[2019] JMCA App 33

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NOS 276 & 277/2018

MOTION NO COA2019MT00006

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

BETWEEN	**SYMBIOTE INVESTMENTS LTD**	**APPLICANT**
AND	**MINISTER OF SCIENCE AND TECHNOLOGY**	**RESPONDENT**
AND	**OFFICE OF THE UTILITIES REGULATION**	**INTERESTED PARTY**

Lord Anthony Gifford QC, Patrick Bailey and Miss Maria Brady instructed by Patrick Bailey for the applicant

Miss Althea Jarrett instructed by the Director of State Proceedings for the respondent

Mrs Daniella Gentles-Silvera and Miss Kathryn Williams instructed by Livingston Alexander and Levy for the interested party

23 and 26 September 2019

MCDONALD-BISHOP JA

[1] The applicant, Symbiote Investments Limited, seeks conditional leave to appeal to Her Majesty in Council from a decision of this court made on 29 March 2019. The

motion is brought pursuant to section 110(2)(a) of the Constitution of Jamaica ("the Constitution").

[2] The applicant brought, among other things, an application for a stay of execution of a revocation order, which had been made against it by the Minister of Science and Technology, the respondent. At the end of the hearing, the court ordered that:

> "1. The order granting permission to appeal is set aside.
>
> 2. The application for stay of execution is refused.
>
> 3. Costs to the respondent and to the interested party to be agreed or taxed."

The background

[3] The application for permission to appeal emanated from the applicant's dissatisfaction with an order made in the Supreme Court by Stamp J on 7 December 2018, refusing its application for leave to apply for judicial review of a decision of the respondent made in April and June 2018. The respondent, acting on the recommendation of the interested party, the Office of Utilities Regulations ("the OUR"), revoked six licences that the respondent had granted to the applicant under the Telecommunications Act.

[4] The factual background leading to the revocation of the licenses and the application in the Supreme Court is well documented in the judgment of this court, which gives rise to this motion, **Symbiote Investments Limited v Minister of**

Science and Technology and Office of Utilities Regulation [2019] JMCA App 8 at paragraphs [8] – [19].

[5] This court accepts the facts stated in that judgment as an accurate and succinct representation of the case under review. It is considered unnecessary for present purposes to detail those facts.

[6] In its application for leave to apply for judicial review, the applicant had included that it was seeking leave to apply for, among other things, various declarations and an order of certiorari, quashing the decision of the respondent.

[7] Stamp J, not surprisingly, refused to consider the aspects of the application in which the applicant was seeking declarations because that remedy does not require the leave of the court for it to be pursued. The learned judge, therefore, concentrated on the proposed application for the judicial review remedy, which was the order of certiorari.

[8] After hearing legal arguments and considering the case presented by each party, Stamp J made no order in respect of the declarations proposed. He refused to grant the leave for judicial review, having had regard to the threshold test of arguability with a prospect of success, laid down in **Sharma v Browne-Antoine and others** [2006] UKPC 57 and other authorities from this jurisdiction. He concluded that the applicant had failed to show that it had an arguable case with a prospect of success.

[9] On 12 December 2018, following Stamp J's refusal of the application for leave to appeal his decision, the applicant applied to this court for leave to appeal and for a stay of execution and or other interim relief.

[10] On 17 December 2018, the court granted the applicant leave to appeal and ordered that implementation of the order made by the respondent be stayed until 14 January 2019. The record of the court reflects that the permission to appeal was granted as a conservatory measure to treat with the application for stay. There was no ventilation of the issues concerning the application for leave to appeal to ascertain whether, indeed, the criterion for leave to appeal was satisfied.

[11] The hearing of the application for stay of execution came before the court in January 2019. It was adjourned from time to time, with an extension of the interim stay of execution, until its discharge by order of the court on 29 March 2019.

