ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2007/010

BETWEEN:

CABLE & WIRELESS (W.I.) LIMITED

Appellant/Employer

and

CONRAD TONGE ET AL, represented by
The Antigua and Barbuda Workers' Union

Respondents/Employees

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal [Ag.]
The Hon. Mde. Indra Hariprashad-Charles	Justice of Appeal [Ag.]
The Hon. Mde. Janice George-Creque	Justice of Appeal [Ag.]

Appearances:

Ms. E. Ann Henry for the Appellant/Employer
Mr. Charlesworth Brown for the Respondents/Employees

2008: November 27;
2009: March 23.

Civil Appeal – Industrial dispute – redundancy – severance pay – computation of severance pay – tenure of employment – from what date shall severance payments be paid – whether a miscarriage of justice has occurred –

The appellant (an international communications company) re-structured and declared several of its employees redundant entitling them to severance pay. No specific formula for the computation of severance pay where an employee was made redundant existed in the Collective Agreement, but there was provision that a severance pay agreement should be the subject of negotiations between the Company and the Union. After negotiations broke down on 1st January 2001, the appellant unilaterally computed and paid the redundant employees severance pay calculated at the rate of 4 weeks pay for each year of service from the date on which their respective employment was terminated. The respondents (some of the redundant employees) brought an industrial action against the appellant. The Court in its ruling categorized the respondents into 5 groups according to

their years of service and made different awards to each category at rates ranging from 5½ weeks pay for each year of service for persons with 30 plus years to 12 days pay for persons with one year's service. The Court also ruled that the severance pay should be paid out from the date negotiations broke down on 1st January 2001. The appellant seeks to set aside this decision in its entirety.

Held: affirming the decision of the Industrial Court but setting aside the order that all severance payments shall be paid from 1st January 2001 and substituting that the employees are entitled to severance pay simultaneously upon termination of their employment in accordance with the Labour Code of Antigua and Barbuda, (Edwards, JA dissenting).

1. Having referred to section 10(3) of the Industrial Court Act, it must be inferred that the Industrial Court was guided by the principles of fairness and good conscience and considered the issues of appropriateness, reasonableness, fairness and adequacy in coming to its conclusion.

2. The Court cannot be criticised for the approach it took when it relied, to a large extent, on the prevailing practice of other similar business entities with respect to the quantum of the severance pay.

3. Upon examining the evidence and taking into consideration the purpose of section 10(3) of the Industrial Court Act, the decision of the Court to award a higher rate of severance pay for those with more years of service and a lower rate of severance pay for those with shorter years of service seemed fair and was not outside of the general ambit of reason such as to warrant interference by this Court.

4. In this present appeal I do not consider that any substantial miscarriage of justice has occurred to substitute my discretion for that of the trial Court.

Sundry Workers of Antigua Port Authority v Antigua Port Authority Civil Appeal No. 8 of 2001 – judgment delivered on 28 January 2003 [unreported] cited.

JUDGMENT

[1] HARIPRASHAD-CHARLES, J.A. [AG.]: In or about 2001, Cable and Wireless, an international communications company, decided to re-structure and as a result, declared several of its employees ("the Employees") redundant, thereby entitling them to severance pay. The tenure of employment of the Employees ranged from 5 to 40 years and the terms and conditions of their employment are largely set out in the Collective Agreement dated 28th February 1994. However, the computation of severance pay in the event of redundancy was not expressly provided for in the

Collective Agreement. Article 16 of the Collective Agreement merely states that "*Severance pay terms shall be the subject of negotiations between the Company and the Union."*

[2] Negotiations between Cable & Wireless and the Antigua and Barbuda Workers Union representing the Employees ("the Union") for a rate of severance payment for the Employees lasted over six months but eventually broke down as of 1st January 2001. On or about 26th September 2001, Cable and Wireless unilaterally paid the Employees an amount of severance calculated at the rate of 4 weeks pay for each year of service, irrespective of the employee's status or number of years of service from the date on which their respective employment was terminated.[1]

[3] The Employees contended that, given their respective years of service, their job classifications and the industry norm both within and outside of Antigua and Barbuda, their severance payments were unreasonable and inadequate and accordingly, wrongful. They wanted severance pay to be computed at the rate of 6 weeks pay for each year of service. Although they accepted that the severance payments made were calculated in excess of the minimum amount laid down in the Labour Code[2], they did not agree with Cable & Wireless' contention that the severance pay was made in accordance with the practice over the last five years. Their view was that the severance payments were not fair compared to the severance payments made in other similar business entities within and outside of Antigua and Barbuda which include LIAT (1974) Ltd, Barclays Bank PLC, BWIA, Bank of Nova Scotia and Antigua Commercial Bank.

