BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 6 of 2014

BETWEEN

BRYDENS INSURANCE INC. **APPELLANT**

AND

RICHARD GIBSON **RESPONDENT**

Before: The Hon. Sandra P. Mason, The Hon. Andrew D. Burgess and The Hon. Kaye C. Goodridge, Justices of Appeal

2014: June 5
2017: February 9

Ms. Hazelyn E. Devonish in association with Ms. Phedessa Walker for the Appellant
Mr. Richard Gibson, appearing in person.

DECISION

BURGESS JA

INTRODUCTION

[1] This is an appeal from the decision of the Severance Payments Tribunal ("the Tribunal") in which it was determined that the appellant, Brydens Insurance Inc. ("Brydens") dismissed the respondent, Mr. Richard

Gibson ("Mr. Gibson"), because of redundancy. This appeal is also against the Tribunal's decision that Mr. Gibson was entitled to a severance payment in the sum of $4,788.45.

[2] For the reasons that follow, we have decided to allow the appeal but to make no order as to costs.

FACTUAL BACKGROUND

[3] Mr. Gibson was employed by Brydens as a Marketing Officer at that company's offices in Norman Centre, Broad Street, Bridgetown, St. Michael. His letter of offer of appointment dated 7 September 2010, which was accepted by him on that same date, stated the commencement date of his employment to be 1 October 2010. That letter also set out the terms and conditions of Mr. Gibson's employment in detail and, in particular, included a clause for termination by notice or payment in lieu of notice.

[4] On 31 January 2013, in the presence of the Branch Manager, Mr. Paul Inniss (Mr. Inniss), Mr. Gibson was handed by the Human Resources Manager, Ms. Harriet Garcia (Ms. Garcia), a letter of termination and a termination of services certificate which stated that the reason for his termination was 'as per notice clause in the contract of employment'.

The letter, which was signed by Mr. Inniss, read in the relevant part as follows:

> "Dear Mr. Gibson,
>
> We wish to inform you that Brydens Insurance Incorporated has decided to exercise its rights as per the notice clause in your contract of employment. In this regard, the company gives you one month's notice that your employment will be terminated on 28th February, 2013. Please note that you are not required to report for duty during the period of notice.
>
> The termination benefits due to you are as follows:
>
> 1. Payment for accrued vacation leave totalling $2,385.57.
>
> 2. Your salary for the month of February 2013."

[5] Upon inquiry of Ms. Garcia as to his entitlement to a severance payment, Mr. Gibson was told: "It is out of my hands and this is a Trinidadian decision." In consequence of this intimation, Mr. Gibson applied to the Tribunal for a determination as to whether he had a right to a severance payment, and the amount of severance payment to which he was entitled, if any.

[6] Brydens indicated its intention to resist Mr. Gibson's application on the ground that the dismissal was in accordance with the terms of his contract and was not because of redundancy.

THE PROCEEDINGS BEFORE THE TRIBUNAL

The Hearing

[7] Mr. Gibson's application to the Tribunal was heard on 30 September 2013. That hearing commenced with the Tribunal asking Mr. Gibson, who was unrepresented by counsel, questions as to whether (i) he was an employee of Brydens; (ii) he was so employed for the statutory stipulated period; and (iii) he was dismissed from that employment by Brydens. These questions were doubtlessly intended to determine whether Mr. Gibson satisfied the basic conditions to be eligible for an award of a severance payment.

[8] After the Tribunal's questioning of Mr. Gibson, counsel for Brydens, Ms. Phedessa Walker, cross-examined Mr. Gibson. In that cross-examination, counsel elicited admission from Mr. Gibson, that he was terminated in writing with one month's notice based on the terms of his contract of employment.

[9] Ms. Garcia was the only witness called by Brydens to give evidence. In her examination-in-chief, she testified that the reason why Mr. Gibson's contract was terminated was because "[t]he company determined that it would be of better value if we hired someone else and Mr. Gibson was terminated in accordance with his contract of employment." She also gave evidence that Ms. Debbie Millar

(Ms. Millar) was hired to do the job vacated by Mr. Gibson and that her duties were the same as those of Mr. Gibson, namely, "to market the company's products and to bring in new business".

