[2019] JMCA Civ 8

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 117/2017

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**BEVERLEY WILLIAMSON**	**1st APPELLANT**
AND	**RICHARD ROBERTS**	**2nd APPELLANT**
AND	**THE PORT AUTHORITY OF JAMAICA**	**RESPONDENT**

Allan S Wood QC and Mrs Daniella Gentles-Silvera instructed by Livingston Alexander & Levy for the appellants

Michael Hylton QC and Kevin Powell instructed by Hylton Powell for the respondent

25, 26 October 2018 and 29 March 2019

MORRISON P

Introduction

[1] This appeal is concerned with a contractual discretion vested in an employer to grant a retirement benefit to former employees in certain circumstances. It is common ground between the parties that such a discretion is not unfettered and that the employer is in such a case under a duty to (i) act in good faith towards the employee in

its consideration of whether or not to grant the benefit; and (ii) arrive at a rational decision; that is, a decision which is not arbitrary or capricious.

[2] Both sides therefore accept the authority of the dicta of Lord Sumption and Lady Hale in **British Telecommunications Plc v Telefonica O2 UK Ltd**[1] and **Braganza v BP Shipping Ltd**[2] respectively, both decisions of the United Kingdom Supreme Court.

[3] In the former case ('**British Telecommunications**'), Lord Sumption explained that –

> "... As a general rule, the scope of a contractual discretion will depend on the nature of the discretion and the construction of the language conferring it. But it is well established that in the absence of very clear language to the contrary, a contractual discretion must be exercised in good faith and not arbitrarily or capriciously … This will normally mean that it must be exercised consistently with its contractual purpose ..."

[4] And, in the latter case ('**Braganza**'), Lady Hale, commenting on the relevance of considerations of rationality in the context of a contractual discretion, observed that –

> "There are signs … that the contractual implied term is drawing closer and closer to the principles applicable in judicial review …
>
> If it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those

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[1] [2014] 4 All ER 907, 923
[2] [2015] 1 WLR 1661, paras 28-29

> considerations which are obviously relevant to the decision in question …"

[5] The matter arises in this way. The respondent ('the PAJ') is a corporate body established under the Port Authority Act ('the PAA')[3]. It is also a public body for the purposes of the Financial Administration and Audit Act ('the FAAA')[4] and the Public Bodies Management and Accountability Act) ('the PBMAA')[5].

[6] The PAJ's principal duties are to regulate the use of all port facilities in a port in Jamaica and to provide and operate such port facilities and other services as may be required[6]. Among other things, the PAA empowers the PAJ to enter into contracts and to sue and to be sued in its own name.[7]

[7] The appellants are former senior executives of the PAJ. For the purposes of this judgment I will describe them collectively as 'the appellants', but where necessary I will also refer to them individually as Mrs Williamson and Mr Roberts.

[8] Mrs Williamson retired on 30 June 2016, after 21 years of service to the PAJ under a total of eight consecutive contracts of employment. Mr Roberts retired on 31 December 2014, after 16 years of service under several consecutive contracts of employment.

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[3] Port Authority Act, section 4(1), in which the entity is described simply as 'the Port Authority'.
[4] Section 2(1)
[5] Section 2
[6] Ibid, section 6(a) and (b)
[7] Ibid, section 4(1)

[9] Pursuant to their individual contracts of employment over the years, both appellants were entitled to and were paid a gratuity of 25% of the total emoluments earned by them over the preceding period at the end of each contract period.

[10] Section 19 of the PAA empowers the PAJ, with the approval of the Minister, to make regulations determining the conditions of service of its employees and relating to, among other things, "(a) the grant of pensions, gratuities and other benefits …"; and (b) "the establishment and maintenance of … superannuation funds".[8]

[11] On 22 September 2004, with the approval of the then Minister of Transport and Works, the PAJ issued the Port Authority (Superannuation) Regulations 2004 ('the regulations'). The regulations established the Port Authority Pension Fund ('the pension scheme'), but they did not come into effect until 31 July 2007[9]. Under regulation 5(1), membership of the pension scheme is restricted to "every employee on the permanent staff of the [PAJ] who after the appointed day has attained the age of 18, but has not attained the age of 55".

[12] Regulation 41 provides that, where a member of staff of the PAJ, who is not entitled to a pension under the pension scheme, has served for over 10 years, "the [PAJ] may in its discretion grant the member a special retirement benefit".

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[8] Section 19(a) and (b)

[9] Although issued in 2004, the regulations did not come into force until 31 July 2007 - see the Port Authority (Superannuation) Regulations, 2004 (Appointed Day) Notice, paragraph 2.

[13] It is common ground that, as contract employees, neither appellant qualified for membership in the pension scheme. Accordingly, in the case of Mrs Williamson[10], with effect from 31 May 2006, and, in the case of Mr Roberts[11], with effect from 12 December 2008, all but one[12] of the appellants' successive contracts of employment contained a clause ('the retirement benefit clause') providing for payment of a retirement benefit in the following terms:

> "***Retirement Benefit***
>
> At the discretion of the Board you may be paid a retirement benefit as follows:-
>
> a. The equivalent of two (2) years' closing salary, if you have served a minimum of ten (10) years; or
>
> b. The equivalent of three (3) years' closing salary, if you have served a minimum of twenty-five (25) years.
>
> This benefit will apply on retirement or earlier through incapacity or on death."

[14] The retirement benefit clause therefore provided for the payment by the PAJ of a discretionary retirement benefit to all employees who at the time of retirement from its service satisfied either of the two criteria set out in the clause. The appellants, having

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[10] Amended affidavit of Beverley Williamson in support of fixed date claim form sworn to on 5 October 2017, para. 5

[11] Amended affidavit of Richard Roberts in support of fixed date claim form sworn to 5 October 2007, para. 5

[12] The exception was Mrs Williamson's final one-year contract before retirement dated 9 January 2015, which expressly provided that the clause in her previous contracts providing for a retirement benefit "does not form a part of this extension". However, PAJ takes no point based on this provision and nothing therefore turns on it for present purposes.

served more than 10, but less than 25 years as at their respective retirement dates, fell within the first category. Upon retirement, each of them was therefore eligible, at the discretion of the board of the PAJ, to a retirement benefit of two years' closing salary .

[15] Upon their retirement from the service of the PAJ in 2014 and 2016 respectively, each of the appellants applied to the PAJ for a retirement benefit under the retirement benefit clause. The PAJ failed to respond to the appellants' requests for a retirement benefit. As a result, the appellants each filed action against the PAJ claiming various declarations and orders for payment to them of retirement benefits calculated in accordance with the retirement benefit clause. The PAJ defended the actions, on the basis that it had been advised by the Auditor that guidelines issued by the Ministry of Finance and the Public Service ('MoFPS') prohibited the award of such benefits to persons, such as the appellants, who were also employed under contracts of employment providing for the payment of a gratuity at the end of each contract period.

[16] At the trial before Laing J ('the judge'), the appellants contended that, in declining to exercise its contractual discretion in favour of the grant of retirement benefits to the appellants, the PAJ acted in breach of its duty of good faith to the appellants. Further, that the decision of the PAJ not to award them retirement benefits was irrational.

[17] In a judgment given on 30 November 2017, the judge rejected the appellants' claims and found for the PAJ with costs against the appellants to be agreed or taxed. The principal bases of the judge's decision were his findings that the PAJ did not act in

breach of its duty of good faith to the appellants, nor did it act irrationally in declining to grant them retirement benefits.

[18] This is the appellants' appeal against this judgment. On appeal, the appellants principally contend that the judge's findings on both the good faith and the irrationality points were wrong and cannot be supported in the face of the evidence. Secondly, they submit that a legitimate expectation that they would be paid a retirement benefit upon retirement would have been created by the repeatedly renewed retirement benefit clauses in their contracts. And lastly, the appellants say that the judge's order for costs against them, which was in any event harsh and unreasonable, was made in breach of the principles of natural justice, in that he did not give the appellants an opportunity to be heard on costs before making the order against them.

Some additional background

[19] Between 1998 and 2007, the PAJ established various funds ('the retirement funds') to facilitate the provision of retirement benefits for certain of its senior executives. These included the Senior Executive Retirement Fund ('the senior executive fund'), which was set aside to meet the PAJ's contractual obligation to pay a discretionary retirement benefit to retiring senior executives.

[20] Over a period spanning several years, the PAJ paid out substantial sums of money by way of retirement benefits to retiring senior executives out of the retirement funds, including the senior executive fund. However, in April 2014, Messrs Hylton Powell, the PAJ's attorneys-at-law, advised that the establishment of the retirement

funds was *ultra vires* the PAA and the regulations. Hylton Powell therefore advised that the PAJ had no authority to continue to make any payments under the retirement funds and that they should be discontinued immediately. Further, that consideration should be given to recovering any sums previously paid out from the funds to retiring senior executives.[13]

[21] On 8 December 2014, shortly before the expiry of Mr Roberts' final contract of employment, the appellants and other senior executives of the PAJ were invited to a meeting with the Minister of Transport, Works and Housing, Dr Omar Davies. Dr Davies indicated to the group that the Government of Jamaica ('GOJ') wished to terminate the contractual retirement benefit to which the PAJ had committed itself. In order to achieve this, Dr Davies proposed that there should instead be a distribution to the affected senior executives of the current reserve in the senior executive fund.

[22] Mr Roberts' final contract of employment expired on 31 December 2014. As at that date, he had been employed to the PAJ for 16 years. When the PAJ advised him that his contract would not be renewed, he immediately wrote requesting that favourable consideration be given to "granting me the Retirement Benefit referred to in my contract"[14].