Application for leave to appeal to Her Majesty in Council

[12] The applicant has set out in its notice of motion for conditional leave to appeal to Her Majesty in Council, the decisions, which it believes to be wrong. The court has noted the gravamen of the applicant's complaint and the bases for its application for conditional leave as detailed in paragraph 12 of its written submissions, filed on 23 September 2019 in support of the motion for conditional leave. The submissions read in direct terms:

> "12. The [Applicant] seeks to reverse two decisions which it believes to be wrong:

(1) The decision to set aside the grant of leave made on 17 December 2018. The Applicant contends that there were grounds of appeal which had realistic prospects of success and that the Court acted correctly in granting leave in December 2018. The Applicant will, if leave to appeal to the Privy Council is granted, seek rulings from the Privy Council:

(a) that leave to apply for judicial review be granted and the case remitted to the Supreme Court for a full hearing of the judicial review claim; or in the alternative:

(b) that the grant of leave made by the Court on 17 December 2018 be restored, and the case remitted to the Court of Appeal for a full hearing of the application for leave. The Courts would be guided by such principles, for example on proportionality, as the Privy Council would articulate.

(2) The decision that a stay of the Respondent's revocation order cannot be properly granted and that the Court was bound by the decision in **Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd** [1991] 4 All ER 85 ("**Vehicles and Supplies"**). The Applicant will, if leave to appeal to the Privy Council is granted, seek rulings:

(a) that **Vehicles and Supplies** was wrongly decided; or in the alternative:

(b) that this Honourable Court was wrong in holding that it was obliged by the decision in **Vehicles and Supplies** to refuse a stay of the Respondent's revocation of the licences pending the hearing of the judicial review proceedings; and in either case:

(c) that implementation of the Respondent's revocation of the Applicant's licences be stayed until the outcome of the further proceedings ordered under (1) above."

[13] In essence, the applicant seeks leave to appeal to Her Majesty in Council, the following aspects of the decision of the court:

(a) the court's decision to set aside the permission granted to the applicant on 17 December 2018 to appeal Stamp J's decision;

(b) the refusal of the court to stay the execution of the respondent's revocation order, the court having held itself bound by the decision in **Minister of Foreign Affairs Trade and Industry v Vehicles and Supplies Ltd and another** [1991] 4 ALL ER 65; and

(c) the refusal to stay the OUR's implementation of the respondent's revocation order.

[14] The challenge to the decision of the court in these respects is launched on five main planks as set out in the applicant's notice of motion. They are:

i) proportionality;

ii) refusal of stay;

iii) illegal obtaining of evidence;

iv) the issue of fair hearing; and

v) the interpretation of the Telecommunications Act.

[15] Under these five headings, the applicant sets out the bases on which it is challenging the decision of the court. It has not, however, formulated any specific

question that it wishes to submit for the consideration of the Board. The court discerns from the issues raised, the questions that would have had to arise for the consideration of Her Majesty in Council. The court has, therefore, taken the liberty to formulate the core questions it perceives as arising from the issues as stated under the five broad headings as follows:

Proportionality

i) Whether the Court of Appeal erred in law in holding that the applicant's argument that the decision of the respondent was proportionately severe, having regard to the fault alleged, had no reasonable prospect of success.

Refusal of stay

ii) Whether the Court of Appeal erred in law in not holding that the circumstances manifestly called for a stay of execution in the interests of justice and that the court had the power to grant such a stay.

Illegally obtained evidence

iii) Whether the Court of Appeal erred in law in holding that the applicant had no prospect of success in its contention that the banking documents on which the respondent's decision was based were confidential documents, which the Contractor-General had no power to obtain. Therefore, the documents should not have been relied on as a basis for revocation.

Fair hearing

iv) Whether the Court of Appeal erred in law in holding that the applicant had no reasonable prospect of success in its contention that the respondent acted unfairly in taking the banking documents at their face value; not allowing a full hearing, and failing to await the outcome of a police investigation.

The interpretation of the Telecommunications Act

v) Whether the decisions of the respondent, Stamp J, and the Court of Appeal were all based on a misrepresentation of section 14(6)(b) of the Telecommunications Act.