[10] The following exchange between the Tribunal and Ms. Garcia, which took place after Ms. Garcia's evidence in chief, is particularly important in the context of this appeal:

"Tribunal: You said that Mr. Gibson was expected to market the company's products and to bring in new business.

Ms. Garcia: Yes.

Tribunal: You also said that Debbie Millar is to market the company's products and to bring in new business.

Ms. Garcia: Yes.

Tribunal: So there was no change at all in the duties?

Ms. Garcia: Not as far as I'm aware, sir.

…

Tribunal: Is she Bajan?

Ms. Garcia: Yes.

…

Tribunal: Was there any difference in the remuneration paid to Mr. Gibson to that paid to Ms. Millar?

Ms. Garcia: Yes.

…

Tribunal: Were there any other changes in the conditions of employment?

Ms. Garcia: No.

…

Tribunal: Where was Mr. Gibson located when he worked for the company?

Ms. Garcia: He was located at our main office in Norman Centre. Brydens Insurance, Norman Centre.

Tribunal: And where is Ms. Millar located?

Ms. Garcia: She's located at the same address Norman Centre, 3rd Floor, Norman Centre, Bridgetown.

Tribunal: Was it the same office?

Ms. Garcia: Not the same office, no.

Tribunal: If not the same office is it similarly outfitted in terms of the necessary tools to do his work? The size of a desk can connote some significance as to the importance of a person.

Ms. Garcia: Yes.

…

Tribunal: And these were the same duties that he was contracted to carry out. That's right? He was contracted by the company to do these duties and he carried them out.

Ms. Garcia: Marketing and bringing in new business.

Tribunal: And he was contracted so to do and he did it.

Ms. Garcia: As far as I know, yes.

…

Tribunal: Was there any difference in the remuneration paid to Mr. Gibson to that paid to Ms. Miller?

Ms. Garcia: Yes.

Tribunal: There was?

Ms. Garcia: Yes.

Tribunal: Were there any other changes in the conditions of employment?

Ms. Garcia: No."

[11] Mr. Gibson was then given the opportunity to put questions to Ms. Garcia. Mr. Gibson's questions to Ms. Garcia and her answers to them bear verbatim repetition.

"Mr. Gibson:	Debbie Millar, could you tell me what her job title is?
Ms. Garcia:	She's business development officer. Sorry, business development associate.
Mr. Gibson:	So it's a different title all together from marketing officer.
Ms. Garcia:	Different title, yes, same duties.
Mr. Gibson:	Only one other question. Is the rate of pay less or more?
Ms. Garcia:	It is less."

[12] After Mr. Gibson's cross-examination of Ms. Garcia, the Tribunal continued the following rather unfortunate, strange exchange with Ms. Garcia:

"Tribunal	… Is she [Ms. Millar] a member of the minority community in Barbados?
Ms. Garcia:	No, if I understand what you mean.
Tribunal:	Whatever you understand by that. I just called a spade a spade.
Ms. Garcia:	She's Barbadian, a lady and Barbadian.
Tribunal:	That covers a lot of things…"

[13] After this, counsel for Brydens made her legal submissions, and thereafter, the Tribunal made the following closing remarks and reserved its written reasons for its decision:

> "Even though you say he was dismissed in accordance with the terms of his contract there's a presumption in favour of redundancy whenever there's a dismissal or a termination. That is one of the reasons why some attorneys lead evidence as for the reason for the dismissal, not that we're dealing with matters of wrongful dismissal but to

> rebut the presumption of redundancy or severance, according to the Act…"

The Decision

[14] The written decision was handed down by the Tribunal sometime in February 2014 in an undated document titled "REASONS FOR DECISION" as follows:

> "The Tribunal believed that the reason given for the termination of the services of the Claimant was not genuine and that on a balance of probabilities, the presumption of redundancy, which arises on a dismissal by virtue of Section 38 (2) of the Severance Payments Act, Cap 355A, was not displaced by the Respondent, for the evidence clearly showed that the decision to terminate the services of the Claimant for reasons other than the exercise of a term in the contract, in that -
>
> (a) The decision to terminate the Claimant was a decision taken in Trinidad. **"It is out of my hands and this is a Trinidad decision"**, with a particular intent and purpose.
>
> (b) The decision had been made to **"benefit"** the Respondent Company, even if only in terms of the lesser amount paid to the person who took over the duties of the Claimant.
>
> (c) There was clearly an element of some restructuring in that the job designation of the Applicant, had been changed from **"Marketing Officer"** to **"Business Development Associate"**, further that there was a difference in the emoluments paid to the replacement employee; and
>
> for these reasons, notwithstanding the provisions of Section 3(1) and Section 3 (2) of the Act, Cap. 355A and

> the authorities cited, the Tribunal collectively found in favour of the Applicant."