[23] In furtherance of Dr Davies' proposal, the PAJ engaged the services of the actuarial firm of Duggan Consulting Limited ('Duggan') to carry out a review of the

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[13] See Hylton Powell, attorneys-at-law, Legal Opinion on Port Authority Retirement Funds, 13 April 2014.
[14] Letter dated 3 November 2014, Roberts to PAJ

senior executive fund with a view to determining each person's share. In a report dated 9 January 2015, Duggan recommended a total distribution of $86,469,000.00 to the affected group of senior executives and also provided a table showing each member's individual entitlements[15].

[24] On the same day on which it was received, the senior executives sent the Duggan report to Dr Davies. In the letter enclosing the report[16], the senior executives advised that all the affected persons had confirmed their agreement with Duggan's distribution proposals. Responding a few days later[17], Dr Davies said that he was studying the proposals.

[25] Nothing further came of these proposals. However, the PAJ next appears to have felt the need to seek a further legal opinion on the issues upon which Messrs Hylton Powell had already advised. This was provided by the Honourable Dr Lloyd Barnett OJ, who, in a brief note dated 29 May 2015, expressed his concurrence with "the reasoning and conclusions of the Hylton Powell opinion".

[26] At a meeting held on 16 September 2015, Professor Gordon Shirley, the President and Chief Executive Officer of the PAJ ('Professor Shirley'), shared the Hylton Powell and Barnett opinions with the senior executives of the PAJ. At that meeting, on

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[15] Under this proposal, Mrs Williamson and Mr Roberts would have received $10,155,316 and $8,333,561 respectively.

[16] Which was sent over the signature of Dr Carrol Pickersgill, PAJ's Senior Vice-President of Legal, Regulatory and Corporate Affairs and Corporate Secretary, who was herself one of the affected senior executives.

[17] Letter dated 13 January 2015 from Dr Davies to Dr Pickersgill

Mrs Williamson's account[18], "Professor Shirley presented the aforesaid opinions to support the [PAJ's] position that the terms contained in the contracts of employment of the senior executives for the payment of a retirement benefit were not lawful and had to be removed …"

[27] There the matter remained for the next few months. However, in separate letters dated 4 January 2016, Professor Shirley advised the appellants formally that the PAJ had received legal advice that it had no power "to grant the Retirement Benefit", and therefore had no discretion to pay the contractual retirement benefit. Both letters concluded that, in the circumstances, "the PAJ is constrained to refuse to pay you a Retirement Benefit".

[28] In the same letters, Professor Shirley went on to indicate that the PAJ had already commenced steps to recover any similar retirement benefits paid to retired senior executives in the past.

[29] No doubt prompted by these developments, the senior executives sought a further opinion on the matter from Mr Allan Wood QC, providing him with copies of the Hylton Powell and Barnett opinions. In his opinion dated 8 February 2016, which was in due course shared with the PAJ, Mr Wood disagreed with the conclusions of the previous two opinions in several respects. Among other things, he observed that it was unfortunate that neither Messrs Hylton Powell nor Dr Barnett had been told by the PAJ

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[18] Second affidavit of Beverley Williamson sworn to on 5 October 2017, para. 5

of the existing contracts of employment which contained provisions entitling senior executives to a discretionary retirement benefit. He pointed out that the payment of a discretionary retirement benefit was entirely consistent with regulation 41, which permits the payment of such a benefit to members of staff who have served for more than 10 years and who are not entitled to a pension from the pension scheme.

[30] Then, as appears from Professor Shirley's next letter to Mrs Williamson, dated 16 March 2016, the PAJ had a change of heart. I set out this letter in full below:

> "I refer the [sic] previous discussions, meetings and correspondence on this matter ending with my letter of January 4, 2016.
>
> The Port Authority of Jamaica has obtained further legal advice as a consequence of which I hereby withdraw my last letter to you.
>
> The Authority has been advised that it has a discretion to award a retirement benefit to a Senior Executive who is not entitled to a pension and who served more than 10 years. Where those criteria are satisfied, the Authority must take into account all the circumstances existing at the time of retirement to decide whether the retirement benefit should be granted.
>
> In the circumstances, at the time of your retirement the Authority will determine whether you are paid a retirement benefit, and if so, the amount of the benefit.
>
> The Authority is taking the same position with its other current Senior Executives."

[31] By the date of this letter, as has been seen, Mr Roberts was no longer a member of the PAJ's staff. Despite the fact that the PAJ had also sent him the 4 January 2016

letter, it did not send him a copy of the 16 March 2016 letter withdrawing the previous letter. But, on 30 March 2016, no doubt having been made aware of this development by his former colleagues, Mr Roberts wrote to Professor Shirley to indicate his understanding that, "based on legal opinion recently received the retirement provision in my employment contract is not ultra vires as previously advised". Mr Roberts accordingly concluded that, "I look forward to payment of same as soon as possible". There was no response to this letter.

[32] In Mrs Williamson's case, her employment to the PAJ terminated upon her retirement on 1 July 2016. As at that date, she had been employed to the PAJ for 21 years under eight consecutive contracts of employment. So, in anticipation of her retirement, she too wrote to the PAJ claiming the retirement benefit provided for in her various employment contracts[19].

[33] But, as it would subsequently appear, the PAJ had already taken another step in the matter in March 2016.[20] This was to seek advice from the Auditor-General as to whether it could properly pay the retirement benefits, given that the affected senior executives were also entitled to payment of a gratuity at the end of each contract period. I will set out in full Professor Shirley's account of the background to the request for advice from the Auditor-General[21]:

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[19] Letter dated 14 June 2016, Williamson to PAJ
[20] At para. 20 of her amended affidavit sworn to on 5 October 2917, Mrs Williamson states the date of the PAJ's request to the Auditor General for advice on the matter as 14 March 2016.
[21] Second Affidavit of Gordon Shirley, sworn to and filed on 7 November 2017, paras 4-7

> "4. ... In or about January 2014 an internal audit was conducted of the retirement benefits granted to executives at the [PAJ]. The internal audit disclosed that in or about December 1998, the [PAJ] decided to grant retirement benefits to senior executive staff and in March 2006, it extended those benefits to persons at the position of Vice President. The [PAJ] set up a fund from which the retirement benefits could be paid to its senior executives. In or about 2014 the fund was discontinued as a result of legal advice the [PAJ] received.
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> 5. The [PAJ] subsequently sought and obtained legal advice on the appropriateness of the grant of retirement benefits to the senior executives, including the Claimant, especially considering that the senior executives are also entitled to a gratuity.
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> 6. The [PAJ] informed the senior executives of the position it would take in relation to the grant of the retirement benefits in accordance with the legal advice it had received. The senior executives did not accept and challenged the legal advice obtained by the [PAJ].
>
> 7. In about March 2016 the [PAJ] sought the views of the Auditor General on the provision of the retirement benefits in light of the fact that the senior executives are also entitled to a gratuity."

The Auditor-General's Report

[34] The Auditor-General's report on the special audit commissioned by the PAJ was issued in July 2016[22]. In her executive summary, the Auditor-General explained that the purpose and scope of the audit was "to determine whether PAJ's governance practices accorded with the Public Bodies Management & Accountability (PBMA) Act, GOJ

[22] The actual document which we were shown does not carry a more precise date.

Corporate Governance and Accountability Frameworks and Circulars issued by the Ministry of Finance and Public Service (MoFPS)".

[35] The Auditor-General concluded that the PAJ's governance policies "were inconsistent with the Public Bodies Management & Accountability (PBMA) Act and Ministry of Finance Circulars".

[36] In particular, under the rubric, 'Executive Retirement Fund and Contracted gratuity benefits'[23], the Auditor-General observed, among other things, that:

> (i) in December 1998, the PAJ board "approved the establishment of a Senior Executive Staff Retirement Fund without the approval of the Minister of Finance … in breach of Section 2.02.04 of the Guidelines to Financial Management in Public Sector Entities Circular dated October 1, 1996" ('the 1996 guidelines');
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> (ii) on 20 March 2006, the PAJ board gave approval for a discretionary retirement benefit to be paid to senior officers with over 10 years' service;
>
> (iii) the employment contracts for 14 of the senior officers of the PAJ provided for the payment of a retirement benefit, in addition to the payment of gratuity of 25 % of gross taxable emoluments. The Auditor-

[23] Paras 2.3 - 2.7

General's comment on this particular finding[24] was that "[t]he MoFPS Policy dictates that gratuity payments are made in lieu of pension or retirement benefits and are calculated on basic pay only";

(iv) prior to the approval of the retirement benefit scheme in March 2006, a PAJ board member had also raised concerns about the fact that the proposed retirement plan was not explicitly approved by MoFPS, and that "persons on contract were already in receipt of gratuity payments 'which is [sic] supposed to be in lieu of pension'."; and

(v) the PAJ had informed the Auditor-General "of a proposed settlement whereby funds that were previously set aside would be distributed in accordance with an actuarial study and the employment contracts of the senior officers amended to remove the provision of retirement benefit".

[37] Based on these observations/findings, the Auditor-General's recommendation was that –

> "In the absence of explicit approval from the MoFPS, PAJ should take steps to recover amounts overpaid in respect of retirement benefit and gratuity payments. Further, PAJ should ensure employment contracts conform with provisions of the PBMA Act and Ministry of Finance circulars and guidelines."

[24] At para. 2.4

[38] The PAJ then sought the approval of the Minister of Finance to pay the retirement benefits. However, as Professor Shirley put it[25], "his approval was not forthcoming".

[39] It is in these circumstances that the PAJ decided that it could no longer properly consider payment of retirement benefits to retiring senior executives and, in relation to the appellants, declined to do so.