Whether question(s) should be submitted to Her Majesty in Council, pursuant to section 110(2)(a) of the Constitution

[16] Section 110(2)(a), in so far as is relevant, reads:

> "(2) An appeal shall lie from decisions of the Court of Appeal to Her Majesty in Council with the leave of the Court of Appeal in the following cases-
>
> (a) where in the opinion of the Court of Appeal the question involved in the appeal is one that, by reason of its great general or public importance or otherwise, ought to be submitted to Her Majesty in Council, decisions in any civil proceedings; ..."

[17] For the applicant to succeed, it must satisfy this court that the questions it proposes to submit, or any of them, are questions arising from civil proceedings that, because of their great general or public importance or otherwise, ought to be submitted to Her Majesty in Council.

[18] The necessary guidance in treating with this aspect of the motion is obtained from previous decisions of this court, which have considered and applied section 110(2)(a). The principles derived from those authorities are "well-defined, circumscribed and established" as well as "clear and consistent". See, for instance, **Paul Chen-Young and others v Domville Limited and others** [2018] JMCA App 31 at paragraph [60]; **Georgette Scott v The General Legal Council (Ex-Parte Errol Cunningham)** (unreported), Court of Appeal, Jamaica, Civil Appeal 118/2008, Motion No 15/2009, judgment delivered 18 December 2009; **National Commercial Bank Jamaica Limited v The Industrial Disputes Tribunal and Peter Jennings** [2016] JMCA App 27 and **Emanuel Olasemo v Barnett Limited** (1995) 32 JLR 470. There is no controversy about them.

[19] In **Georgette Scott v The General Legal Council**, Phillips JA pronounced on the three-step approach that the court should employ in construing this section. She stated:

> "… Firstly, there must be the identification of the question(s) involved: the question identified must arise from the judgment of the Court of Appeal, and must be a question, the answer to which is determinative of the appeal. Secondly, it must be demonstrated that the identified question is one of which it can be properly said, raises an issue(s) which require(s) debate before Her Majesty in Council. Thirdly, it is for the applicant to persuade the Court that that question is of great general or public importance or otherwise. Obviously, if the question involved cannot be regarded as subject to serious debate, it cannot be considered one of great general of public importance."

[20] The dictum of Morrison P in **National Commercial Bank Limited v The Industrial Disputes Tribunal and another**, at paragraph [33], also proves quite instructive. It states that:

> "[33] ...[I]n order to be considered one of great general or public importance, the question involved must, firstly, be one that is subject to serious debate. But it is not enough for it to give rise to a difficult question of law: it must be an important question of law. Further, the question must be one which goes beyond the rights of the particular litigants and is apt to guide and bind others in their commercial, domestic and other relations; and is of general importance to some aspect of the practice, procedure or administration of the law and the public interest..."

[21] The wording of section 110(2)(a) denotes that even if the proposed question cannot be said to be one of great general or public importance, it can, nevertheless, be submitted for the consideration of Her Majesty in Council, if it is such that it "ought otherwise" to be submitted.

[22] The court has also had regard to the guidance afforded by Wolfe JA (as he then was) in **Emanuel Olasemo v Barnett Limited**, at page 476, in considering the rubric "or otherwise". There, his Lordship directed:

> "Is the question involved in this appeal one of great general or public importance *or otherwise*? The matter of a contract between private citizens cannot be regarded as one of great general or public importance. **If the applicant is to bring himself within the ambit of this subsection he must therefore do so under the rubric 'or otherwise'. Clearly the addition of the phrase 'or otherwise' was included by the legislature to enlarge the discretion of the Court to include matters which are not necessarily of great general or public importance, but which in the opinion of the Court may require some**

> **definitive statement of the law from the highest Judicial Authority of the land. The phrase 'or otherwise' does not per se refer to interlocutory matters. 'Or otherwise' is a means whereby the Court of Appeal can in effect refer a matter to Their Lordships Board for guidance on the law**." (Emphasis added)

[23] It is against this background of the applicable law that the court has examined each proposed ground on which the motion for leave to appeal is based.

Ground 1: Proportionality

Whether the Court of Appeal erred in law in holding that the applicant's argument that the decision of the respondent was proportionately severe, having regard to the fault alleged, had no reasonable prospect of success.