[4] The Employees further contended that they are entitled to severance payments from 1st January 2001, when the negotiations between Cable & Wireless and the Union broke down rather than from the date on which their respective employment was terminated.

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[1] See First Schedule and Second Schedule of the Record of Appeal. Pages 42-43 for the termination date of each Employee.

[2] CAP 27 Laws of Antigua and Barbuda

[5] As a result, they brought an action in the Industrial Court against Cable and Wireless.[3]

The Judgment of the Industrial Court

[6] The Industrial Court ("the Court") decided largely in favour of the Employees. At paragraph [22] of the judgment, the Court ruled that severance pay should be calculated based on the number of years served by each Employee at the rate of:

(a) Persons with 30 years of service or more shall be paid 5 ½ weeks pay for each year of service.

(b) Persons with 20 years of service or more but less than 30 years shall be paid 5 weeks pay for each year of service.

(c) Persons with 10 years of service or more but less than 20 years shall be paid 4 ½ weeks pay for each year of service.

(d) Persons with less than 10 years of service but more than 1 year shall be paid 4 weeks pay for each year of service.

(e) Persons with 1 year of service shall be paid 12 days severance.

[7] The Court also ruled that the above payments shall be effective from the date when the negotiations between Cable & Wireless and the Union broke down, i.e. from 1st January 2001. In coming to its decision, the Court declared that it "is not laying down an irrevocable and final rate for computation of severance but simply making a rule for resolution of the present deadlock, the parties being free to negotiate new terms if so desirous."[4]

The law

[8] The Antigua and Barbuda Labour Code makes provision for the minimum amount of severance pay to which an employee is entitled.

Section C.40 provides that:

> "Every employee whose terms of employment with an employer and his predecessors has in aggregate exceeded one year is entitled to

[3] Reference No. 20 of 2002.

[4] Para. 21 of the judgment of the Industrial Court.

severance pay upon termination of said employment by employer for reasons of redundancy."

Section C.41 states that:

"Severance pay shall consist of at least one day's pay, at the employee's latest basic wage, for each month or major fraction thereof of his term of employment with his employer and any predecessor employer."

[9] Since the Labour Code only stipulates the minimum requirement for the amount of severance pay to which an employee is entitled, the Industrial Court is then faced with the task of determining the rate of severance pay which should be awarded in accordance with the Industrial Court Act[5] ("the Act"). Section 10(3) of the Act states as follows:

"Notwithstanding anything in this Act or in any other rule of law to the contrary, the Court in the exercise of its powers shall-

(a) make such order or award in relation to a dispute before it as it considers fair and just, having regard to the interests of the persons immediately concerned and the community as a whole;

(b) act in accordance with equity, good conscience and the substantial merits of the case before it, having regard to the principles and practices of good industrial relations and in particular, the Antigua and Barbuda Labour Code."

[10] Concisely, Section 10(3) requires the Court, as a matter of policy, to be guided in its deliberations by considerations of good conscience and fairness.

The appeal

[11] Cable & Wireless appeals the judgment of the Court delivered on 26th February 2007, in Reference No. 20 of 2002. It seeks, by way of relief, an order that the judgment be set aside in its entirety and that the Reference be dismissed. Cable & Wireless advances five grounds of appeal[6] which essentially raise three separate issues for determination. Grounds 1 and 2 will be dealt with separately while Grounds 3, 4 and 5 are capable of being subsumed into one ground.

[5] CAP 214 Laws of Antigua and Barbuda

[6] See Grounds of Appeal contained at paragraph 3 in the Notice of Appeal.

[12] Ground 1 states that the Court misdirected itself as to the issues before it in Reference No. 20 of 2002.