The proceedings

[40] It is against this background that the appellants filed suit against the PAJ on 5 July 2017. Save in relation to the actual amounts claimed, both appellants sought identical orders in the following terms:

> "1. A Declaration that the provision made in the [Appellant's] contract of employment for the payment of a discretionary retirement benefit was lawful and binding on the[Respondent].
>
> 2. A Declaration that the [Respondent] is contractually obligated to pay a discretionary retirement benefit in accordance with the contract of employment made between the [Appellant] and the [Respondent] which provided as follows:
>
> …
>
> 3. A Declaration that the [Respondent], as a statutory body is bound to honour its contractual obligations to the [Appellant] for the payment of a discretionary retirement benefit.

[25] Second Affidavit of Gordon Shirley, para. 9

4. A Declaration that the aforementioned provisions in the [Appellant's] contract of employment do not contravene any provisions of the Public Bodies Management & Accountability Act ('PBMA Act') nor the Guidelines to Financial Management in Public Sector Entities Circular dated October 1, 1996 ('Guidelines') thereunder.

5. A Declaration that the [Appellant's] entitlement under [her/his] contract of employment amounts to …[26]

6. A Declaration that the [Respondent] proceed to pay the retirement Benefit due to the [Appellant] under the aforesaid provision of the [Appellant's] contract of employment.

7. An Order as to the costs to the [Appellant].

8. Such further and/or other relief as this Honourable Court may deem just."

[41] The PAJ's defence to these claims was set out by Professor Shirley in his second affidavit as follows[27]:

"8. The Auditor General took the position that the [PAJ] was bound by the provisions of the Public Bodies Management and Accountability Act and that the relevant clauses of the senior executives' contracts of employment breached the Ministry of Finance and Planning Guidelines which prohibit the payment of both gratuity and retirement benefits.

9. As a consequence, the [PAJ] sought the approval of the Minister of Finance to pay the retirement benefits but his approval was not forthcoming. The [PAJ] formed the view that it should not properly consider paying the retirement benefits to the senior executives.

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[26] Mrs Williamson claimed a retirement benefit of $22,351,000.00, while Mr Roberts claimed a retirement benefit of $16,044,184.00, both with interest at 3% per annum from the respective dates of their retirement.

[27] Second Affidavit of Gordon Shirley, paras 8-13

10. … The [Appellant's] contracts of employment contained a provision for the [Appellant] to be paid a gratuity of 25% on gross emoluments on completion of the contract period. On completion of each contract of employment the [Appellant] was paid the gratuity payable.

11. … I deny that the [PAJ] had an obligation to pay a retirement benefit to the [Appellant] or that it has acted unlawfully or in breach of contract. The Board duly considered the [Appellant's] position, and claim for the payment of a retirement benefit, and concluded that it should not make the payment in view of the following:

a. The [PAJ] is a statutory authority and is therefore a public body for the purposes of the Public Bodies Management and Accountability Act and the Financial Administration and Audit Act;

b. The Auditor General is the constitutional office with authority to oversee and investigate corporate governance practices in public bodies;

c. The [PAJ] was uncertain about the legitimacy of a scheme that would involve certain senior executives receiving retirement benefits in addition to receiving a gratuity;

d. The [PAJ] therefore sought guidance from the Auditor General;

e. The Auditor General took the position that by reason of the relevant legislation and the Ministry of Finance and Planning Guidelines the [PAJ] should not pay retirement benefits to senior executives who are also entitled to receive a gratuity, without the approval of the Minister of Finance; and

f. The Minister of Finance has not approved the payment of retirement benefits to the [Appellant].

> 12. The [PAJ] does not take any position on the correctness of the Auditor General's conclusion or the applicability or enforceability of guidelines issued by the Ministry of Finance. Those are matters for the Government of Jamaica and this Honourable Court. The [PAJ] will of course, accept and act on any directions given by the court.
>
> 13. However, the [PAJ] and its Board maintain that they at all times they [sic] sought to act in accordance with the principles of good governance and consistent with the [PAJ's] status as a public body handling public funds."

[42] Both appellants filed affidavits in response to Professor Shirley's second affidavit. In a third affidavit sworn to on 9 November 2017, Mr Roberts directly challenged the assertion that there were guidelines issued by the MoFPS prohibiting the payment of a retirement benefit in cases in which the employee in question had been paid gratuity payments during the course of his or her employment. Mr Roberts observed[28] that Professor Shirley "has not identified and exhibited the alleged guidelines that were supposedly breached", and asserted that, "[t]o the best of my knowledge no guidelines have been issued by the Ministry of Finance and Planning containing such prohibition or requiring the approval of the Ministry of Finance and Planning for payment of a retirement benefit where the employee had been paid a gratuity in the course of his employment". In these circumstances, Mr Roberts maintained[29], it was "incumbent on [Professor] Shirley to identify and produce same rather than making such unsubstantiated allegations".

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[28] At para. 2
[29] At para. 4

[43] Mr Roberts next went on to state[30] that the Ministry of Finance and Planning had in fact issued guidelines under cover of a letter dated 8 May 2012 which dealt specifically with fixed term contract officers in the public service ('the 2012 guidelines')[31].

[44] The 2012 guidelines were exhibited by Mr Roberts to his affidavit. In the covering letter signed by the then Financial Secretary, they were described as revisions of guidelines previously issued in September, 1997[32]. The 2012 guidelines define a 'Contract Officer' as "an employee who is engaged in a contract of employment on a fixed term basis in a Government Ministry, Department, Agency or Public Body". Among other things, the 2012 guidelines contain provisions relating to the manner of calculation of gratuity payments ("on basic salary and the salary element for vacation leave not taken during the contract period"); the maximum gratuity allowable (25% "of basic salary earned for a contract period of not less than two (2) years"); and the ineligibility of contract officers to redundancy payments under section 5 of the Employment (Termination and Redundancy Payments) Act.

[45] However, as Mr Roberts observed in his third affidavit, "[t]here is no provision in [the 2012 guidelines] prohibiting payment of a retirement benefit or pension where the

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[30] At para. 5
[31] 'Fixed-Term Contract Officers Policy Guidelines', dated 8 May 2012
[32] A copy of the September 1997 guidelines handed up to the court by Mr Wood during the hearing of the appeal revealed nothing of relevance to the matters currently in dispute between the parties.

contract officer receives a gratuity nor is there a requirement for Ministry of Finance [sic] approval for payment of a retirement benefit".

[46] In a brief third affidavit of her own sworn to on 9 November 2017, Mrs Williamson adopted and relied on the contents of Mr Roberts' third affidavit, stating[33] that "there are no guidelines issued by the Ministry of Finance and Planning which prohibit the grant of a retirement benefit to me".

The issues before the judge

[47] Before the judge, Mr Wood QC for the appellants and Mr Hylton QC for the PAJ were agreed that the following questions arose for his decision: (i) whether the PAJ had the power under the PAA and the regulations to grant a retirement benefit under contracts of employment entered into with its senior executives; (ii) if the provisions in the contracts of employment for payment of a discretionary retirement benefit are valid, is the PAJ's discretion unfettered or is it reviewable in accordance with the principles that the PAJ must exercise it rationally and in good faith; and (iii) did the PAJ exercise its discretion in this case rationally and in good faith?

[48] Mr Wood also posed a fourth question, which was, in effect, whether the Auditor-General was correct in her view that the PBMAA, the regulations made and the guidelines issued thereunder rendered the provisions in the contracts of employment for the grant of discretionary retirement benefits invalid. For his part, Mr Hylton

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[33] At para. 2

contended that this issue was irrelevant to the issue of whether or not the PAJ had exercised its discretion rationally and in good faith.

What the judge decided

[49] There was no disagreement between counsel on either of the first two questions identified above and the judge had no difficulty answering them in the affirmative. Accordingly, citing the dicta from both **British Telecommunications** and **Braganza** to which I referred at the outset of this judgment[34], the judge approached the matter on the basis that, in considering the exercise of its discretion to grant retirement benefits to the appellants, the PAJ was under a duty to act in good faith and to exercise the discretion rationally.

[50] On the third question, however, the judge found that the evidence did not support the contention that the PAJ had acted either irrationally or in bad faith in exercising its discretion against the grant of discretionary retirement benefits to the appellants.

[51] As regards the question whether the PAJ exercised its discretion in breach of the duty of good faith, the judge examined a number of items of evidence of which complaint was made under the rubric "Potential acts of bad faith" [35]. These were (i) the omission by PAJ to bring the existence of the contractual retirement benefit provisions to the attention of Messrs Hylton Powell and Dr Barnett when seeking advice on the

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[34] Paras [4] and [5] above.
[35] Paras [27]-[34]

legality of the retirement fund; (ii) the PAJ's initial reliance on the Hylton Powell and Barnett opinions as justifying a refusal to honour the contractual retirement benefit provisions; (iii) in relation to Mr Roberts, the fact that the PAJ did not write to him advising that it had withdrawn the 4 January 2016 letter and reversed its position on the legality of the contractual retirement benefit; (iv) in relation to Mrs Williamson, the fact that, having assured her by letter dated 16 March 2016 that it would determine upon her retirement whether to pay her a retirement benefit and if so in what amount, the PAJ was virtually simultaneously seeking the Auditor-General's advice on whether such a benefit was payable at all to an employee, such as Mrs Williamson, who was entitled to periodic gratuity payments; and (v) the fact that the PAJ consulted the Auditor-General without first obtaining ministerial direction to do so pursuant to section 17(5) of the PAA[36].

[52] After detailed consideration of each of these matters, the judge found that they did not amount to evidence of "bad faith". He therefore concluded[37] "that the elements of the [PAJ's] conduct which were submitted as constituting bad faith do not individually or collectively amount to bad faith on the part of the [PAJ]".