[24] The criticism of the applicant is levelled at the conclusion of Brooks JA at paragraphs [88]-[92] of the judgment. He concluded that proportionality does not apply to judicial review cases within this jurisdiction and, so, the applicant's proposed ground of appeal, based on arguments regarding the application of a proportionality test, has no prospect of success. In dealing with the issue of proportionality, the court accepted the arguments and authority cited on behalf of the respondent, **R v Secretary of State for the Home Department, Ex parte Brind and Others** [1991] 1 AC 696 ("**Ex parte Brind**"). This case established that legislation was required to allow for the analysis of the principle of proportionality in respect of a challenge to an executive order on the ground that it was disproportionate to the mischief it seeks to prevent. At paragraph [88] of the judgment, Brooks JA said:

> "Miss Jarrett's submissions and the authority of **R v Secretary of State for the Home Department, Ex parte Brind** are, with respect, correct on the issue of

> proportionality. In that case, the Court of Appeal of England and Wales considered a complaint that an executive order was disproportionate to the mischief that it sought to prevent. The headnote of the report of the Court of Appeal's decision ([1990] 1 All ER 469) accurately states that the court held, in part:
>
> '(3) **The doctrine of proportionality had no place in English law as a separate ground for the judicial review of administrative action since it was but one aspect of the test of reasonableness**. Accordingly, the fact that a minister's decision was not in proportion to the benefit resulting from or mischief prevented by the decision was not by itself sufficient to render the decision unlawful and it was only relevant if it showed that the minister's action was perverse, unreasonable or irrational'..." (Emphasis as in original)

[25] He emphasised the principle enunciated by the English Court of Appeal that the doctrine of proportionality had no place in English Law as a separate ground for the judicial review of administrative action since it was but one aspect of the test of reasonableness.

[26] Having had due regard to the dicta of the House of Lords in **Ex parte Brind** at paragraphs [89]–[91], Brooks JA stated at paragraph [92]:

> "It is noted, however, that after **R v Secretary of State for the Home Department, Ex parte Brind** was decided, that England passed legislation dealing with the issue. Section 2(1)(a) of the Human Rights Act, 1998 stipulates that in considering rights which flow from the Convention, English courts should take into account the judgments, decisions, declarations and advisory opinions of the European Court of Human Rights. The Act further states, in section 3(1), that '[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights'. Those provisions do not have an equivalent in Jamaican law."

[27] Lord Anthony Gifford QC, on behalf of the applicant, had taken issue with Brooks JA's pronouncement that there is no legislative provision in Jamaica equivalent to sections 2(1)(a) and section 3(1) of the Human Rights Act of the UK. This Act provides that in considering rights which flow from the Convention, courts in the UK should take into account "the judgments, decisions, declarations and advisory opinion of the European Court of Human Rights". Although Lord Gifford is saying that Brooks JA is wrong in so stating, he has not brought to the court's attention any provision in Jamaica's legislative framework that makes similar provisions as the Human Rights Act of the UK.

[28] In advancing his argument concerning what he perceived as an error on the part of this court on this issue of proportionality, Lord Gifford contended that if the case of **Ex parte Brind** had been heard in Jamaica, the position would have been quite different. The difference, he said, would have resulted from the fact that Jamaica has a Constitution as its supreme law, and within the Constitution is the Charter of Fundamental Rights and Freedoms ("the Charter"), which guarantees the right to freedom of expression and other fundamental rights. Proportionality, he continued, is one of the cornerstones used by the courts in many countries, including Jamaica, for the determination of whether a law or an Act of the State should be struck down for unconstitutionality.

