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STATE  
v  
MINISTER FOR LABOUR AND INDUSTRIAL RELATIONS  
*ex parte*  
FIJI BANK EMPLOYEES UNION

B [HIGH COURT, 1995 (Byrne J.) 16 January]  
Revisional Jurisdiction

C *Trade Disputes-secret ballot-whether validly conducted-whether employer or Registrar of Trade Unions has power to decide location-Trade Union Regulations (Amendment) Regulations 1991 Regn. 10(1).*

*Registrar of Trade Unions-whether Acting Registrar may be appointed retrospectively-Trade Unions Act (Cap. 96) Sections 3 & 4.*

D The Minister of Labour and Industrial Relations retrospectively appointed an Acting Registrar of Trade Unions during the Registrar's absence abroad. The Acting Registrar advised the Minister that a pre-strike ballot had not been validly conducted because the Union had disregarded the Returning Officer's direction that it be held on the employer's premises. HELD: (1) The Acting Registrar had been validly appointed (2) The choice of location for a pre-strike ballot is that of the employees, not that of the Returning Officer.

E Case cited:

*West v. Gwynne* [1911] 2 Ch. 1

Motion for Judicial Review of a decision of the Acting Registrar of Trade Unions.

*M. Raza* for the Applicant

*D. Singh and S. Rabuka* for the Respondent.

F **Byrne J:**

G I have given the correct title of this action for the purpose of this judgment although until now the action has had a much longer title. It is an application for Judicial Review pursuant to leave which I granted on the 19th of May 1993 and thereafter a substantive motion for Judicial Review should have been issued by the Applicant.

The fact that it was not escaped my attention until coming to prepare this judgment but its omission should have been noticed by the Applicant's solicitors much earlier and the necessary Motion issued.

In the circumstances and to avoid any further delay I propose to treat the application for leave for Judicial Review as a substantive motion as the Court has received submissions from the parties obviously on the assumption that a substantive motion has been filed.

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The application concerns the decision of the Registrar of Trade Unions dated 16th April 1993 declaring the result of a secret ballot held at the Bank of Baroda premises in Suva on the 1st April 1993 illegal and the subsequent decision by the Minister for Labour and Industrial Relations ("the Respondent") dated 16th April 1993 declaring illegal a strike between the members of the Applicant and the Bank of Baroda arising out of the failure of the Applicant and the Bank to reach agreement on the Applicant's 1992 Log of Claims. Various affidavits have been filed on behalf of the parties and from them it appears that the following matters are not in dispute:

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There was a dispute between the Applicant and the Bank of Baroda over the Union's Log of Claims which was referred to the Respondent who directed that conciliation talks be held. These failed and therefore the Applicant by letter dated 10th March 1993 addressed to the Registrar of Trade Unions ("the Registrar") gave due notice of the Union's intention to hold a secret ballot at the Bank of Baroda on the question of whether or not strike action would be taken.

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The Registrar appointed supervisors to supervise the ballot which took place after correspondence and discussions, and with the approval of the Registrar was carried out by post in some cases and by personally casting votes in other cases at agreed times at various premises of the Bank on agreed dates.

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The present proceedings have arisen because of the ballot conducted at Suva outside the front door of the Bank's Head Office at about 5.00 p.m. on 1st of April 1993.

On 31st of March 1993 the Applicant wrote to the Chief Manager of the Bank in Suva indicating that it would take secret ballots in all Bank of Baroda branches on the 1st and 2nd of April 1993. The Suva ballot was to take place at 4.30 p.m. on the 1st of April and the ballots in the various country centres at 8.30 a.m. on the 2nd of April.

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On the 1st of April 1993 the Bank through its Chief Manager replied to the Applicant's letter of the 31st of March stating that in view of the pressure of work related to the Bank's Financial year ending on 31st March 1993 it would allow the Applicant to conduct secret ballots at all branches of the Bank at 5 p.m. on the 2nd of April instead of 4.30 p.m. on the 1st of April 1993 at Suva and 8.30 a.m. on the 2nd at other branches.