[53] Finally, as regards the fourth question (the relevance of which Mr Hylton had disputed), the judge found, after detailed analysis of the constitutional and statutory role of the Auditor-General, that it was appropriate for the PAJ to have sought the

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[36] "The Auditor-General shall be entitled, on the direction of the Minister, at all reasonable times to examine the accounts and other records in relation to the business of the Authority."
[37] At para. [34]

Auditor-General's advice on the question of whether to pay a discretionary retirement benefit to the appellants; and that there was no duty on the PAJ to verify or satisfy itself as to the accuracy in law of the Auditor-General's position. In light of this finding, the question of whether the Auditor-General's advice was soundly based was irrelevant.

[54] For these reasons, the judge stated his conclusion as follows[38]:

> "… the Court finds that the decision of the [PAJ] not to pay the Contractual Retirement Benefit was not arbitrary, capricious or irrational. Specifically the Court finds that the [PAJ] did not act irrationally in seeking and/or considering the opinion of the Auditor General and consequently its decision making process did not fail to exclude extraneous considerations. The [PAJ] as a consequence did not breach its contractual obligations to the [Appellants]. Based on the opinion of the Court expressed earlier in these reasons, the facts before the Court are distinguishable from those in the cases of **Braganza** as well as **Clark and Nomura** having regard to the special position which the Auditor General occupies, her statutory responsibilities and the importance which attaches to her conclusions published in her audits or her expressed opinions within her remit."

[55] In the result, the judge refused the declarations and orders sought by the appellants and awarded costs to the PAJ, such costs to be taxed or agreed.

The grounds of appeal

[56] The appellants rely on a total of eight grounds of appeal[39]. I hope that I do them no disservice by summarising them as follows:

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[38] At para. [69]

1. The judge's finding that a breach by the PAJ of the duty of good faith had not been established was wrong and contrary to the weight of the evidence. In arriving at his conclusion, the judge failed to consider and address all elements of the contractual obligation of good faith owed to the appellants by the PAJ (grounds 1-2) ('the good faith issue').

2. The contractual discretion to grant a discretionary retirement benefit to the appellants was that of the PAJ and not of the Auditor-General. Accordingly, in pursuance of the duty to exercise its discretion in good faith and rationally, the PAJ was obliged to verify the accuracy of the unsubstantiated facts and opinions on which the Auditor-General based her decision. In those circumstances, the judge's finding that it would be unreasonable to burden the PAJ with the task of verifying the Auditor-General's opinion was wrong in law and inconsistent with the authorities (grounds 3-6) ('the irrationality issue').

3. The judge failed to appreciate that the appellants would have had a legitimate expectation, which could not be overridden by a guideline, of the grant to them of a discretionary retirement benefit, given the

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[39] Amended Notice and Grounds of Appeal filed on 8 February 2018

repeatedly renewed contractual term entitling them to such a benefit (ground 7) ('the legitimate expectation issue').

4. The judge erred in making an order for costs against the appellants without first affording them an opportunity to be heard on the issue; in any event, the order that the appellants should pay the PAJ's costs was harsh and unreasonable in the circumstances (ground 8) ('the costs issue').

The good faith issue

[57] As I have indicated, the judge accepted that in the exercise of its discretion to grant a special retirement benefit to the appellants, the PAJ was under a duty to act in good faith. The judge also appears to have accepted that, as Lord Sumption put it in **British Telecommunications**, "[t]his will normally mean that [the discretion] must be exercised consistently with its contractual purpose".

[58] There is no appeal from the judge's decision that the PAJ was bound by an implied contractual duty of good faith to the appellants and Mr Hylton did not seek to contend to the contrary. There is therefore no need to explore all the authorities to which Mr Wood referred us on the point. But, in order to demonstrate the scope of the implied duty of good faith, I will make brief mention of four of them.

[59] First, there is the influential judgment of Sir Nicolas Browne-Wilkinson V-C in **Imperial Group Pension Fund Trust Ltd and Others v Imperial Tobacco Ltd and Others**[40]. In that case, which was concerned with the requirement of the employer's consent to amendments to the rules of a pension scheme, the learned Vice-Chancellor observed that:

> "In every contract of employment there is an implied term:
>
> > 'that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee;' *Woods v W.M. Car Services (Peterborough) Ltd*. [1981] I.C.R. 666, 670, approved by the Court of Appeal in *Lewis v Motorworld Garages Ltd.* [1986] I.C.R. 157.
>
> I will call this implied term 'the implied obligation of good faith'. In my judgment, that obligation of an employer applies as much to the exercise of his rights and powers under a pension scheme as they do to the other rights and powers of an employer. Say, in purported exercise of its right to give or withhold consent, the company were to say, capriciously, that it would consent to an increase in the pension benefits of members of union A but not of the members of union B. In my judgment, the members of union B would have a good claim in contract for breach of the implied obligation of good faith …"

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[40] [1991] 1 WLR 589, 597

[60] Second, there is the decision of the House of Lords in **Equitable Life Assurance Society v Hyman**[41], in which, in the context of a contractual discretion, Lord Cooke of Thorndon observed, that –

> "… no legal discretion, however widely worded … can be exercised for purposes contrary to those of the instrument by which it is conferred."

[61] Third, there is the decision of the House of Lords in **Malik v Bank of Credit and Commerce International SA**[42], in which Lord Steyn, who delivered one of the two leading judgments of a unanimous panel, accepted the correctness of the following statement in an academic article by Mr Douglas Brodie of Edinburgh University[43]:

> "In assessing whether there has been a breach [of the implied obligation of trust and confidence], it seems clear that what is significant is the impact of the employer's behaviour on the employee rather than what the employer intended. Moreover, the impact will be assessed objectively."

[62] And fourth, more recently and closer home, there is **UC Rusal Alumina Jamaica Limited and others v Wynette Miller and others**[44], yet another pension scheme case in which the employer's power to withhold consent arose. In considering the employer's obligation of good faith, Lord Mance observed that:

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[41] [2002] 1 AC 408, 460
[42] [1998] AC 20, page 47
[43] Douglas Brodie, 'Recent Cases, Commentary, The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 I.L.J. 121
[44] [2014] UKPC 39, para. 51

> "... First, it is common ground that [the employer] would have to act bona fide. Second, that does not merely mean that it must act honestly; it must avoid irrational or arbitrary behaviour and must not exercise its power to give or refuse consent for extraneous reasons ..."

[63] With these authoritative statements in mind, I therefore approach the matter on the basis that, in exercising its contractual discretion to grant a special retirement benefit to the appellants, the PAJ was obliged to act in good faith. "Good faith" in this context means that the PAJ was not only required to act honestly, but also to avoid capricious, arbitrary or irrational behaviour; to have regard to the purpose for which the discretion existed; and not to decline to grant a benefit for extraneous reasons.

[64] It is impossible to do justice to Mr Wood's admirably detailed submissions on the good faith point[45] within the narrow compass which this judgment allows. But the essence of them may I think be fairly summarised as follows. Throughout, the PAJ pursued a course of conduct that was (i) inconsistent with the purposes for which the discretion to grant a special retirement benefit was given by the contracts of employment and regulation 41; and (ii) showed "no regard whatsoever for the reasonable expectation of the retired employees"[46]. The judge approached the matter on the erroneous basis of a piecemeal examination of each item of evidence as though they were isolated incidents, scrutinising each with a view to determining whether it

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[45] Running, in the appellants' revised written submissions, to 45 pages and, in speaking notes handed up on the first day of the hearing of the appeal, to 17 pages.
[46] Appellants' revised written submissions filed 23 October 2018, para. 57

showed "bad faith" on the part of the PAJ. Accordingly, the judge failed to appreciate that, viewed objectively and taken as a whole, the evidence revealed a course of conduct designed to terminate the special retirement benefit, which is what the Minister had wished to achieve, in breach of PAJ's obligation of good faith to the appellants. The PAJ's purported exercise of its discretion was therefore in aid of a collateral purpose. While Mr Wood expressly declined to make any suggestion of mala fides in the sense of dishonesty or conspiracy on the part of PAJ, he submitted that PAJ was obliged to comply with both the letter and the spirit of the law in its dealings with the appellants and that, if it failed to do so, it would evince a lack of good faith. Further, good faith and rationality are not discrete considerations, so the absence of the latter can have an impact on whether there has been a breach of the former.

[65] Mr Hylton submitted that, in coming to the decision that there was no breach of the duty of good faith by the PAJ, the judge applied the correct test and that his decision ought not to be disturbed. The submission that the PAJ had engaged in a deliberate plan to deprive the appellants of the retirement benefit was an obvious invitation to the court to infer dishonest conduct by the PAJ. Whether the allegations on which the appellants rely to argue bad faith/lack of good faith are taken individually or collectively, the judge was right to conclude that this ground of challenge to the PAJ's exercise of its discretion had not been made out.

[66] In determining this question, I accept Mr Wood's submission that it is the overall impact of the PAJ's conduct, viewed objectively, which must be assessed in considering

whether there has been a breach of the obligation of good faith which it unquestionably owed to the appellants in this case. However, it seems to me that it would have been impossible for the judge to make that assessment sensibly without first considering each of the particular breaches alleged for its own intrinsic worth, or lack of it, as the case may be. This is the approach the judge took and I think he was right to do so.

[67] Approaching the matter in the same way, while I am bound to say that I have found at least some aspects of the PAJ's conduct on the question of the retirement benefit somewhat peculiar, to say the least, I have been unable to discern in them any evidence of a lack of good faith.

[68] First, there was the PAJ's omission to advise either Hylton Powell or Dr Barnett of the fact that the PAJ was contractually bound to consider payment of a discretionary retirement benefit to its senior executives, the very persons for whose benefit the funds upon which they were being asked to advise were established in the first place. But, curious as this omission is, it is not clear what impact it could have had on the PAJ's subsequent decision not to pay the retirement benefit to the appellants.