[29] The applicant relied on the recent decision of the Constitutional Court in **Julian J Robinson v The Attorney General of Jamaica** [2019] JMFC Full 04, in support of

the argument that the law now accepts proportionality as an applicable test in determining whether legislation passed by the State should be struck down for unconstitutionality. Lord Gifford referenced dicta of Sykes CJ at paragraphs [86] and [87], where he stated, in part:

> "[86] What is proportionality? It is the legal doctrine of constitutional adjudication that states that all laws enacted by the legislature and all actions taken by any arm of the state, which impact a constitutional right, ought to go no further than is necessary to achieve the objective in view.
>
> [87] This test of proportionality has been described by Dr Dhananjaya Chandrachud J in **Justice K Puttaswamy (Rtd) and anor v Union of India** Writ Petition (Civil) NO 494 of 2012 (delivered 26 September, 2018 at paragraphs 197 – 198, in these terms:
>
> The test of proportionality, which began as an unwritten set of general principles of law, today constitutes the dominant 'best practice' judicial standard for resolving disputes that involve either a conflict between two rights claims or between a right and a legitimate government interest. It has become a 'centrepiece of jurisprudence' across the European continent as well as in common law jurisdictions including the United Kingdom, South Africa and Israel. … It has been raised to the rank of fundamental constitutional principle, and represents a global shift from a culture of authority to a culture of justification.
>
> **…The test of proportionality stipulates that the nature and extent of the State's interference with the exercise of the right**
>
> **…must be proportionate to the goal it seeks to achieve… .**" (Emphasis as in original)

[30] The gravamen of Lord Gifford's argument is that, on the one hand, the Court of Appeal made a clear statement that "the principle of proportionality was not a ground for judicial review" while, on the other hand, the Full Court has declared that

proportionality is the yardstick by which "all laws enacted by the legislature and all actions taken by an arm of the state", should be measured in determining unconstitutionality.

[31] He argued that, in the present case, the remedy sought was an application for judicial review. However, a judicial review application will usually, as here, involve a claim that a public authority has not treated a claimant equitably or humanely, which is a right guaranteed by the Constitution. Furthermore, he contended, two other constitutional rights of the applicant and its customers have been affected by the revocation of its licences. Those rights are:

> "(1) 'The right to seek, receive, distribute or disseminate information, opinions and ideas through any media': section 13(3)(d) of the Charter of Fundamental Rights and Freedoms. ...
>
> (2) 'The right to freedom of…association': section 13(3)(e)."

[32] The applicant submitted that contrary to the opinion of Brooks JA, the issue of proportionality must be considered in a judicial review application, such as in the present case, "where the power of the state has been used to revoke licences, close down a business, and diminish competitiveness in a new and significant industry; and where the reason given is that the [a]pplicant associated with a person with an 'adverse trace'". This issue, the applicant contended, is "eminently an issue", which is fit for determination by the highest court.

[33] It was submitted on behalf of the respondent, through Miss Althea Jarrett, that **Julian J Robinson v The Attorney General of Jamaica**, relied on by the applicant,

cannot assist it as the claim was not for judicial review. Miss Jarrett further submitted that the pronouncement on proportionality, in that case, was within the context of section 13(2) of the Charter. The test of proportionality to be applied within that context is that expressed in **R v Oakes** [1986] 1 SCR 103. This court accepts those submissions.

[34] It must be stated that the proportionality test applied by the Full Court in the context of the Charter provisions does not emanate from any equivalent provision in Jamaica as the Human Rights Act of the UK. It was adopted from the common law of Canada, based on the interpretation of section 1 of their Charter, which is the equivalent to section 13(2) of our Charter. The **R v Oakes** test is, therefore, not a legislative construct but a judge-made construct, and so, is not equivalent to section 2(1) of the Human Rights Act, which has rendered the test of proportionality applicable to Convention cases in the UK.

[35] Quite apart from the absence of legislative provisions, to which Brooks JA spoke, there is no case brought to the attention of this court which makes a test of proportionality (in the sense used in **Julian J Robinson v The Attorney General of Jamaica** and **Oakes**) binding on any court in Jamaica in the context of judicial review applications. Although reference was made to the opinion of Sykes J (as he then was) in **The Northern Jamaica Conservation Association and others v The Natural Resources Conservation Authority**, (unreported), Supreme Court, Jamaica, Claim No HCV 3022/2005, judgment delivered 16 May 2006, that proportionality should apply

to judicial review cases, that dictum was not binding on Stamp J. This court, therefore, cannot properly hold that Stamp J erred in law in failing to follow it.

[36] In **Ex parte Brind**, Lord Ackner said:

> "The first observation I would make is that there is *no* authority for saying that proportionality in the sense in which the appellants have used it is part of the English common law and a great deal of authority the other way...."