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This letter displeased the Applicant or, it would appear more particularly, its National Secretary Dewan Shankar who has sworn and filed an affidavit on

A behalf of the Applicant so much that on the 1st of April 1993 he replied to the Bank's letter of that date stating that in the circumstances the Union would conduct the secret ballot in Suva that day outside the Bank in full view of the Suva Public and the Press. The letter concluded with this far from conciliatory remark "This I am sure will give your Bank the necessary publicity it deserves and confirm our view that the process of taking mandate from members was being discouraged". Mr. Shankar ended by extending his best wishes to the Chief Manager but this did not serve to prevent what in my view was a situation B which could and should have been avoided had both the parties shown less obstinacy and had the supervisor of the ballot appointed by the Registrar of Trade Unions Mr. Senitiki Lesi shown more understanding of the Trade Unions Regulations than he did.

C According to a report by Mr. Lesi annexed to an affidavit by Mr. Nainendra Nand, State Solicitor in the Attorney-General's Chambers who was the Acting Registrar of Trade Unions at the relevant time, Mr. Lesi arrived at the office of the Bank of Baroda at about 4.28 p.m. on the 1st of April 1993. He states he left the Bank at 5.10 p.m. He states further that on his arrival at the Bank he met the Applicant's Officers and Management and was told by them that the supervision of balloting would have to be conducted after 5.00 p.m. and would D be held on the same floor i.e. 1st floor and that all arrangements had been made.

Mr. Lesi says that at this stage the Secretary of the Union, Mr. Shankar walked in and questioned the management staff as to what authority they had to decide on where and how the balloting was to be conducted. Mr. Lesi says that he was called by the management to tell them where the balloting could take place and was shown a letter written by the Union stating that if the Union was not E allowed to conduct the balloting inside the Bank premises it would conduct it outside the Bank premises in full view of the public.

I interpolate here that so far this appears to be consistent with the allegations made by Mr. Shankar both in his affidavit of the 20th of April 1993 and his F letter to the Bank of the 1st of April.

Returning to Mr. Lesi's report he states that the management then requested him to ask the Union to withdraw its letter stating that the balloting could be conducted in a public place. It appears that Mr. Shankar refused to withdraw the letter whereupon the management said the Union could not conduct the ballot inside the Bank premises. Mr. Lesi's report then continues, "I informed G Mr. Shankar that my instructions were to supervise the balloting inside the Bank premises. I also made it clear to Mr. Shankar I will only supervise the balloting inside the Bank. The Union Secretary insisted that he will have the balloting conducted outside the Bank. I then refused to supervise and left at 5.10 p.m. Whilst I was leaving I noticed the ballot box was placed at the footpath in front of the Bank's main entrance. Since the Union was going to conduct the balloting outside Bank premises I left before they commenced."

This latter part of Mr. Lesi's report differs from paragraph 8 of the affidavit of Mr. Shankar of the 20th of April which reads in part as follows:

"That the Applicant conducted its secret ballot at the Suva premises of the Bank on 1st April, 1993 in accordance with the provisions of the Trade Union Regulations (Amendment) Regulations 1991. The designated officer, Mr. Lesi appeared, checked the ballot box, gave the go ahead and supervised the ballots both inside and outside the Bank's premises. All voting was conducted at the Bank's premises and Mr. Lesi decided to leave at about 5.20 p.m. by which time the voting was completed and as the returning officer I declared the voting closed."

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On the 7th of April the Applicant advised the Registrar of the results of the secret ballot taken at the Bank's branches throughout Fiji. This was to the effect that of a total number of 152 votes cast 125 members voted in favour of a strike, 23 voted against the strike and there were 4 invalid votes.

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Earlier on the 2nd of April the Applicant had written to the Minister expressing its concern at the actions of Mr. Lesi and of the Acting Permanent Secretary for Labour and Industrial Relations.

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In part Mr. Shankar, author of the letter, stated that he was not aware of any law giving the supervisor of a ballot appointed by the Registrar the right to determine whether a ballot takes place. Mr. Shankar also stated that the law does not stipulate where a mandate of strike action should be taken.

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On the 13th of April the Minister apparently indicated his intention to declare illegal the strike by the Union and there is no doubt this was because in the Minister's view the ballot conducted in Suva was not supervised by the delegate of the Registrar of Trade Unions.