[69] Second, there was the PAJ's original position that the legal advice it had received precluded it from even considering payment of the retirement benefit in a similar category: that position was, as has long since been conceded, obviously wrong in the light of the narrow issue which the Hylton Powell and Barnett opinions had addressed. However, I simply cannot read either the error, egregious as it was, or PAJ's subsequent reversal of its position, as providing any evidence of a lack of good faith.

Indeed, it seems to me quite possible to view the reversal as positive evidence of good faith on the part of PAJ. Albeit expressed somewhat differently, this must obviously be what the judge had in mind when he observed[47] that "[t]he Court does not find that the [PAJ's] earlier reliance on the Opinions is evidence of bad faith having regard to the fact that it abandoned that position when presented with additional legal advice subsequently".

[70] Third, there was (a) the timing of the PAJ's request for advice from the Auditor-General on whether the retirement benefit should be granted to an employee who has been in receipt of gratuity payments; and (b) the fact that the PAJ took the decision to approach the Auditor-General without prior ministerial approval.

[71] In relation to (a), I accept that there is some hint of anomaly in the fact that, almost in the same breath in which Professor Shirley was advising Mrs Williamson (in his letter to her of 16 March 2016) that the issue of whether she would be granted a retirement benefit would be considered as at the date of her retirement, the PAJ would have been consulting the Auditor-General on the question of whether she was entitled to such a benefit at all. However, it is clear from the Auditor-General's report that this was not the first time the question had arisen, given the fact that a member of the PAJ board had raised the identical question some 10 years before. In any event, in the light of the special position which the Auditor-General occupies in respect of the financial and

[47] At para. [30] of his judgment in the court below.

governance regime applicable to public bodies[48], I would be loath to characterise a decision by a public sector employer to seek her advice on a matter of pay policy as a breach of good faith on the part of that employer. Nor would I consider that particular decision to be so irrational as to be evidence of a lack of good faith. And, in relation to (b), I think that the judge was unquestionably correct in his conclusion[49] that section 17(5) of the PAA "does not support the argument that the [PAJ] must secure ministerial approval before consulting the Auditor-General". As a matter of plain language, the section is directed at what steps the Auditor-General can take on the direction of the minister, and nothing more.

[72] And lastly, there was the PAJ's failure to apprise Mr Roberts directly of its change of position after its 4 January 2016 letter to him advising that it had no discretion to pay a retirement benefit. While this was a clear discourtesy, nothing now turns on it in the light of the fact that the PAJ is not now treating Mr Roberts any differently from Mrs Williamson and the other senior executives.

[73] But I agree with Mr Wood that, even if the various items of evidence, taken by themselves, do not support the appellants' case of a breach of the duty of good faith, that would not be the end of the matter. It would still be necessary for the court to consider whether the evidence revealed, as the appellants contend that it did, a course

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[48] As to which, see paras [89]-[95] below
[49] At para. [33]

of conduct by the PAJ aimed at achieving the termination of the obligation to consider payment of a retirement benefit.

[74] In my respectful view, notwithstanding the attractive way in which the appellants' case on this point was put, the evidence, taken as a whole, cannot support an inference of any such design. For it seems to me that despite Mr Wood's express disavowal of any allegation of conspiracy or dishonesty, as Mr Hylton submitted, the evidence would have had to suggest something close enough to that to enable the court to conclude on an objective view of the matter that any such design existed. As indecisive, inconsistent and downright inexplicable as PAJ's approach may have been, I do not think that the evidence rises anywhere near as high as that. In the circumstances, therefore, I agree with the judge that, whether the matters complained of are taken individually or collectively, the case that the PAJ conducted itself in bad faith (as the judge more than once put it) or in breach of the duty of good faith, was not made out.

The irrationality issue

[75] But, as has already been seen, there is no want of authority for the proposition that a contractual discretion, no matter how widely drawn, must be exercised rationally. In employment cases in particular, as Lord Hodge observed in **Braganza**[50], "the employee is entitled to a bona fide **and** rational exercise by the employer of its

[50] At para. 57

discretion"[51]. Accordingly, although some formulations of the implied obligation of good faith also list rationality as an aspect of good faith[52], the judge was required to give separate consideration to the question whether the PAJ's refusal to grant retirement benefits to the appellants was based on a rational exercise of its discretion.

[76] As I have already indicated, there was no dispute about any of this before the judge. Nor was there any before us. The real question for this court on this issue is therefore whether the judge's application of the law to the facts and the particular circumstances of the case was correct. So, as with the good faith issue, it is only necessary to refer briefly to a couple of Mr Wood's authorities to illustrate the principle in action.

[77] In **Clark v Nomura International plc**[53], the claimant was a senior equities trader. His remuneration consisted of a moderate basic salary and a discretionary bonus awarded annually on the basis of his individual performance. After less than two years' service to the defendant, during which his performance was outstanding, he was given three months' notice of dismissal. None of the reasons which led to him being given notice had previously been considered sufficiently serious to require even a warning or advice to the claimant. He was required to serve out the notice period as "garden leave"; meaning that, while still remaining on the defendant's payroll, he was required to stay away from work during the notice period.

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[51] Emphasis mine
[52] See, for instance, Lord Mance in **UC Rusal**, at para. [62] above
[53] [2000] IRLR 766

[78] The date for payment of the annual bonus fell within the claimant's notice period. During the immediately preceding period, the claimant had earned substantial profits for the defendant in excess of £6,000,000.00. He had also been responsible for a transaction that would probably bring in another £16,000,000.00 to the company in the near future. But the decision was made not to pay him a bonus in respect of that period, despite the fact that other senior employees were paid substantial bonuses for the same period, including one whose department had made a loss. The basis of the defendant's decision not to pay a bonus to the claimant was that, while financial performance was one of the factors to be considered, the company was entitled to take into account other discretionary factors, such as the defendant's legitimate business needs and interests, the claimant's overall contribution to the success of the business and the need to retain and motivate him as an employee.

[79] The claimant sued for breach of contract. Burton J held[54] that the defendant's discretion whether to pay a performance bonus was not unfettered and that the correct test to be applied was "one of irrationality or perversity … ie that no reasonable employer would have exercised his discretion in this way". Having considered all the circumstances, including the nature of the allegations against the claimant which led to his dismissal, Burton J concluded[55] that –

> "… no rational company … would award, in respect of a bonus to be awarded dependent upon the individual

[54] At para. 40
[55] At para. 80

> performance of that employee, a nil bonus. Such decision was, in my judgment, plainly perverse, irrational and, if such be necessary, capricious, and certainly did not comply with the terms of the discretion."

[80] I should mention in passing that **Clark v Nomura** was followed and applied by this court in its decision in **NCB Insurance Company Limited v Claudette Gordon-McFarlane**[56]. In that case, the respondent, a former employee of the appellant, claimed to recover a discretionary performance reward and profit share in respect of a period when she was still employed. In a judgment with which the other members of the court agreed, Phillips JA held[57] that in the circumstances of the case, in which the respondent had performed commendably and the appellant company had been profitable, "no reasonable employer could have come to the conclusion that a nil award was to be made to the respondent … [s]uch a decision could be viewed as irrational …"

[81] And then there is **Braganza** itself. In that case, the claimant's deceased husband was a former employee of the first defendant, a shipping line. The deceased lost his life, apparently after falling overboard in the middle of the Atlantic late at night while working on one of the first defendant's vessels. The deceased's contract of employment entitled his dependents to a death-in-service benefit, save where his death was the result of his own wilful act. There was some evidence from e-mail correspondence between the deceased and the claimant that he had been troubled by

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[56] [2014] JMCA Civ 51. See also **Mallone v BPB Industries Ltd** [2002] EWCA Civ 126 and **Horkulak v Cantor Fitzgerald International** [2004] EWCA Civ 1287, in both of which **Clark v Nomura** was referred to with approval by the Court of Appeal of England and Wales.
[57] At para. [58]

financial and other worries. But there was also evidence that, due to some weather-sensitive maintenance work which was scheduled to be carried out the following day, the deceased had shown an interest in the weather shortly before his disappearance. So there was also a possibility that he might have fallen overboard after going on deck to check on the weather conditions. The second defendant, which was responsible for the investigation into the circumstances of the deceased's death, determined that the most likely explanation for his disappearance at sea was that he had committed suicide and that on that basis no benefit was payable to the claimant. The issue in the case was therefore whether the second defendant's employee who made the determination had properly exercised his discretion in relation to whether the death-in-service benefit was payable.

[82] The Supreme Court held that, in a case in which contractual terms gave one party the power to exercise a discretion or form an opinion on relevant facts, the court would imply a term in appropriate cases that the power should be exercised not only in good faith, but also without being capricious, arbitrary or irrational. Such a decision could therefore be impugned, not only where it was one which no reasonable decision-maker could have reached, but also where the decision-making process has failed to exclude extraneous considerations, or to take into account all obviously relevant ones. On this basis, it was held that there was insufficient cogent evidence that the deceased had met his death by suicide and the decision-maker's determination was therefore set aside.

[83] **Braganza** therefore confirms that, in considering a challenge to the exercise of a contractual discretion under this head, the court will conduct what Lord Hodge characterised[58] as "a rationality review".