[37] Brooks JA, in paragraph [90] of the judgment of this court, emphasised the foregoing dictum from **Ex parte Brind**. Following on the words of Lord Ackner, therefore, it may be stated that the applicant has brought to this court, "no authority for saying that proportionality in the sense in which the [applicant has] used it", within the context of their application for judicial review, is part of the laws of Jamaica.

[38] **Julian J Robinson v The Attorney General of Jamaica** involved a breach of Charter rights that gave rise to the court's consideration of section 13(2) of the Charter. It was within the context of applying the provisions of that section to the question of constitutionality that the Full Court had regard to the proportionality test as laid down in **R v Oakes**. The Full Court, at no time, pronounced on a principle of proportionality of universal application to be applied to judicial review cases. Also, this court did not venture into any question relating to the applicability of proportionality in the **R v Oakes** sense to this case, or any other, involving a claim for judicial review. The reasoning in **Julian J Robinson v The Attorney General of Jamaica**, relied on by the applicant, has no bearing on this case.

[39] The concept of proportionality, which is applicable in the context of section 13(2) of the Charter, has never been applied to judicial review cases in this jurisdiction. Nor is it provided for by any statute to make its application binding on any court.

[40] It follows then that neither Stamp J (had he considered the point) nor this court would have been bound or, indeed, required to apply the proportionality test utilised by the Full Court in **Julian J Robinson v The Attorney General of Jamaica** to the case for judicial review under consideration.

[41] The court notes that even in criminal cases, there is a principle of proportionality dealing with the question of sentencing, where the law recognises that the sentence must fit the crime. The court accepts that the applicant in its notice of application expressed a bare contention that the penalty did not fit the crime. The applicant did not seek to rely on the test of proportionality in a sense expressed in **R v Oakes**. The circumstances of the cases are therefore different and, so, the matters in dispute among the parties called for different considerations.

[42] There is thus no evident or apparent conflict as perceived by Lord Gifford, between the reasoning of this court and that of the Full Court in **Julian J Robinson v The Attorney General of Jamaica** on the issue of proportionality that would warrant clarification or resolution from the highest court of the land.

[43] It has not escaped the attention of this court that the applicant sought to, quite belatedly, raise issues of breaches of Charter rights for the first time in its notice of motion. This, obviously, was in an attempt to bring its case within the ambit of the

proportionality test pronounced in **Julian J Robinson v The Attorney General of Jamaica**. A perusal of the application before Stamp J for leave to apply for judicial review shows that at no time did the applicant, even remotely, raise issues of breaches of its Charter rights now being alleged, or, any at all. It alleged breaches of natural justice and its statutory rights under the Telecommunications Act.

[44] Although in treating with the application for stay, this court had examined the issue of proportionality, it did so to determine whether the proposed ground of appeal, based on it, had a real prospect of success. It must be noted, as Miss Jarrett pointed out, that there were no arguments advanced by the applicant on proportionality before Stamp J. Consequently, nothing arose from the decision of Stamp J concerning proportionality. The issue was raised for the first time in the application for permission to appeal.

[45] Stamp J had not considered the proportionality issue because he did not focus on the declarations that were being sought. It was on the terms of one of the declarations being applied for that the applicant had raised the issue of proportionality. Even so, it did not do so in a sense used in the Charter cases.

[46] In the light of the case presented by the applicant before Stamp J, it is safe to say that nothing concerning breach of Charter rights and the application of the test of proportionality, within that context, can properly form the subject of any appeal to Her Majesty in Council. This is, simply, because the decisions of Stamp J and this court have

not given rise to a question involving proportionality that warrants any or any serious debate before Her Majesty in Council.

[47] Brooks JA's assertion that there is no equivalent provision in this jurisdiction to the Human Rights Act of the UK remains uncontroverted up to the end of this hearing. It is, therefore, extremely difficult to see a serious debate arising from this pronouncement at paragraph [82] of the judgment of the court that would warrant the consideration of Her Majesty in Council. It gives rise to no question of great or public importance as alleged by the applicant.