In its application for Judicial Review the Applicant gives various grounds most of which it is unnecessary to mention here but those which are relevant are:

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(i) that the Registrar of Trade Unions had no power to declare the result of the secret ballot held at the Bank of Baroda Suva null and void;

(ii) that the Registrar disregarded the provisions of the Trade Unions Act (Cap 96) and the Trade Unions Regulations (Amendment) Regulations 1991;

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(iii) that the Registrar did not give the Applicant an opportunity to make submissions on the relevant matters or a fair hearing before making his decision on the 16th of April

1993;

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(iv) that the Registrar had no power in law to make the decision because he had been invalidly appointed and his appointment had not been gazetted;

(v) that the Minister had no power to declare the strike unlawful and to order discontinuance of strike action.

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The relevant provisions for secret ballots in industrial matters are contained in Regulations 10 and 10B. of the Trade Unions Regulations (Amendment) Regulations 1991. Regulation 10 reads as follows:

“Secret ballot

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10.1 The ballot shall be conducted by the returning officer appointed by the unions under the supervision of the Registrar of Trade Unions, or some other persons, being an employee of the Ministry of Employment and Industrial Relations, designated by the Registrar to be present at and to supervise that ballot.

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(2) The returning officer shall at the conclusion of the ballot prepare and make available to the Registrar a record showing

(i) the total number of eligible voters;

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(ii) the number of votes in favour of the matter or matters being voted on;

(iii) the number of votes against the matter or matters being voted on, and

(iv) the number of informal votes.

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(3) Notwithstanding anything in the rules of the union, the Registrar of Trade Unions or a designated person may take such action and give such directions as the Registrar of Trade Unions or designated person shall consider necessary to prevent the occurrence of any irregularity in or in connection with the ballot.

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(4) Any irregularity identified shall be reported by the person designated to supervise the election to the Registrar of Trade Unions who if satisfied that the irregularity actually existed shall declare the result of the ballot null and void.”

Regulation 10B. is thus:

“Special ballot procedure

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10B.(1) The procedure to be followed in taking a secret strike ballot shall be as follows:

(a) the ballot shall be held before a trade union authorises or endorses a call for strike action;

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(b) all members of the trade union calling the ballot who are employed by an employer or employers whose employees are to be called out on strike shall be entitled to vote;

(c) no one denied entitlement to vote shall be called on with the authority of the trade union to take part in the strike action;

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(d) voting shall be by the marking of a ballot paper;

(e) those voting shall be able to do so without interference or constraint on the part of the union or any of its members or officials or employees, or on the part of any other person;

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(f) so far as is reasonably practicable, all those entitled to vote shall:

(i) be able to vote in secret;

(ii) be supplied with a voting paper or have one made available to them during their working hours (or immediately before or after their working hours) either at the workplace or at a place convenient to them;

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(iii) be given a convenient opportunity to vote either by post, or during their working hours (or immediately before or after their working hours) either at their workplace or at a place more convenient to them, or a choice between these two methods of voting;

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(iv) be able to vote at no direct cost to themselves;

(g) the questions on the ballot paper shall be framed so as to require a “yes” or “no” answer;

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(h) votes cast shall be accurately and fairly counted (only accidental mis-recording on a scale which could not affect the result is allowable without the ballot being rendered invalid);

- A (1) as soon as is reasonably practicable after the ballot the union shall take the necessary action to ensure that all those entitled to vote have voted and the Registrar are informed of the number of:-
- total votes cast in the ballot;
  - "yes" votes to the question (or, if more than one, each question) in the voting paper;
  - B - "no" votes to the question (or, if more than one, each question) in the voting paper;
  - the number of informal votes.
- C (2) An affirmative strike vote on a particular issue or issues shall authorise a trade union committee to call a strike on that issue or issues during a six week period from the date of declaration of the result of the ballot by the returning officer."

D The Applicant submits that the appointment of Nainendra Nand as Acting Registrar was invalid because it says that the Trade Unions Act Section 3 provides for the appointment of a Registrar of Trade Unions and Section 4 authorises the Minister to appoint one or more Assistant Registrars. It is submitted that the intention of the legislature is clearly that there may be at any time only one Registrar where as there can be more than one Assistant Registrar.

E At all relevant times the Registrar of Trade Unions was Mr. A. Katonivualiku ("Kato") who on about 6th of April 1993 was out of Fiji. By notice dated 28th of April 1993 published in the Government Gazette the Minister appointed Mr. Nainendra Nand to be the Registrar of the Trade Unions from the 6th to 30th of April 1993.