[84] In this case, the appellants complain that the judge erred in finding that the PAJ did not act irrationally by refusing to grant them the special retirement benefits on the basis of the Auditor-General's advice. In speaking notes handed up to the court at the outset of his submissions, Mr Wood summarised the appellants' contentions on this issue in the following way:

> "a. The discretion to grant a contractual retirement benefit is to be exercised by the [PAJ] and not the Auditor General.
>
> b. The learned Judge's finding that it was unreasonable for the [PAJ] to verify the opinion of the Auditor General was wrong.
>
> c. The finding of the learned Judge that the [PAJ] did not act irrationally by refusing to grant the discretionary benefit on the basis that there were guidelines under the PBMA that did not permit this was wrong in circumstances [where] no evidence was placed before the Court as to the existence of these guidelines.
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> d. The learned Judge erred in not addressing the issue of the non-existence of the guidelines referred to by the Auditor General particularly in light of [the 2012 guidelines] issued by the Ministry of Finance and Planning which was before the court and contained no provision prohibiting the grant of contractual retirement benefit where a gratuity was also payable."

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[58] At para. 52

[85] In his oral submissions, Mr Wood emphasised that the guidelines upon which the Auditor-General relied as authority for saying that the retirement benefit was not payable in cases in which a gratuity was also paid were not before the court. Nor was there any provision in the 2012 guidelines which Mr Roberts had brought to the court's attention to like effect. Even if such guidelines did exist, they do not appear to have been gazetted and did not therefore have the force of law. And, in any event, they would have been overridden by the 2012 guidelines and regulation 41. And, further still, there is no provision in the PBMAA, to which the Auditor-General also referred in her report, prohibiting the making of contracts of employment granting a retirement benefit.

[86] In response to these submissions, Mr Hylton observed, firstly, that the PAJ as a public body was obliged to have regard to the statutory provisions by which it is bound. In this regard, he drew attention to section 20 of the PBMAA, which provides that where the board of a public body exercises its powers in relation to emoluments payable to staff, "… the board shall act in accordance with such guidelines as are issued from time to time by the Minister responsible for the public service and the Minister [with portfolio responsibility for the public body]". Section 27 of the PBMAA establishes the supremacy of that Act over public bodies, so to the extent that there is any conflict between regulation 41 of the regulations, which provides that the PAJ "… may in its discretion grant … a special retirement benefit" to a member of staff in certain circumstances, and a guideline issued by the relevant Minister, it is the latter which must prevail.

[87] Secondly, Mr Hylton submitted that given the constitutional and statutory remit of the Auditor-General, which is to ensure the proper governance of public funds, it was perfectly appropriate for the PAJ to have referred the issue to the Auditor-General for advice in the circumstances of this case. Having received that advice, the PAJ was fully entitled to consider and take that advice into account without seeking to verify its correctness. Indeed, in answer to a direct question from the court on this last point, Mr Hylton took the position that the actual content of the guidelines to which the Auditor-General referred in her report was not a matter with which the PAJ needed to have concerned itself. Finally, having considered that advice, the PAJ then acted quite properly in seeking the approval of the Minister to pay the special retirement benefit to the appellants.

[88] In all the circumstances, Mr Hylton submitted[59], "the [PAJ] did not act irrationally in considering how to exercise its discretion to grant a retirement benefit by taking into account the views of the Auditor General".

[89] In considering these submissions, I must first consider the role of the Auditor-General, given the central part which her report has played in this matter. The office of Auditor-General is established under the provisions of section 120 of the Constitution of Jamaica ('the Constitution'). The position of importance which the office occupies in the scheme of our constitutional arrangements is clearly signified by the fact that the

[59] Respondent's submissions filed on 29 June 2018, para. 76

Auditor-General enjoys a level of security of tenure readily comparable to that enjoyed by members of the senior judiciary.[60]

[90] The principal functions of the Auditor-General are set out in section 122(1) of the Constitution:

> "The accounts of the Court of Appeal, the accounts of the Supreme Court, the accounts of the offices of the Clerks to the Senate and the House of Representatives and the accounts of all departments and offices of the Government of Jamaica (including the offices of the Cabinet, the Judicial Service Commission, the Public Service Commission and the Police Service Commission but excluding the department of the Auditor-General) shall, at least once in every year, be audited and reported on by the Auditor-General who, with his subordinate staff, shall at all times be entitled to have access to all books, records, returns and reports relating to such accounts."

[91] Section 122(2) requires the Auditor-General to submit reports under section 122(1) to the Speaker of the House of Representatives to be laid before the House, while section 122(4) requires the accounts of the department of the Auditor-General to be audited and reported on in similar fashion by the Minister responsible for finance.

[92] Of special relevance in the present context is section 122(5)(a), which allows the Auditor-General to perform "such other functions in relation to the accounts of … other public authorities and other bodies administering public funds in Jamaica as may be prescribed by or under any law for the time being in force in Jamaica".

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[60] Constitution of Jamaica, section 121

[93] In this regard, section 13A(1) of the PBMAA provides that "the Auditor-General may, if he thinks fit, audit the accounts of any public body …"

[94] The Auditor-General's audit functions are amplified in sections 25-32 of the FAAA. In particular, section 26(1)(b) provides that if in the course of an audit it appears to the Auditor-General that "any payment is improper or, as the case may be, is so extravagant or nugatory as to be regarded as an improper payment, the Auditor-General shall send a statement of such findings to the Financial Secretary".

[95] In the light of these provisions, there can be no doubt that, as the judge observed[61], the Auditor-General plays "a very important supervisory role" in the constitutional scheme. Nor could there possibly be any disagreement with the judge's conclusion[62], having considered in greater detail the various statutory provisions impacting the role of the Auditor-General, that –

> "One can conclude from Section 122 of the Constitution and sections 25 and 26 in particular of the Financial Administration and the Audit Act, that the responsibilities and remit of the Auditor General is [sic] not simply limited to examining the accounts of public bodies to determine if they are accurate, but extends to ensuring that they are in accordance with any applicable laws, regulations and directives. It is the responsibility of the Auditor General to ensure that payments are not improper or improperly made."

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[61] At para. [45]
[62] At para. [53]

[96] It follows from this that in this case, as I have already suggested, it cannot possibly be maintained that it was irrational for the PAJ to have consulted the Auditor-General on the issue of whether it would be in order to pay retirement benefits to the appellants notwithstanding their having previously been in receipt of gratuity payments. But that was, of course, in the context of the earlier discussion on whether the allegation of a lack of good faith was made out. What is now in issue is whether, having sought the Auditor-General's view, the PAJ acted irrationally in, in effect, treating that view as conclusive of the question whether to grant retirement benefits to the appellants.

[97] By the time the Auditor-General's report became available in July 2016, the factual and legal position was that:

1. Regulation 41 permitted the payment on a discretionary basis of a special retirement benefit to an employee with over 10 years' service with the PAJ who was not entitled to a pension under the pension scheme;

2. Both appellants had retired from the PAJ after more than 10 years' service and neither of them was entitled to a pension under the pension scheme;

3. In these circumstances, the PAJ was bound by contract with each of the appellants to consider, on a discretionary basis, the payment to them of a retirement benefit equivalent to two years' closing salary;

4. Despite the fact that, ostensibly based on legal advice, the PAJ had taken the position in its 4 January 2016 letter to the appellants that it had no discretion to pay the contractual retirement benefit, its latest position, as conveyed in its 16 March 2016 letter to Mrs Williamson, was that, based on further legal advice, it did in fact have a discretion to award a retirement benefit to a senior executive who was not entitled to a pension and who had more than 10 years' service. Further, that consideration would be given to whether she should be paid such a benefit at the time of her retirement; and that the PAJ would take the same position in relation to its other current senior executives;

5. There was no suggestion that either of the appellants left the service of the PAJ otherwise than in good standing. Indeed, in Mrs Williamson's case, Professor Shirley had as recently as 25 March 2016 nominated her to the Inter-American Committee on Ports of the Organization of American States for the 2016 'Maritime Award of the Americas: Outstanding Women in the Maritime and Port Sectors'. For his part, Mr Roberts asserted[63], without contradiction, that "[u]pon leaving the [PAJ] as a senior executive, I was in good standing and had been commended for my contribution to the [PAJ's] legal department".

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[63] At para. 31.iii of his Amended Affidavit, sworn to on 5 October 2017

6. On the face of it therefore, it appeared that there would have been very little standing in the way of a favourable consideration by the board of the PAJ of the request made by both appellants for payment of a retirement benefit.

[98] The Auditor-General's opinion that retirement benefits and gratuities cannot co-exist in relation to the same employee is contained in the statement at paragraph 2.4 of her report that "[t]he MoFPS Policy dictates that gratuity payments are made in lieu of pension or retirement benefits and are calculated on basic pay only". It is the non-production of either the 1996 guidelines, or some other source document in relation to what the Auditor-General described as "MoFPS policy", that has given rise to one of the appellants' principal complaints in this matter.

[99] While I am satisfied that the Auditor-General's view was clearly entitled to command the greatest of respect, it is clear that the discretion which was in play in this case was that of the board of the PAJ, and not the Auditor-General. The Auditor-General's opinion cuts across regulation 41, the PAJ's own settled practice and its longstanding contractual obligations to the appellants. In these circumstances, it appears to me that it was simply not open to the PAJ to adopt the stance of a neutral observer, leaving the question of "the correctness of the Auditor General's conclusion or the applicability or enforceability of guidelines issued by the Ministry of Finance" to "the

Government of Jamaica and this Honourable Court", as Professor Shirley put it[64]. In my view, a proper exercise of its discretion in this matter would have required the board of the PAJ to satisfy itself, even on a prima facie basis, of the provenance, status and applicability of the "MoFPS" policy upon which the Auditor-General relied.

[100] In this regard, I would observe in passing that I have no doubt that, had the PAJ put its mind to it at all, it would have been in a much better position than Mr Roberts was to gain access to some documentary evidence of the policy to which the Auditor-General referred. By that means, it could have satisfied itself of the exact terms of the policy and whether it was necessarily decisive of the question of whether the retirement benefit should be paid to the appellants.