[48] The decision of this court that the argument based on proportionality has no real prospect of success does not give rise to any question of great or general public importance. Consequently, there is no proper basis in law to submit this question for the consideration of Her Majesty in Council.

[49] There is also nothing arising on this issue regarding proportionality that makes the question formulated concerning it otherwise appropriate for submission to Her Majesty in Council.

Ground 2: Refusal of Stay

Whether the Court of Appeal erred in law in not holding that the circumstances manifestly called for a stay of execution in the interests of justice and that the court had the power to grant such a stay

[50] The applicant wishes to challenge the court's conclusion at paragraph [38], where it held that "an application for staying the Minister's revocation order, pending appeal, cannot properly be granted". The court had reasoned at paragraph [37] that,

"for good or ill, [it is] bound by **Vehicles and Supplies**" and could not follow cases in the UK, which had criticised that decision.

[51] The applicant's contention concerning this conclusion is that the court's decision to hold itself bound by the decision in **Minister of Foreign Affairs Trade and Industries v Vehicles and Supplies Ltd and another** [1991] 4 ALL ER 65 calls for consideration by the Privy Council. According to the applicant, it would be a matter of great general and public importance for the law concerning a stay of execution in judicial review cases to be settled, notwithstanding the respondent's contention that the law is fully and correctly stated in **Vehicles and Supplies**.

[52] It also contended that the decision of the court that the balance of justice did not justify a stay was manifestly unreasonable against the weight of the evidence and, so, the Privy Council would need to consider whether a stay ought to have been granted.

[53] This aspect of the applicant's motion needs no in-depth analysis. It suffices to say that the court, having considered this ground, can discern no question arising from the decision of the court concerning the stay which satisfies the criterion for conditional leave to be granted under section 110(2)(a).

Ground 3: Illegal obtaining of evidence

Whether the Court of Appeal erred in law in holding that the applicant had no prospect of success in its contention that the banking documents on which the respondent's decision was based were confidential documents which the Contractor-General had no power to obtain and which, therefore, should not have been relied on as a basis for revocation.

[54] The applicant's submission on this issue is that the court failed to recognise that the illegal procurement of confidential documents was a violation of the applicant's constitutional rights to privacy. According to Lord Gifford, the applicant was entitled to challenge the procurement and use of banking documents by agents of the State in circumstances where the Telecommunications Act made provision for the lawful procurement of the documents under the supervision of the court. According to Lord Gifford, the proper approach to the disclosure of confidential documents is also a matter of great general importance because the applicant's constitutional right to privacy is impacted.

[55] Again, it is evident that the applicant's case which it wishes to take to Her Majesty in Council is different from the case it had presented in the Supreme Court and before this court on the application for permission to appeal. The appeal to the Constitution is, once again, belated.

[56] The proposed grounds that were presented to this court were that the acquisition of the documents by the Office of the Contractor General ("OCG") was unlawful, having been made without the applicant's approval and without the OCG having secured them in the course of an authorised investigation. Lord Gifford's contention was that while the law allows illegally obtained evidence to be used in evidence, the principle has no validity outside of the arena of the criminal law.

[57] The applicant also complained that the documents secured from the bank contained inconsistencies and, therefore, should not have been relied on by the respondent. The applicant had not appealed to constitutionality.

[58] Having considered the documentary evidence presented by Mrs Gentles-Silvera for the OUR and the submissions made concerning them, Brooks JA concluded, at paragraph [60] of the judgment, that these complaints had not addressed the real issue. The real issue, as he identified it to be, is that a connection between the applicant and Mr George Neil in any capacity was prohibited. He concluded that the OUR, in its recommendation to the Minister, was entitled to rely on the contents of the documents, which, on their face, established breach of prohibition. He further opined that Stamp J was entitled to find that these complaints had no prospect of success on an application for judicial review. Brooks JA then went on to find that the ground of appeal, concerning the documents, had no real prospect of success.