[13] Learned counsel for Cable & Wireless, Ms. Henry, submitted that having properly identified the issues in paragraph [10] of the judgment, the Court made no attempt to address these issues but simply repeated the submissions of both counsel without offering any opinion on the integrity of those submissions. Counsel further submitted that what the Court did, and without any rationale whatsoever, was to impose a formula for resolution of the deadlock which confronted it. To that extent, she submitted the Court, took no cognizance of the real issues which underpinned the matter and as such, misdirected itself as to the issues before it. Consequently, the decision should be set aside.[7]

[14] Learned counsel contended that at the heart of the dispute was the question as to whether Cable & Wireless acted reasonably in applying the 4 weeks pay formula across the board and whether the amount paid was adequate.

[15] Though three in number, triable issues (a), (b) and (c) in paragraph [10] of the judgment merely required the Court to determine whether the rate of severance pay which Cable & Wireless unilaterally paid to its Employees was appropriate and if not, what rate should be applied.

[16] At paragraph [15] of the judgment, the Court recognised the minimum rate stipulated in the Labour Code. It expressed that "negotiation is the most appropriate way to resolve disputes of this nature as the Employers and the Union are in a better position to evaluate the competence of the Employee and make the necessary assessment."[8] The Court asserted that in the absence of an agreement between the parties, it shall determine the dispute in a manner that it considers fair and just.

[7] See paragraphs 13 to 15 of skeleton arguments filed on behalf of the Appellant.
[8] Para. 15 of the Judgment of the Industrial Court.

[17] Having established its role, the Court then considered the evidence relating to the computation of severance pay in 10 Collective Agreements and noted that, save for Cable & Wireless' unilateral payment of 4 weeks pay per annum worked across the board, all other rates were based on years of service.[9] The Court relied, to a large extent, on the prevailing practice of other similar business entities with respect to quantum of the severance pay.[10] It underscored that Cable & Wireless did not infringe the Labour Code to grant the severance pay at 4 weeks pay for each year of service, which, it acknowledged, was above the statutory minimum. It also recognised that Cable & Wireless, like many other similar business entities provides extra benefits such as re-training, medical insurance and contribution to the Employees' retirement benefits.

[18] I am of the view that although the Court chose not to make direct pronouncements on each individual issue or for that matter, on any of them, it was mindful throughout its analysis of the evidence, the submissions of counsel and the relevant law, particularly the special considerations of section 10(3) of the Act, of the issues it identified in paragraph [10]. Having referred to section 10(3), it must be inferred that the Court was guided by the principles of fairness and good conscience and considered the issues of appropriateness, reasonableness, fairness and adequacy in coming to its decision.

[19] I do not think that the Court can be criticised for the approach it took. In my view, this ground of appeal fails and I would dismiss the appeal on this ground.

[20] Ground 2 reads as follows:

> "That the Learned President and Members of the Industrial Court misdirected themselves by introducing terms of agreement relative to severance pay into the Collective Agreement signed and executed between the parties through their representative, the Antigua and Barbuda Workers' Union, where such terms did not exist and in circumstances in which it was not necessary or appropriate to do so."

[9] See pages 18 to 22 of the Judgment of the Industrial Court.
[10] See paragraph 18 of the Judgment of the Industrial Court.

[21] Learned counsel for Cable & Wireless argued that it was not open to the Court to introduce the new formula for calculating severance pay in the face of its two findings namely that: (i) Cable & Wireless did not infringe the Labour Code in its calculation of the severance pay and (ii) the calculation based on 4 weeks per year of service had been accepted by both parties for several years.[11]

[22] Learned counsel intimated that the Court acted in a capricious and arbitrary manner in determining the issues before it and/or that, it might have been driven by sentimentally.[12] Her argument is premised, no doubt, on the fact that the Court made a positive finding that the 4 week formula for calculating severance pay had been accepted by both parties for several years. However, Counsel did not explore the circumstances under which there was an acceptance of the 4 week formula. The uncontroverted evidence of Davidson Charles and Keithlyn Smith is therefore instructive. Between 1996 (when redundancies were first declared) and 2000, only seven positions were made redundant and those employees agreed to the rate of severance pay of 4 weeks per each year of service. However, in this case, the Employees challenged that rate of severance pay. This resulted in negotiations between Cable & Wireless and the Union, of which there was no agreement.