THE APPEAL

The Notice of Appeal

[15] On 15 April 2014, Brydens filed a notice of appeal titled Civil Appeal No. 6 of 2014 against the decision of the Tribunal. In that notice, Brydens seeks an order of this Court that the decision of the Tribunal be set aside on the following grounds:

> "The Tribunal misdirected itself on the interpretation of Section 3 of the Severance Payments Act, Cap. 355A of the Laws of Barbados.
>
> 1. The Tribunal paid no heed to the Common Law principle that an employer and employee can determine the amount of notice to be given to terminate the contract of employment.
>
> 2. The Tribunal erred in law in holding that any employee who has been employed for 104 weeks is entitled to Severance Payment in any event.
>
> 3. The Tribunal took into account matters which were irrelevant and prejudicial such as the ethnicity of the person who was employed to succeed the Respondent, and the fact that the decision to terminate the employment of the Respondent was made in Trinidad.
>
> 4. The Tribunal misdirected itself in law in holding that restructuring in itself leads to redundancy.
>
> 5. The Tribunal erred in law in holding that the Respondent was made redundant as a result of the

change of designation of the position he previously held from Marketing Officer to Business Development Associate.

6. The Tribunal failed to appreciate the distinction between redundancy and unfair or wrongful dismissal.

7. The decision of the Tribunal is against the weight of the evidence and in particular, the Tribunal failed to evaluate properly or at all the written evidence and the oral evidence of Ms. Harriett Garcia on behalf of the Appellant.

8. The Tribunal erred in law in holding that because the Appellant received a benefit as a result of the termination of the services of the Respondent he was entitled to Severance payment."

Counsel's Submissions

[16] In her written submissions to and oral arguments before this Court, Ms. Hazelyn Devonish, counsel for Brydens, presented arguments in support of each of the eight grounds on which this appeal is based. However, counsel's major submission was in respect of the presumption of a dismissal because of redundancy in **section 38 (2)**. That presumption, she maintained, was rebutted in this case by *inter alia* (i) the letter of appointment showing the notice clause which provides for termination by one month's notice; (ii) the repeated statement of management that the termination was in accordance with the contract; and (iii) the clear evidence of Ms. Harriett Garcia that there

was no redundancy since there was no cessation of or diminution in the work of the type done by Mr. Gibson. Counsel contended that even though Ms. Millar's emoluments and job title were not the same as Mr. Gibson's, the work that was required to be done by Ms. Millar was the same as that required of Mr. Gibson.

[17] There were no written submissions filed by or on behalf of Mr. Gibson. Nonetheless, Mr. Gibson made oral submissions before this Court on 5 June 2014. Then, Mr. Gibson maintained that the duties of Ms. Millar as a Business Development Associate were fewer than those previously assigned to him as Marketing Manager. This, he argued in effect, evidenced that there was a diminution of the kind of work previously done by him.

COURT'S ANALYSIS AND CONCLUSIONS

The Issues

[18] In its very recent decision of **Trimart Inc. v Glenda Knight, Civil Appeal No. 9 of 2014, ("Trimart")**, this Court underlined that, in an application for severance payment under **section 3** of **Cap. 355A**, four conditions must be satisfied. These are (i) that an "employer"/"employee" relationship existed; (ii) that there was continuous employment by the employee for 104 weeks, the requisite

period stipulated in **section 17 (1)**; (iii) that there was a dismissal of the employee by his/her employer; and (iv) that that dismissal was because of redundancy.

[19] It is clear from the Tribunal's "REASONS FOR DECISION", the grounds of appeal stated in the notice of appeal and the written submissions to, and oral arguments before this Court that, no issues arise as to whether an employee/employer relationship existed between Mr. Gibson and Brydens, whether Mr. Gibson was employed continuously for the stipulated period or whether he was dismissed. The sole issue in this appeal relates to the fourth condition, namely, whether Mr. Gibson's dismissal was because of redundancy.