[101] But the matter does not end there. While the Auditor-General plainly thought that a contract which provided for payment of a gratuity and a retirement benefit was in breach of MoFPS policy, she expressed no opinion on the legal status of the employment contracts which contained such a clause. However, some indication of her likely view on the point can be had from her comments in a slightly different, but clearly related, context in another section of her report.

[102] Under the rubric, 'Senior executives overpaid gratuity totalling $15.05 million'[65], the Auditor-General observed that "PAJ's senior officers contract [sic] provided for gratuity of 25 per cent of gross taxable emoluments". However, she pointed out,

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[64] Second Affidavit of Gordon Shirley, para. 12
[65] Paras 2.12-2.14

"MoFPS guidelines stipulate that gratuity should be paid on basic pay only". Accordingly, having found that, between April 2011 and March 2015, the PAJ had incorrectly calculated gratuity payments for 14 senior executives in breach of MoFPS guidelines, the Auditor-General commented as follows[66]:

> "In April 2015, PAJ wrote to MoFPS requesting a waiver for existing senior officers whose contracts … were in breach of the Circular. **MoFPS accepted that while the provisions in the current contracts are legally binding on the [PAJ], the Ministry cannot grant approval for provisions which are contrary to those detailed in the Circular. Section 25 of the PBMA Act, provides for administrative action to be taken against the officer (s) who approved the employment contracts for the employees that were overpaid.** To date the overpaid amounts have not been recovered by PAJ". (Emphasis mine)

[103] So the Auditor-General was here plainly implying that a provision in an employment contract which is in breach of MoFPS guidelines/policy might nevertheless be binding as between the PAJ and the affected employees. In other words, although MoFPS policy might proscribe any such contractual provision for the future, already accrued rights might not similarly be affected. Having raised the point, I think that it is hardly surprising that the Auditor-General would have expressed no definitive view on this aspect of the matter. This was, after all, a purely legal question and therefore a matter for lawyers. But it is clear from Professor Shirley's account[67] that, having considered the Auditor-General's position that contracts which provided for payment of both a gratuity and a retirement benefit were in breach of MoFPS policy, the PAJ took

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[66] At para. 2.14
[67] See para. [41] above

no steps to secure further legal advice as to the legal consequence of this, despite its contractual obligation, underpinned by regulation 41, to the appellants and other senior executives.

[104] Any such further advice would no doubt have had to consider the effect of sections 20, 25 and 27 of the PBMAA. Section 20, while requiring the board of a public body considering the question of emoluments payable to the staff of the public body to "act in accordance with such guidelines as are issued from time to time by the Minister …", makes no pronouncement as to the legal effect on existing contracts of employment of a failure by the board so to act. Nor does section 25, which merely provides, as the Auditor-General pointed out in her comment quoted at paragraph [102] above, a mechanism for the taking of administrative action against the officers actually responsible for the public body's failure to act in accordance with the guidelines.

[105] Mr Hylton placed much reliance on section 27, which provides that:

> "Notwithstanding any provision of any other law or enactment to the contrary, where that other law or enactment raises any inconsistency between this Act and that provision in relation to the operations of any public body, the provisions of this Act shall prevail."

[106] However, as Mr Wood submitted, there is in fact no provision in the body of the PBMAA itself which prohibits payment of the type of retirement benefit contemplated by regulation 41 and the appellants' contracts of employment. Nor is there any provision in the PBMAA which prohibits such payments in a case in which a gratuity is also paid. So

the ultimate efficacy of section 27 will depend entirely on the true status of the "MoFPS policy" referred to by the Auditor-General in her report.

[107] Naturally, it is no part of the court's remit in this appeal to make any pronouncement on this aspect of the matter. But, as the record shows, the PAJ had not shied away in the recent past from seeking – and relying on - legal advice on various matters related to the obligation to pay retirement benefits to its senior executives. Against this background, PAJ's failure to consider or take further legal advice on the impact of the Auditor-General's opinion on its contractual obligations was, in my view, quite inexplicable. It is as if, in fact, on what was in essence a legal issue, it had decided to abdicate its discretion in favour of the Auditor-General's views.

[108] As Lord Sumption explained in the passage from his judgment in **British Telecommunications** to which I referred close to the beginning of this judgment[68], the proper exercise of a contractual discretion will normally require that it be exercised "consistently with its contractual purpose". Later in the same passage, Lord Sumption went on to observe that the intention of the contracting parties "necessarily informs the scope and operation of any contractual discretion". Meaning to say, as I understand it, that a contractual discretion cannot be exercised in a vacuum, but must take into account the context in which it was conferred by agreement between the parties on one or the other of them.

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[68] Para. [3] above

[109] At the very outset of his judgment in **Equitable Life**[69], Lord Steyn made the point that "the need to plan for retirement is for many a high priority". In the vast majority of cases the reason for this need is not far to seek. It may understandably be an even greater priority in the case of persons in the position of the appellants, who were not entitled to a pension under the pension scheme established by the PAJ for the benefit of retired permanent employees. As the board of the PAJ would obviously have been well aware, this was the lacuna that regulation 41, made with the approval of the then relevant Minister, and the retirement benefit clauses in the appellants' contracts of employment, were plainly designed to fill, at least in part.

[110] In the course of his judgment in **UC Rusal**, Lord Mance referred[70], with apparent approval, to the statement by Newey J in **Prudential Staff Pensions Ltd v The Prudential Assurance Co Ltd**[71], another pension fund case, that "… members' interests and expectations may be of relevance when considering whether an employer has acted irrationally or perversely".

[111] Against this background, a rational exercise of its discretion to grant retirement benefits to the appellants demanded, in my view, a purposive approach on the part of the PAJ, mindful of the contractual purpose of the retirement benefit clause and what

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[69] At page 451
[70] At para. 53
[71] [2011] EWHC 960, para. 146

Lord Steyn described in **Equitable Life**[72] as "the reasonable expectations of the parties".

[112] In these circumstances, as it seems to me, by taking the Auditor-General's views at face value without any further investigation or interrogation; and by failing to take further legal advice on the legal issues plainly arising from the Auditor-General's advice, the PAJ exercised its discretion irrationally within the meaning ascribed to the word by the authorities. In this regard, I refer in particular to Lady Hale's comment in **Braganza**[73] that, "[i]f it is part of a rational decision-making process to exclude extraneous considerations, it is in my view also part of a rational decision-making process to take into account those considerations which are obviously relevant to the decision in question".

[113] The judge did not dissent from this formulation of the test of rationality. However, as has been seen[74], he took the view that the facts of this case were distinguishable from those in **Clark v Nomura** and **Braganza**, "having regard to the special position which the Auditor General occupies, her statutory responsibilities and the importance which attaches to her conclusions published in her audits or her expressed opinions within her remit". I think that, in common with the PAJ, the judge's approach was wrong. Despite the undoubted importance of the office and the role of the Auditor-General, her view on whether retirement benefits should be paid to the

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[72] At page 459
[73] At para. 29
[74] See para. [54] above

appellants in this case was only one of the considerations, albeit an important one, which the PAJ was obliged to take into account. In my respectful view, by treating the Auditor-General's advice as decisive of the issue which it had to determine, the PAJ excluded from its purview other obviously relevant considerations, and thereby acted irrationally in declining to grant a retirement benefit to each of the appellants.

[114] In both **Clark v Nomura** and **Braganza**, the consequence of the court's finding that the employer had exercised its contractual discretion irrationally was a decision in favour of the grant of the contractual benefit to the employee. In **Clark v Nomura**, having discussed the test of irrationality in the exercise of a contractual discretion, Burton J explained the basis of the court's approach in such a case in this way[75]:

> "… if and when the court concludes that the employer was in breach of contract, then it will be necessary to reach a conclusion on the balance of probabilities, as to what would have occurred had the employer complied with its contractual obligations … That will involve the court in assessing the employee's bonus, on the basis of the evidence before it, and thus to an extent putting itself in the position of the employer …"

[115] And in **Braganza**, Lady Hale considered[76] that the material upon which the investigation team relied to ground its opinion that the deceased had committed suicide did not provide "sufficiently cogent evidence" to justify that conclusion. It seems clear that it is in these circumstances, there being no other evidence disentitling the claimant

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[75] At para. 40
[76] At para. 42

to a favourable exercise of the contractual discretion, that it was held that her claim for the death benefit should succeed.

[116] Naturally, each case will turn on its own facts. Accordingly, in considering how best to give effect to a finding of irrationality in a particular case, the court must have regard, as Burton J observed in the passage from **Clark v Nomura** quoted above, to the evidence before it. In this case, as Professor Shirley was at pains to make clear, the only obstacle in the way of the PAJ granting the retirement benefits to the appellants was the advice received from the Auditor-General. Indeed, having considered that advice, the board of the PAJ even found it possible to seek the Minister's approval to pay the retirement benefits. Professor Shirley's final comment[77], which was that "[the PAJ] will of course, accept and act on any directions given by the court", provides yet further confirmation that, putting on one side the Auditor-General's advice, the PAJ had no basis for refusing to exercise its discretion in favour of the appellants.

[117] In these circumstances, having concluded that the PAJ's decision not to grant the retirement benefits was irrational, I am clearly of the view that the appropriate outcome of the appeal would be an order for payment to the appellants of their respective retirement benefits.

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[77] Second affidavit of Gordon Shirley, para. 12, para. [41] above

The legitimate expectation issue

[118] Given my conclusion on the irrationality issue, I can take this issue shortly. Mr Wood's submission was that the appellants had a legitimate or reasonable expectation, created by regulation 41 and their repeatedly renewed contracts of employment, that, provided that if they satisfied the relevant criteria, they would be granted a retirement benefit upon retirement. It was further submitted that it is clear that the PAJ gave no consideration to the appellants' reasonable expectations, but rather "pursued a course intended to defeat the purpose of the contractual provision …"[78]

[119] Mr Hylton answered this submission by observing, among other things, that the PAJ was not under a duty to pay a retirement benefit, but had a discretion whether to do so once certain criteria were met. Thus, "[t]he appellants could only have a legitimate expectation that the [PAJ] would exercise its discretion rationally and in good faith"[79].

