

**COMMONWEALTH OF DOMINICA****IN THE COURT OF APPEAL**

CIVIL APPEAL NO. 5 OF 1997

BETWEEN:

**J. ASTAPHAN AND Co.(1970) LTD.****APPELLANT****AND****THE ATTORNEY GENERAL OF THE COMMONWEALTH****OF DOMINICA****RESPONDENT**

Before:	The Hon. Satrohan Singh	Justice of Appeal - President
	The Hon. Albert Redhead	Justice of Appeal
	The Hon. Lyle St. Paul	Justice of Appeal (Ag.)

Appearances: Mr. A. Astaphan for the Appellant  
Mr. Williams for the Respondent

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1997 September 17 & 29  
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*Administrative Law* - Delegated Legislation - Whether the Orders made by the Minister purporting to act under statutory powers were valid & intra vires his statutory powers - Whether the Orders were in keeping with the principles of fairness &/or legitimate expectations of the plaintiff - Need to obtain an import licence, not previously required - *Supplies Control Act* - Principles governing the exercise of a discretion conferred by statute - **Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.** (1947) 1 K.B. 223; **Padfield v Minister of Agriculture** (1968) A.C. 997 considered - Whether the provisions of a Treaty not yet enacted into local law could lawfully be considered in exercise of the statutory discretion - **J.K. Rayner Ltd. v. Department of Trade** (1990) A.C. 418 considered. Appeal allowed.

**JUDGMENT****REDHEAD, ALBERT J.A.**

On 2nd June, 1992 the appellant made an application by way of an

Originating Summons in which he sought the following declarations:-

- (1) A declaration that S.R.O 33 of 1987; 21 of 1988 and 20 of 1990; made by the minister pursuant to Section 4(1)(b) of the Supplies Control Act chapter 20.01 are unreasonable and or are ultra vires the powers of the minister and are therefore null and void.

- (2) A declaration that S.R.O 33 of 1987; 21 of 1988 and 20 of 1990; made pursuant to Section 4(1)(b) of the Supplies Control Act chapter 20.01 in so far as they relate to wheat flour are null and void in that they are made contrary to the Principles of fairness and or the legitimate expectations of the plaintiff.

In support of the application, an affidavit was filed by the Managing Director of the appellant, containing some forty-eight (48) paragraphs. In his affidavit, the Managing Director deposed that the plaintiff had been importing flour from Trinidad and Tobago from the year 1985/1986 without the need to obtain a licence to do so.

However, the government passed the Supplies Control Act chapter 20.01 which came into effect on 17th January, 1980. In 1987 the Minister purporting to act under Section 4(1)(b) of the Act passed S.R.O. 33 of 1987, 21 of -1988 and 20 of 1990 which placed cereal flour of wheat on the negative list of import. As a result, the plaintiff was required to get an import licence, which was sometimes denied him, in order to import flour from Trinidad and Tobago.

In his affidavit the Managing Director of the plaintiff said, that the reason for the refusal of his application for a licence was that flour must be sourced from within the O.E.C.S sub-region and reliance was usually placed on Article 56 of the Treaty of Chaguaramas.

The learned trial judge at page 12 of his judgment wrote that there was no evidence before the Court that the minister had taken into account any resolution made by the council of Ministers or any provisions of the Articles of the Treaty of Chaguramas or any other Treaty in making the relevant orders.

The learned trial judge concluded:-

**"The issue, the live issue, is whether the orders made by the minister pursuant to Section 4(1)(b) of the Supplies control Act chapter 20.01 viz S.R.O. 33 of 1987 S.R.O. 21 of 1988 and S.R.O. 20 of 1990, in so far as they relate to wheat flour, are ultra vires the powers conferred on him by the said Section 4 of the Act. . . On the affidavit evidence of Larocque on the factual issues, which I accept and my interpretation of the law, I am of the view, that the ultra vires doctrine has no application to the Orders made by the minister under S. 4(1)(b) of the Supplies Control Act chapter 20.01."**

Mr. Astaphan submitted that the learned trial judge was in error in holding that there was no evidence before the Court to show that the minister took into account any resolution made by the council of Ministers or any provisions of the articles of the Treaty of Chaguaramas or any other Treaty in making the relevant orders.