F The Applicant contends first that there is no power to appoint an Acting Registrar and secondly that the appointment was invalid because it was retrospective.

Accordingly as Mr. Nand's appointment was invalid it follows, according to the submissions, that he was in no position to make any declarations as Registrar.

G Similarly with regard to the Minister's order of 16th April 1993 declaring the strike unlawful it is submitted that as the Minister made this upon the decision of the Registrar of Trade Unions that there had been no properly conducted strike ballot it follows with the Minister's Order was likewise invalid.

In answer to these submissions the Respondent argues that they ignore the provisions of Section 39(1) of the Interpretation Act Cap. 7 which states that any reference in any written law to a power to make appointment to any office shall, except where a contrary intention appears, be construed as including power to appoint a person to act in that office during any period the office is vacant or

the holder thereof is unable to perform the functions of that office.

Under sub-section 2 in any written law or instrument, warrant or process a reference to the holder of an office by the term designating his office shall, unless a contrary intention appears, be construed as including a reference to any person for the time being lawfully acting in or performing the functions of that office.

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Lastly under sub-section 3 where a person is appointed under any written law to act in or perform the functions of any office because the holder thereof is himself unable to perform those functions no such appointment shall be called in question on the ground that the holder of the office was not unable to perform those functions.

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There is no dispute that Mr. Kato was out of Fiji at all relevant times and unable to physically perform his duties here under the provisions of the Trade Unions Act. In these circumstances in my judgment the logical thing to do and which is frequently done in other similar situations was for the Minister to appoint in effect an Acting Registrar to perform Mr. Kato's functions while he was abroad.

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The Applicant's submissions both as to the decision of Mr. Nand and the subsequent order of the Minister must therefore fail. In my judgment the Minister's act in appointing Mr. Nand for the period 6th April to 30th April 1993 was legal.

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As to the Applicant's submission that Mr. Nand's appointment was invalid because it was made retrospective from 28th April 1993 the Respondent relies on Section 2 of the Interpretation Act which states that "Act" includes any Act of Parliament and subsidiary legislation. I cannot see the relevance of this section to the matter before me nor to the reference by the Respondent to Section 5(2) of the Interpretation Act which deals with the commencement of the Act and not acting appointments. However I consider the Respondent is on stronger ground when answering the Applicant's submission on retrospectivity.

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Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. It is a fundamental rule of the common law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication - West v. Gwynne [1911] 2 Ch.1, per Kennedy L.J.

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In my judgment there must be implied into the Trade Unions Act a power by the Minister to make retrospective appointments of the Registrar of Trade Unions if the circumstances warrant this. The functions of the Registrar are important and I have little doubt onerous for much of the time.

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To enable those functions to be performed it seems to me both common sense and legally warranted to allow the Minister power to make retrospective appointments of this nature lest there should be any unnecessary halt in the functions of the



A Registrar due for example to his absence abroad or illness. The Trade Unions Act and its connected legislation are important parts of our law and it would be wrong in my view for their operation to be prevented or frustrated by holding that the Minister has no power to make such retrospective appointments. I therefore reject the Applicant's submission on this point.

B There is also a presumption in law that the decision or order of the Minister in appointing Mr. Nand was properly and validly made. In this case I consider that the maxim "*omnia praesumuntur rite esse acta*" applies here. I am not satisfied that the Minister's action was ultra vires the Trade Unions Act and I therefore reject this submission by the Applicant.

C I now pass to the question of validity of the ballot at Suva. I have not found this easy to resolve but in the end have come to the conclusion that the action of Mr. Lesi in refusing to supervise the ballot was wrong in law. Here it is necessary to refer again to the provisions of the Trade Unions Regulations (Amendment) Regulations 1991 and particularly first to Regulation 10(1).

D This requires the ballot to be conducted by the Returning Officer appointed by the Union under the supervision of the Registrar of Trade Unions or his delegate. The word "supervision" is derived from the Latin words "super" meaning above and "videre" meaning to see. The word "supervision" therefore literally means to oversee and in my view that means in cases such as the present to be physically present overseeing the conduct of the ballot to ensure that no irregularities occur.

E I therefore reject the submission by the Applicant that the supervision can be physical or otherwise in the sense that if the designated supervisor chooses not to stay while the ballot is being held it does not follow that the ballot is improper.