[120] On the facts of this case, I agree with Mr Hylton. I put it this way, as I would not want to be taken as making any definitive pronouncement on whether a legitimate or reasonable expectation in this kind of dispute can give rise to any separate ground of liability on the part of an employer. That will no doubt be a matter for further argument and exploration in a case in which the issue properly arises.

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[78] Appellants' Speaking Notes, para. 74
[79] Respondent's Submissions, para. 38

[121] But, in this case, I have already factored the reasonable expectations of the appellants into the consideration of whether the PAJ acted rationally in arriving at the decision not to pay them retirement benefits. In these circumstances, I do not find it necessary to take the legitimate expectation point any further in this case.

The costs issue

[122] In the light of my conclusion on the irrationality issue, it may not be strictly speaking necessary to add anything on this issue either. But, given the general importance of at least one aspect of Mr Wood's complaints under this head, it may be helpful to deal with it briefly.

[123] The judge reserved judgment at the conclusion of the hearing of the matter on 16 November 2017. The record shows that judgment was delivered in favour of the PAJ on 30 November 2017, at which time it was also ordered that the appellants should pay the PAJ's costs to be agreed or taxed.

[124] Mr Wood submitted that the judge breached the principles of natural justice by failing to afford the appellants an opportunity to be heard on costs before making this order. This now familiar argument derives from the decision of the Privy Council, on appeal from this court, in **Sans Souci Limited v VRL Services Limited**[80], in which Lord Sumption observed that "[i]t is the duty of a Court to afford a litigant a reasonable opportunity to be heard on any relevant matter, including costs, on which he wishes to

[80] [2012] UKPC 6, para. 22

be heard". Lord Sumption went on to state[81] that "the rule of practice is that until either (i) a reasonable time has elapsed [after judgment] or (ii) the order has been perfected, a party who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard".

[125] On this basis, it was submitted that the judge's order for costs should be set aside.

[126] In response, Mr Hylton pointed out that the parties were given two days advance notice of the date on which the judgment was to be delivered. The judgment was delivered on 30 November 2017 in the presence of the parties and their counsel. The formal order was perfected four days later by the appellants themselves. In these circumstances, it was submitted that the appellants could have applied to make submissions on costs before the order was perfected and cannot now complain that they were not given a reasonable opportunity to be heard on costs.

[127] The principle which Lord Sumption restated in **Sans Souci v VRL**, is a salutary one, often overlooked in the rush of things by counsel and judges alike. As Lord Sumption also pointed out[82], injustice can generally be avoided by the court making a provisional order for costs at the time of delivery of the judgment, giving either or both of the parties a reasonable opportunity to address the court on costs at some later time.

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[81] At para. 23
[82] At para. 22

[128] While the principle that both parties should be given an opportunity to address the question of costs is clear, it seems to me that each case has to be looked at in the light of its own facts. It is on this basis that in **Sans Souci v VRL**, as Mr Hylton pointed out, despite what Lord Sumption described[83] as "a strong sense of discomfort about the rather peremptory procedure which was adopted in this case", the Board ultimately concluded that the party who had been ordered to pay costs below had had a reasonable opportunity to be heard.

[129] In this case, it would obviously have been prudent for the judge to have raised the issue of costs in the presence of the parties and their counsel in court on 30 November 2017, at the time when judgment was being delivered. But it seems to me that there can have been no impediment to counsel for the appellants raising the issue of costs himself, either at that time, or subsequently before the judgment was perfected. I would therefore reject the contention that, in breach of the principles of natural justice, the appellants were not given a reasonable opportunity to make submissions on costs.

[130] But Mr Wood also submitted that, in any event, the judge's order for costs against the appellants was harsh and unreasonable, given that the appellants were obliged to file action in order to ascertain the true legal position. Accordingly, despite the general rule set out in rule 64.1(1) of the Civil Procedure Rules 2002 ('the CPR'), which is that "the unsuccessful party [should] pay the costs of the successful party",

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[83] At para. 24

this was an appropriate case in which to disapply the general rule, either on the basis that one of the exceptional considerations listed in rule 64.6(4) of the CPR applied; or by analogy to claims for administrative orders, in respect of which the general rule is that no order for costs will ordinarily be made against an unsuccessful applicant for such an order[84]. In all the circumstances, Mr Wood submitted, the proper order in this case was that the PAJ should pay the appellants' costs, both in the court below and in this court.

[131] Mr Hylton submitted that this was no more than a private law money claim in contentious proceedings and that there was therefore no reason why costs should not have followed the event. There was therefore no basis upon which to disturb the judge's exercise of his discretion in relation to costs.

[132] I agree with Mr Hylton. The general rule is that costs are a matter for the discretion of the court and, as with other discretionary decisions, a judge's exercise of a discretion will not lightly be disturbed on appeal[85]. Despite the fact that the appellants proceeded by way of fixed date claim forms claiming declarations in this matter, their claims were in substance private law claims aimed at securing orders for payment to them of their retirement benefits. Indeed, they also sought orders for costs in respect of their claims. While it is true that there were elements of indecision in the PAJ's approach to the question of payment of the retirement benefits, the appellants, when

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[84] CPR 56.15(5)

[85] See, for example, **Jamaica Infrastructure Operators Ltd v United Management Services Ltd and Dwayne McGaw** [2018] JMCA Civ 4, esp. at para. [62]

faced with this situation, did what it was their right to do, which was to file action against the PAJ. The PAJ having prevailed in that action, the judge applied the general rule that costs should follow the event and, in my view, nothing has been shown to suggest that his approach to the question of costs was aberrant in any way.

[133] But, having said all of the above, different considerations obviously arise at this stage in the light of my conclusion that the appellants are entitled to succeed in this court – and ought to have succeeded before the judge - on the irrationality issue. Mr Wood made it clear that, should the appeal succeed, he will seek orders for costs in this court and in the court below. Mr Hylton accepted, albeit in general terms, the principle that costs should follow the event. In these circumstances, it now seems to me to be inevitable that the PAJ should be ordered to pay the appellants' agreed or taxed costs in both courts.

Conclusion

[134] In the exercise of its contractual discretion to grant a retirement benefit to the appellants, the PAJ was under an implied obligation to act in good faith and to approach the matter rationally. While the evidence does not support the contention that the PAJ acted in breach of its duty of good faith, the appellants have made good their contention that the PAJ's refusal to grant them a retirement benefit was irrational. Accordingly, in the circumstances of this case, the appellants are entitled to an order from this court granting them the retirement benefits provided for in their respective contracts of employment. However, while the reasonable or legitimate expectations of the appellants are a relevant factor in assessing the rationality of the PAJ's decision to

refuse them a retirement benefit, I have not found it possible to give those expectations a wider scope of operation on the facts of this case. Finally, while the appellants have not demonstrated that the judge erred in the exercise of his discretion as to the costs of the trial before him, their success in this court on the irrationality issue entitles them to an order that the appeal should be allowed, with costs in this court and in the court below.

Disposal of the appeal

[135] In their amended notice and grounds of appeal filed on 18 February 2018, the appellants seek orders granting the orders and declarations sought by them in the court below[86]. In the light of the conclusions which I have reached in this judgment, I would allow the appeal and make the following declarations and orders:

(i) The provision made in the appellants' contracts of employment for the payment of a discretionary retirement benefit was lawful and binding on the respondent.

(ii) The respondent is contractually obligated to pay a discretionary retirement benefit in accordance with the contracts of employment made between the appellants and the respondent and has not indicated any basis on which it would not exercise that discretion in favour of the appellants.

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[86] See para. [40] above

(iii) Mrs Beverley Williamson's entitlement under her contract of employment amounts to $22,351,000.00. The respondent is hereby ordered to pay the said sum to Mrs Williamson, together with interest at 3% per annum from 30 June 2016 to the date of payment.

(iv) Mr Richard Roberts' entitlement under his contract of employment amounts to $16,044,184.00. The respondent is hereby ordered to pay the said sum to Mr Roberts, together with interest at 3% per annum from 31 December 2014 to the date of payment.

(v) The respondent is to pay the appellants' costs of this appeal and the trial in the Supreme Court, such costs to be taxed if not agreed.

BROOKS JA

[136] I have read in draft the judgment of the learned President and agree with his reasoning and conclusion. There is nothing that I wish to add.

P WILLIAMS JA

[137] I too have read the draft judgment of the learned President. I agree with his reasoning and conclusion and have nothing to add.

MORRISON P

ORDER

1. Appeal allowed.

2. The court makes the following declarations:

    (i) The provision made in the appellants' contracts of employment for the payment of a discretionary retirement benefit was lawful and binding on the respondent.

    (ii) The respondent is contractually obligated to pay a discretionary retirement benefit in accordance with the contracts of employment made between the appellants and the respondent and has not indicated any basis on which it would not exercise that discretion in favour of the appellants.

    (iii) Mrs Beverley Williamson's entitlement under her contract of employment amounts to $22,351,000.00. The respondent is hereby ordered to pay the said sum to Mrs Williamson, together with interest at 3% per annum from 30 June 2016 to the date of payment.

    (iv) Mr Richard Roberts' entitlement under his contract of employment amounts to $16,044,184.00. The respondent is hereby ordered to pay the said sum to Mr Roberts, together with

interest at 3% per annum from 31 December 2014 to the date of payment.

3. The respondent is to pay the appellants' costs of this appeal and the trial in the Supreme Court, such costs to be taxed if not agreed.