[20] We therefore turn to consideration of the question of whether Mr. Gibson's dismissal was because of redundancy.

Was Mr. Gibson's Dismissal "because of redundancy"?

(1) The governing principles

[21] In addressing this question, it is of primary importance to remember that this case arose out of a reference to the Tribunal by Mr. Gibson under **section 38** of **Cap. 355A** for determination of a claim by him for severance payment pursuant to **section 3** of that **Act**. **Section 38** provides in its relevant part:

> "(1) Any question arising under this Act as to the right of an employee to a severance payment, or as to the amount of a severance payment, shall, in accordance with regulations made under this Part, be referred to and determined by a tribunal appointed and constituted in accordance with the Sixth Schedule.
>
> (2) For the purposes of any such reference
>
> (a) …
>
> (b) an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed because of redundancy or natural disaster."

[22] In **Trimart**, this Court held that in any reference to the Tribunal, the question of whether an employee is "dismissed because of redundancy" for purposes of **section 3** is to be determined in accordance with **section 38 (2) (b)**. This section, it was held in **Trimart**, creates a statutory presumption that, unless the contrary is proved, an employee who has been dismissed by his employer is dismissed because of redundancy.

[23] In this Court's earlier recent decision in **Trimart Inc. v Michelin Cox, Civil Appeal No. 1 of 2014**, it was pointed out that the presumption created by **section 38 (2) (b)** means that the only obligation on the employee is to prove that he/she was dismissed and that he/she is under no obligation to prove to the Tribunal that the dismissal was because of redundancy. As long as he/she proves dismissal by the employer, the

statutory presumption of dismissal because of redundancy arises and the burden of proof falls on the employer to rebut that presumption. If the employer fails to rebut that presumption as happened in **Trimart**, the statutory presumption must prevail. As was explained in that case, **section 38 (2) (b)** employs, in the words of Lord Nicholls in **Royal Bank of Scotland Plc v Etridge (No 2) [2002] 2 AC 773** at **para [14],** "the forensic tool of a shift of the evidential burden of proof" in the form of the rebuttable presumption of redundancy.

[24] In **Trimart** also, we opined that the shift of the evidential burden of proof utilised in the **section 38 (2) (b)** presumption is best understood in light of Professor Grunfeld's explication in *The Law of Redundancy (3 Ed., 1988)* at p 112. There, he wrote in relation to *section 91 (2) (b)* of the English *Employment Protection (Consolidation) Act, 1978*, a section *in pari materia* with **section (38) (2) (b)**:

> "The normal burden of proof is that, he must prove who alleges. However, while…it is the applicant for redundancy pay who must satisfy the industrial tribunal that he had been 'dismissed', the burden of proving that the dismissal was or was not attributable wholly or mainly to redundancy has been transferred by the Act from the applicant-employee to the respondent-employer. Section 91 (2) states: 'an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been dismissed by reason of redundancy'.

> To avoid liability, the employer must satisfy the tribunal, not beyond reasonable doubt, but on a balance of probabilities, that the dismissal was not due to redundancy, i.e., in practice, that it was due (or substantially due) to a non-redundancy cause.
>
> The provision in section 91 (2) is clear and mandatory. At its face value, section 91 (2) means that, if there is no evidence in a case to indicate the reason for dismissal, the case is governed by the statutory presumption and the applicant-employee wins; alternatively, if there is evidence which is evenly balanced, the statutory presumption will again be decisive in favour of the employee."

[25] In approaching the rebuttal of the **section 38 (2)** presumption, the key question of principle is: what are the "non-redundancy causes" that must be proved by the employer to rebut this statutory presumption?

[26] In **Trimart**, it was held that **section (3) (3)** is crucially important in answering that question. That subsection provides as follows:

> "For the purposes of this Act, an employee who is dismissed shall be deemed
>
> (a) to be dismissed because of redundancy if his dismissal is wholly or mainly attributable to
>
> (i) the fact that his employer has ceased or intends to cease to carry on the business for the purposes of which the employee was employed by him or has ceased, or intends to cease to carry on that business in the place where the employee was so employed; or

> (ii) the fact that the requirements of that business for employees to carry out work of a particular kind or for employees to carry out work of a particular kind in the place where he was so employed, have ceased or diminished or are expected to cease or diminish."