[23] It cannot be gainsaid that in the absence of an agreement between the parties, the Court must exercise its discretion to make an order or award that is "fair and just" and "having regard to the interests of the persons immediately concerned and the community as a whole."

[24] Having made the two findings in paragraph [21], the Court proclaimed that the payment of 4 weeks per each year of service for all employees across the board "would cause disparity between the long-serving Employees and those with but a limited number of years."[13] As a result, the Court sought to cure what it perceived as an anomaly which existed. It considered the wide discretionary power

[11] See paragraph 21 of the Judgment, page 23 of the Record of Appeal.
[12] Para. 22 of Cable and Wireless' Skeleton Arguments.
[13] See paragraph 21 of the Judgment, page 23 of the Record of Appeal.

conferred upon it to resolve disputes in a manner that it considers just, fair and in accordance with equity and good conscience. In my opinion, the Court properly and fairly weighed all the factors in arriving at its decision.

[25] I find that this ground of appeal lacks merit and I would dismiss the appeal on this ground.

[26] Grounds 3, 4 and 5 relate to the issues of (1) whether the Court erred in law in finding that Cable & Wireless did not act in conformity with its legal obligations of fairness and reasonableness in calculating the quantum of severance pay to be paid to the Employees; and (2) whether the decision was inconsistent with the law and practice of good industrial relations in Antigua and Barbuda or with the evidence before it.

[27] Learned counsel for Cable & Wireless submitted that there was no express finding in the judgment as to the reasonableness or otherwise of the action of Cable & Wireless. Counsel argued that the clear findings by the Court, that Cable & Wireless did not infringe the Labour Code and that the 4 week formula has been accepted by both parties for several years prior to redundancy; render the decision in paragraph 23 inexplicable and unsustainable.

[28] As earlier stated, the Court took into consideration the evidence, the submissions of Counsel and the relevant law and rendered its decision using its wide discretion conferred upon it by the Act. It also relied heavily on the prevailing practice of other similar companies within and outside of Antigua and Barbuda within which the severance pay had been calculated based on the number of years each Employee had served. Upon examining this evidence and taking into consideration the purpose of Section 10(3) of the Act, the decision of the Court to award a higher rate of severance pay to employees with more years of service and a lower rate of severance pay for those with shorter years of service seemed fair and was not outside of the general ambit of reason such as to warrant interference by this Court.

[29] I find that this consolidated ground of appeal is unsustainable and I would dismiss it.

[30] An ancillary legal issue which arises is from what date should the severance payments be paid? The Court agreed with the argument of Learned Counsel for the Employees, Mr. Brown, that the Employees should be paid from 1st January 2001, when the negotiations broke down instead of from the date on which each Employee's employment was terminated. It gave no reasons for its decision.

[31] Section C.42(1) of the Labour Code makes provision for when severance pay becomes payable and states as follows:

> C.42(1) "Subject to the other provisions of this section, simultaneously upon the termination of employment of any employee entitled to severance pay under section C40, the employer shall remit to that employee severance pay computed in accordance with section C41".

[32] Accordingly, the Employees are entitled to severance pay simultaneously upon termination of their employment.[14] Therefore, the order that all the severance payments shall be paid from 1st January 2001, is set aside.

The function of the Court of Appeal

[33] Section 17 of the Act relates to appeals on point of law. Section 17(1) prescribes the grounds of appeal on which the Court of Appeal can adjudicate. It states that any party to a matter before the Industrial Court shall be entitled as of right to appeal to the Court of Appeal in matters pertaining to jurisdiction, fraud, errors of law or other specific illegality.

[34] In Sundry Workers of the Antigua Port Authority v Antigua Port Authority,[15] Byron C.J. stated as follows:

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[14] See First Schedule and Second Schedule of the Record of Appeal, pages 42-43 for the termination date of the Employees.

[15] Civil Appeal No. 8 of 2001 (In the Court of Appeal of Antigua and Barbuda)- Judgment delivered on 28 January 2003 [unreported].

> "In Section 17 (3) the Court is required to dismiss an appeal if it considers that no substantial miscarriage of justice has actually occurred, although it is of the opinion that any point raised in the appeal might have been decided in favour of the appellant. The substitution of our discretion for that of the trial court is not part of our function."