But in my judgment the supervision meant by Regulation 10 must be in accordance with the law. Here one must refer to Regulation 10B.(1)(f). This sub-paragraph begins with the important words "So far as is reasonably practicable, all those entitled to vote shall:

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- (i) be able to vote in secret;
  - (ii) be supplied with a voting paper ..... either at the work place or at a place convenient to them;
  - (iii) be given a convenient opportunity to vote either
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- by post or during their work hours (or immediately before or after their work hours) either at their work place or at a place more convenient to them .....

I have emphasised these words in sub-paragraph 3 because in my judgment the supervisor Mr. Lesi ignored them.

It is clear in my view from sub-paragraphs (ii) and (iii) of sub-paragraph (f) that the convenience with which Regulation 10B. is concerned is that of the employees entitled to vote and not others. In my view an employer is not entitled to dictate where a secret ballot is to be held nor can the Registrar of Trade Unions. It is the choice of the employees entitled to vote at whatever place is convenient to them either at the work place or somewhere else more convenient which matters and to this extent I therefore agree with the remarks in paragraphs 20 and 21 in the letter of the Union to the Minister of the 2nd of April 1993 that the Ministry of Labour supervisors had no right to determine where the ballot was to take place. The choice of this location was by law that of the employees.

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I am satisfied on the evidence before me that the Bank stated it would not allow voting inside its premises unless the Union withdrew the letter it had written to the Bank on the 1st of April.

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This is confirmed by a paragraph on page 2 of the letter the Union wrote to the Acting Registrar of the Trade Unions on the 15th of April 1993 which reads:

“At 4.58 p.m. Mr. Shanti Chandra told Mr. Lesi, and later to me, that the Bank would not allow voting inside its premises unless the Union withdrew the letter it had written to the Management earlier that day.”

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In Mr. Lesi's report annexure NN9 to the affidavit of Nainendra Nand sworn on the 19th of October 1993 this statement is confirmed.

Mr. Lesi states that the management informed him that the Union could not conduct the ballot inside the Bank premises unless it withdrew its letter stating that the ballot could be conducted in a public place.

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In my view Mr. Lesi was wrong in telling the Applicant's Secretary Mr. Shankar that he would only supervise the balloting inside the Bank. In my view when faced with this situation his duty was not to accede as readily as he appears to have to the Bank's ultimatum but to have then and there consulted the employees concerned to ascertain where they wished the ballot to take place i.e. to find out which place was more convenient to them.

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It is clear that he failed to do so and thus in my judgment he misconstrued his duties under Regulation 10B.

Undoubtedly some form of ballot took place outside the Bank's premises so that I am entitled to assume that this was more convenient to those participating than inside the Bank.

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In any event because the Bank was of the opinion (wrongly in my view) that it had the right to stipulate where the ballot was to take place, there could easily have been a confrontation between the employees and the Bank if they had insisted

A on the ballot taking place inside the Bank. Discretion is the better part of valour.

B For these reasons I have come to the conclusion on the material before me that both the Registrar of Trade Unions and subsequently the Minister misconstrued the provisions of the Trade Unions Act Cap. 96 and the Trade Unions Regulations (Amendment) Regulations 1991 in that the supervisor of the secret ballot acted in excess of the powers given to him by Regulation 10B.(1).

C I accordingly uphold the grounds of relief No. 3(I) and (iii)(a) and (b). It is thus strictly speaking unnecessary for me to refer to the other principal argument of the Applicant that the Registrar denied the Applicant natural justice by not giving the Applicant the opportunity to make submissions on the relevant matters. However since I have received full argument on this question I should say that I reject the Applicant's submission on this.

D Administrative Law talks much about the right to a fair hearing but this is not a universal or unqualified right. What is essential is substantial fairness to the persons adversely affected. The Applicant complains that it did not see Mr. Lesi's report but I have no doubt that at all times at least since the Registrar's letter to the Union of the 14th of April 1993 the Respondent had indicated to the Applicant the substance of the case that it had to meet. I therefore consider that the Applicant was not denied natural justice in this case.

E The result is that I uphold the application for Judicial Review on the grounds I have stated and issue certiorari to quash the decisions of the Registrar of Trade Unions and the Minister for Labour and Industrial Relations dated 16th of April 1993. I also order the Respondent to pay the Applicant's costs to be taxed if not agreed.

*(Motion allowed in part.)*

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