[27] Broadly speaking, this subsection lists two causes which are to be deemed redundancy causes. These are (i) dismissal wholly or mainly attributable to the cessation of business or the intention to cease business; and (ii) dismissal attributable to cessation, diminution or expected cessation or diminution of the need for a particular kind of work. Non-redundancy causes are causes other than these statutorily listed deemed redundancy causes. They include, in particular, dismissal not attributable to cessation, diminution or expected cessation or diminution of the need for a particular kind of work. This analysis, we would add, is supported by a flood of English authorities on legislative provisions similar to those in **Cap. 355A**: see, e.g., **North Riding Garages Ltd v Butterwick [1967] 1 All ER 644 (CA)**; **A.W. Champion Ltd v Scoble [1967] 2 ITR 411 (QBD)**; **Murray and another v Foyle Meats Ltd [1999] 3 All ER 769 (HOL).**

[28] The burden of proof on the employer, therefore, is to show that the dismissal in question was because of a cause other than the statutorily

deemed redundancy causes listed in **section 3 (3)**. If that burden is not discharged by the employer, then the employer is liable to pay a severance payment to the employee. If, on the other hand, the employer discharged the burden, then the liability to pay a severance payment to the employee disappears.

(2) Application of the governing principles to this case

[29] Turning to the application of the foregoing principles to the case at bar, we note that, as already stated in this judgment, there is no dispute as to the fact that Mr. Gibson was employed continuously for the statutorily required period and that he was dismissed by Brydens. Following our decision in **Trimart**, that is enough to raise the presumption in **section 38 (2) (b)** that Mr. Gibson's dismissal was because of redundancy. Mr. Gibson does not have to prove anything further.

[30] Accordingly, we find that the Tribunal was correct in holding that **section 38 (2) (b)** operated to raise a presumption that Mr. Gibson's dismissal was because of redundancy. That said, we hasten to add that we disagree with the Tribunal's ultimate conclusion on the determinative question which then arose as to whether Brydens, as Mr. Gibson's employer, had adduced evidence on a balance

of probability to rebut the **section 38 (2) (b)** presumption that Mr. Gibson's dismissal was because of redundancy.

[31] The evidence proffered by Brydens by way of rebuttal was the oral testimony of Ms. Garcia. She testified that Mr. Gibson was dismissed because Brydens "determined that it would be of better value if [they] hired someone" other than Mr. Gibson to do the job that he was doing. Consequent upon this determination, Mr. Gibson was terminated pursuant to the terms of his contract of employment and Ms. Millar was hired in his place to carry out Mr. Gibson's duties. Ms. Garcia's further testimony was that Ms. Millar, who replaced Mr. Gibson, had a different job title and was paid less than Mr. Gibson, but that her duties were the same as Mr. Gibson's. In response to questions to her by the Tribunal, Ms. Garcia maintained that the overall business requirements of Brydens had not changed and that there was no cessation of or diminution in the work of the type done by Mr. Gibson.

[32] As regards Ms. Garcia's evidence that Mr. Gibson was terminated pursuant to the terms of his contract of employment, we agree with the Tribunal's implicit conclusion that this in and of itself was not rebuttal evidence for purposes of **section 38 (2) (b).** As was held in **Trimart**, evidence of termination in accordance with the terms of the

employment contract without more is not evidence that rebuts the statutory presumption of dismissal because of a non-redundancy cause. On the other hand, we disagree with the Tribunal's implied conclusion that the evidence of Ms. Garcia that (i) Mr. Gibson was replaced by another employee, Ms. Millar; (ii) that Ms. Millar's duties were the same as Mr. Gibson's; and (iii) that the overall business requirements of Brydens had not changed and that there was no cessation of or diminution in the work of the type done by Mr. Gibson was insufficient to rebut the **section 38 (2) (b)** presumption.

[33] The Tribunal did not in any way take issue with Ms. Garcia's credibility. Ms. Garcia's answers to the questions put to her by the Tribunal, as well as her evidence in chief, must therefore be accepted as facts. By this measure, the facts established before the Tribunal were that there was no cessation or diminution in the work of the type done by Mr. Gibson. There could not, therefore, have been a redundancy as understood in light of **section 3 (3)**.