[35] In the present appeal, I do not consider that any substantial miscarriage of justice has occurred to substitute my discretion for that of the trial Court. On the contrary, the judgment is sound in law.

Costs

[36] Learned counsel, Mr. Brown seeks costs of the appeal. Section 10(2) of the Act provides that the Court (including this Court) shall make no order as to costs unless for exceptional reasons. I would make no award as to costs since Counsel has not shown any exceptional circumstance to warrant such an order.

Conclusion

[37] For all the reasons set out above, I would uphold the judgment of the Industrial Court in calculating the severance pay based on the length of each employee's tenure of employment and set aside the Order that all the severance pay shall be paid from 1st January 2001. I would also make no award of costs.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]

I concur.

Janice George-Creque
Justice of Appeal [Ag.]

DISSENTING

[1] **EDWARDS, J.A [AG.]:** I have considered at length the judgment of my learned sister, Hariprashad–Charles J.A. [Ag.], and except for her conclusions on the ancillary issue and costs, I do not agree with the outcome of the appeal in her

judgment. The facts have been adequately set out in my sister's judgment, and so I shall deal with only those facts that are relevant to my conclusions. This appeal in my view gives rise to consideration of the nature of the jurisdiction to be exercised by the Industrial Court when determining disputes of this sort.

[2] The Court's statutory responsibility in the settlement of industrial disputes regarding severance pay is contained in sections 7(1)(a) and (c), 16, 10 and 9 of the Industrial Court Act. Section 16 of the Industrial Court Act requires the Court to inquire into and investigate the dispute between the employees and their employer and all matters affecting the merits of such dispute before it; and the Court has to hear, receive and consider the submissions, arguments and evidence presented or tendered whether orally or in writing by the respondents and the appellant.

[3] Section 9 authorises the Court to inform itself on any matter, in such manner as it thinks just, and take into account opinion evidence, and such facts as it considers relevant and material, provided the parties to the proceedings are given the opportunity to adduce evidence in regard thereto. Section 10(3) is set out at paragraph 9 of the judgment of Hariprashad-Charles, JA.

[4] In my view, based on these statutory provisions, the Court was empowered to make the adjustment award that is the subject of appeal only where it considered that the respondents' severance pay in 2001 computed for each respondent at the rate of 4 weeks salary for each year of service was not fair and just, having regard to the interests of the respondents and the appellant and the community as a whole.[16] The onus was therefore on the respondents to establish that the severance formula used by the appellant was unjust and unfair. There was no evidence before the tribunal or relevant facts and material to justify such a finding in my view. The Court is not empowered to make a merit finding without evidence or material of some kind to justify the decision it is taking.

[16] Sections 16 and 10(3)(a) of the Industrial Court Act Cap. 214

[5] In deciding whether the appellant's computation was just and fair, the Court was obligated to act in accordance with equity, and the substantial merits of the case having regard to the principles and practices of good industrial relations, conscience and the Antigua and Barbuda Labour Code.

[6] Determining a severance pay dispute is obviously not a precise science. There is a range of factors to be taken into account in the mix based on the relevant statutory provisions. Although the Court has a generous ambit of discretion, it appears to me that the discretion should particularly take into account the provisions in sections 10 and 16 of the Industrial Court Act and sections C41, C42(1) A8 and C69 of the Labour Code.

[7] Section C42 of the Labour Code requires that:

> "Simultaneously upon the termination of employment of any employee entitled to severance pay under section C40, the employer shall remit to that employee severance pay computed in accordance with section C41. Section C41 of Division C of the Labour Code prescribes how the statutory minimum severance pay is to be computed:" at least one day's pay, at the employee's latest basic wage, for each month or major fraction thereof of his term of employment with his employer and any pre-decessor employer."

Section A8 of Division A was referred to by counsel for the appellant. I consider it along with section C69 of Division C of the Labour Code to be very significant provisions in the instant appeal. These provisions state:

> "A8. Nothing herein shall be construed as prohibiting an employer, either unilaterally, by individual contract with an employee or with employees, or by collective agreement with employee representatives, from establishing working conditions more advantageous to employees than those minimum standards set forth in this Code.
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> C69. Nothing herein shall be construed as prohibiting an employer, either unilaterally, by individual contract with an employee, or by a collective bargaining agreement with employee representatives, from establishing working conditions more advantageous to employees than those minimum standards set forth in this Division."