[59] The law on the use and treatment of illegally obtained evidence in this jurisdiction, which was applied by the court in coming to its decision, has long been settled by the Privy Council. See **Herman King v the Queen** (1968) 10 JLR 438, which was noted by Brooks JA at paragraph [56] of the judgment. It provides a complete answer to the applicant's case, even in the face of the belated invocation of the rights to privacy.

[60] The court finds that like the previous ground, this question that the applicant wishes to be submitted to Her Majesty in Council has nothing to commend it as one

that ought properly to be submitted. It is not a question arising from the decision of the court, which is of great public or general importance, as the applicant would want us to find, neither is it such to be otherwise submitted.

Ground 4: The issue of fair hearing

Whether the Court of Appeal erred in law in holding that the applicant had no reasonable prospect of success in its contention that the respondent acted unfairly in taking the banking documents at their face value, not allowing a full hearing, and failing to await the outcome of a police investigation.

[61] The applicant contended that in a matter of such seriousness, involving the integrity of the applicant and its directors, the respondent and the OUR ought to have delayed and sought the co-operation of the police to complete their investigation into the bank documents. According to the applicant, even if the signatures were not forgeries, persons have had the experience of signing on the dotted line where they are told to sign, and through inadvertence, the wrong document was signed. Therefore, the respondent and the OUR had "jumped to the most damaging conclusion when police assistance could have cleared the matter up".

[62] It also complained of the failure of the respondent to hold an oral hearing. The applicant urged that this was a case of disputed facts and the OUR or the respondent, before coming to a decision, should have heard the relevant witnesses, especially the directors of the applicant, the bank officials who had created the documents, and Mr George Neil himself.

[63] The court's approach to the matters raised in this issue is to be found in paragraphs [62]-[77] of the judgment. In those paragraphs, Brooks JA analysed the

facts as presented by the parties. After applying the relevant case law to those facts, he concluded that neither the OUR nor the respondent was wrong in taking the steps they did without obtaining the police report. He, therefore, found that Stamp J was not wrong in finding that this complaint concerning the police report had no prospect of success. The court also found, as outlined in paragraph [76] of the judgment, that there was no requirement for an oral hearing in this case.

[64] When the issues under scrutiny are considered against the background of the judgment of the court, there is nothing found in the reasoning of the court on these matters that has given rise to any question of great general or public importance. Stamp J had been called upon to assess the material before him and to arrive at reasonable findings of fact, in determining how to exercise his discretion. The Privy Council has always expressed its reluctance to interfere with the findings of fact of the lower courts. The criterion has not been satisfied for submitting this issue for consideration by Her Majesty in Council.

Ground 5: The interpretation of the Telecommunications Act

Whether the decisions of the respondent, Stamp J, and the Court of Appeal were all based on a misrepresentation of section 14(6)(b) of the Telecommunications Act.

[65] This issue concerning the interpretation of the Telecommunications Act is not one which arises from the decision of this court. As the applicant's counsel themselves admitted, it is a new ground which was not ventilated in either court. It cannot be said then, that the decision of the court has given rise to a question of great general or

public importance concerning the interpretation of the Telecommunications Act as is now being argued.

[66] The submissions of counsel for the respondent and the OUR that this court should reject this proposed basis to appeal to her Majesty in Council is accepted.

The court's revocation of permission to appeal

[67] The court, having found that there was no proposed ground with a prospect of success to warrant a stay of execution, proceeded to exercise its power under the Court of Appeal Rules, 2002 to revoke the permission granted to the applicant in December 2018, to appeal Stamp J's decision. The reasoning of the court points to one basis for the revocation of the permission to appeal, that is, that the criterion for the grant of permission was not satisfied upon the full hearing of the matter.

[68] There is nothing in the exercise of the court's discretion in revoking or setting aside the permission that was granted to the applicant to appeal the decision of Stamp J, that has given rise to a question that warrants the consideration of Her Majesty in Council.

Conclusion

[69] We find nothing advanced by the applicant in its notice of motion which satisfies the requirements for conditional leave to be granted for an appeal to Her Majesty in Council. The court therefore orders as follows:

i. The notice of motion for conditional leave to appeal to Her Majesty in Council is refused.

ii. Costs to the respondent and the OUR to be agreed or taxed.