[34] We hasten to observe that the rebuttal evidence in this case was very different from that in **Trimart**. In **Trimart**, the evidence was sketchy and did not establish on a balance of probability that the overall business requirements of Trimart had not changed so that the work done

by Ms. Knight had not ceased or diminished, or was not expected to cease or diminish and so was insufficient to rebut the **section 38 (2) (b)** presumption. On the other hand, in this case, the rebuttal evidence presented by Brydens was clear and unshaken and established that the overall business requirements of Brydens had not changed so that the work done by Mr. Gibson had ceased or diminished, or was expected to cease or diminish. The evidence was therefore sufficient to rebut the **section 38 (2) (b)** presumption on a balance of probability. Accordingly, we hold that the statutory presumption was rebutted and that Mr. Gibson's dismissal was not because of redundancy.

[35] In concluding our consideration of this issue, we feel obliged to observe that there is no indication in the Tribunal's "REASONS FOR DECISION" that there was any weighing of the sufficiency of Brydens' rebuttal evidence that the overall business requirements of Brydens had not changed and that the work done by Mr. Gibson had not ceased or diminished, or was not expected to cease or diminish. Rather, the Tribunal restricted itself to consideration of whether Brydens' claim that Mr. Gibson was terminated pursuant to the terms of his contract of employment was substantiated on the evidence before the Tribunal. In this regard, the Tribunal cited three pieces of "evidence" which the

Tribunal said "clearly showed that the decision to terminate the services [was] for reasons other than the exercise of a term in the contract".

[36] The first was that the decision to terminate Mr. Gibson's employment "was a decision taken in Trinidad". In our judgment, not only was this an irrelevant consideration on the question of redundancy, but there was also absolutely no evidence before the Tribunal to this effect. The only possible suggestion of any such evidence was in Mr. Gibson's response to a question put to him by the Tribunal as to the reason for his claim for severance before the Tribunal. His response to that question was that when he asked Ms. Garcia about severance, she told him: "it is out of my hands and this is a Trinidadian decision." In our view, it would require surmounting a high logical hurdle to arrive at the conclusion that this was evidence that the reason for the termination of Mr. Gibson's employment "was a decision taken in Trinidad".

[37] The second was that the decision was made to benefit Brydens. Here, assuming that there was evidence of this before the Tribunal, we cannot see how that would have been evidence in proof of redundancy in the sense of cessation of or diminution in the work of the type done by Mr. Gibson. That, without more, would have been evidence of

dismissal because of economic reasons, not evidence of dismissal because of redundancy.

[38] The third was that there "was clearly an element of some restructuring" in relation to Mr. Gibson's job. Here, we have examined the evidence before the Tribunal and find that any evidence of "restructuring" was at best irrelevant. There was absolutely no evidence that the overall business requirements of Brydens had changed so that the work done by Mr. Gibson had ceased or diminished, or was expected to cease or diminish. The only evidence before the Tribunal was that Ms. Millar had replaced Mr. Gibson, that she had a different title from Mr. Gibson and that she was paid less than he was. However, the mere fact that Ms. Millar's job title was not identical to Mr. Gibson's and that her emoluments were less than his is irrelevant in a situation where Ms. Garcia's evidence was that the overall business requirements of Brydens remained unchanged and that the work done by Mr. Gibson had not ceased or diminished, or was not expected to cease or diminish.

[39] In sum, we think that the Tribunal fell into error in its application of the law to the facts before it. It failed to take into account important rebuttal evidence put before it by Brydens and based its decision on irrelevant

considerations and non-existent evidence. We will accordingly allow the appeal.

COSTS

[40] Ms. Devonish, in her written submissions to and oral argument before us, argued that the discretion in this Court to award costs under **section 85** of the **Supreme Court of Judicature Act, Cap. 117A**, should be exercised, pursuant to **rule 64.6 (1)** of **CPR,** in favour of Brydens, were Brydens to be successful in this appeal. We agree with counsel that the general rule is that the successful party is entitled to costs. However, we hold that, acting judicially and taking the totality of the circumstances of this matter into account, we should not make any award of costs.

DISPOSAL

[41] In light of the foregoing, the appeal is allowed. There will be no order as to costs.

Justice of Appeal

Justice of Appeal Justice of Appeal