs to be agreed or taxed.

DUKHARAN JA

[16] I have read in draft the judgment of my brother Morrison JA. I agree with his reasoning and conclusion.

PHILLIPS JA

[17] I have read the draft judgment of Morrison JA and I entirely agree with the reasoning and conclusion.

MORRISON JA

ORDER:

- (i) GOJ is to pay NTCS' costs of the arbitration proceedings, such costs to be agreed or taxed;
- (ii) NTCS is to pay GOJ's costs of the proceedings before the Supreme Court in Claim No. HCV 01969 and before this court in SCCA No. 117/2004, such costs to be agreed or taxed;
- (iii) GOJ is to pay NTCS' costs of this appeal, such costs to be agreed or taxed.