[8] The appellate court may interfere with the Court's award only where some error has been made in the exercise of its discretion; or where the Court acts upon a wrong principle, or allows extraneous or irrelevant matters to guide or affect its decision. Section 17 of the Industrial Court Act sets the basis for appellate review of the Court's decision. For the purposes of this appeal the Court of Appeal is authorised to interfere with the decision of the Industrial Court only where the Court had no jurisdiction or exceeded its jurisdiction in the matter; or where any finding or decision of the Court in the matter is erroneous in point of law; or where some other specific illegality, substantially affecting the merits of the matter has been committed in the course of the proceedings.[17] The appellant's grounds of appeal when reconciled with section 17, appear to me to be alleging that the Court exceeded its jurisdiction and its decision is erroneous in point of law.

[9] The evidence before the Court was that the appellant's computation of the severance pay, was in accordance with their previously established practice over the years, in the absence of a specific provision in the Collective Agreement, as to what rate severance pay should be calculated at.

[10] The Court found at paragraph 21 of its judgment as follows:

> "I do not believe that there was any infringement of the Labour Code by the employers' decision to grant the Severance at 4 weeks pay for each year of service, which was above the statutory minimum although this would cause disparity between the long serving Employees and those with but a limited number of years but this has been accepted by both parties for several years prior to the redundancy. The Court, by this decision, is not laying down an irrevocable and final rate for computation of severance but simply making a rule for resolution of the present deadlock, the parties being free to negotiate new terms if so desirous."

[11] The Court erred in my view in giving weight to the perceived disparity. Such disparity will always exist regardless of the formula applied since different amounts must be paid to each of the respondents depending on each respondent's salary and length of service.

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[17] See section 17 of the Industrial Act which limits the right to appeal on only specific grounds.

[12] The appellant had referred the Court to its cases previously decided where it had awarded severance pay of one month's salary for each completed year in the case of managerial staff and a lesser amount from between 2 weeks and 3 weeks salary for completed years for non-management staff.[18] The Court also referred to such decisions.[19] The formula used by the appellant was consistent not only with its previous practice, but also with the Court's decisions. The appellant's formula should also be viewed in light of the Labour Code which stipulates the 3 sources or bases for an employer's calculation of severance pay. The employer may unilaterally establish severance pay conditions above the minimum standard set out in section C41 of the Labour Code; or the employer may do so by individual contract with the employees; or by collective bargaining agreement with employee representatives.[20]

[13] In the absence of any finding that the 2001 severance pay calculations were unfair, unreasonable, unjust, inappropriate, or against the principles of good industrial practices, the Court, in my view was not entitled to simply make a ruling to resolve the deadlock. The principle here seems to be that the Court should exercise its discretionary power on the merits of the case based on proof that the appellant acted unfairly and unjustly in the circumstances of the case.

[14] In resolving the deadlock, the Court was obviously influenced by the Collective Agreement provisions for the calculation of severance pay, in the Collective Agreements of the Employees of LIAT (1974) Limited, BWIA, Caribbean Relay company Limited, Barclays Bank PLC, Antigua Commercial Bank, Bank of Nova Scotia, Antigua Public Utilities Authority, and Computer Services Raytheon. These collective agreements are part of the industrial practice and though they may be useful in providing an indication of the prevailing benchmark for severance

[18] See paragraphs 13 (f) of the Court's decision.
[19] See paragraph 16 of the decision.
[20] See sections A8 and C69 of the Labour Code

pay those provisions were genuine consent provisions between employers and employees and are of limited persuasive value in the present dispute, in my view.

[15] I regard the contention of learned counsel for the appellant to be valid in relation to all of the grounds of appeal. It appears to me, that the Court fell into error by applying the practice established by the Collective Agreements previously stated at paragraph 14 of my judgment, to the dispute between the appellant and the respondents to simply break the deadlock.

[16] I would allow the appeal with no order as to costs.

Ola Mae Edwards
Justice of Appeal [Ag.]