Learned Counsel referred to the affidavit of Irwin Larocque, sworn on behalf of the defendant. Mr. Astaphan argued that Larocque does not say that the minister did not consider the Treaty of Chaguramas or the resolution of the Council of Ministers. In fact Mr. Astaphan contended that Larocque expressly and or implicitly admitted that the minister did in fact consider these matters and that they were the basis in relation to the importation of, inter alia, wheaten flour.

Mr. Astaphan argued that the learned trial judge was wrong in holding inter alia, that Section 4 of the said Act is wide enough for orders made thereunder to reflect the Government's trade policies.

Counsel submitted that there is no such thing as an untrammelled absolute discretion and all discretions or powers conferred by statute must be exercised in a manner that is consistent with the provisions of the Act which confers the directions or powers and which promotes the policies and objects of the Act.

Learned Counsel in support of his submission referred to the following cases among others:-

**ASSOCIATED PROVINCIAL PICTURE HOUSES LTD. v WEDNESBURY**

**CORPORATION (1948) 1KB 223**

**PADFIELD c MINISTER OF AGRICULTURE, FISHERIES and FOOD**

**(1968) A.C. 997**

Sections 3 and 4 of the Supplies Control Act chapter 20.01 provide as follows:-

- "3(l) The minister may appoint a suitably qualified public officer to be Controller for the purposes of this Act.
- (2) Without prejudice - to the succeeding provisions of this Act it shall be the function of the Controller to recommend programmes for maintaining, controlling and regulating supplies so as to:
- (a) Secure a sufficiency of those commodities or goods essential to the well being of the community, the equitable distribution thereof and their availability of fair prices; Ensure that exports and imports of commodities are calculated to serve the interest of the community; and
- (c) Ensure generally that the commodities or goods available to the community are used in a manner calculated to serve the community.
- 4(1) The minister may by order-
- (a) Prohibit absolutely the importation or exportation of goods of any class or description from or into any country;
- (b) Prohibit the importation or exportation of goods of any class or description except under the authority of a licence issued by the Controller;
- (c) Control the prices at which goods of any class or descriptions may be sold whether by wholesale or retail."

Mr. Astaphan's argument is that Sections 3 and 4 must be considered together. In considering the minister's powers under Section 4 of the Act the words, "maintaining" "controlling" and "regulating" in Section 3(2) bear important significance.

Learned Counsel argued that the effect of Section 4(ii) is that the minister cannot exercise his discretion under that Subsection unless there is a recommendation by the controller in accordance with Section 3(2)(a)(b) or (c) of the Act.

Mr. Astaphan stressed in his argument that in order to determine the scope and ambit of the minister's discretion one has to examine the legislation.

In **ASSOCIATED PROVINCIAL PICTURE HOUSES LIMITED v WEDNESBURY CORPORATION (1947) 1KB 223 at page 228** Lord

Greene MR said:-

**"When discretion of this kind is granted, the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any Court of law. What then are those principles? They are well understood. They are principles which the Court looks to in considering any question of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication, matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters."**

Mr. Astaphan's argument is that when Parliament conferred the discretion on the minister by Section 4 of the Act that discretion conferred to promote the policy and objects of the Act as contained in Section 3.

In **PADFIELD v MINISTER OF AGRICULTURE, FISHERIES FOOD (1968) A.C. 997 at 1030**

Lord Reid said:-

**"Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by constructing the Act as a whole and construction is always a matter of law for the Court. In a matter of this kind it is not possible to draw a hard and fast line, but if the minister, by reason of his, misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to We protection of the Court. so it is necessary first to construe the Act."**

Mr. Astaphan argued that a proper construction of the Supplies Control Act chapter 20.01 supports the conclusion that the Treaty of Chaguaramas and the resolution of the Council of Ministers are not policies or objects of the said Act nor are they relevant considerations to be taken into considerations either by the Controller of Supplies or the Minister.

Learned Counsel further argued that the construction of the Act determines that the discretion conferred on the Minister and or the Controller of Supplies are intrinsically interwoven with the provisions of Section 3(2) and other Sections of the Act.

Mr. Astaphan further submitted that as the resolutions and Treaty of Chaguramas have not been incorporated or enacted in law they cannot alter any of the provisions of the said Act and therefore cannot be lawfully be considered by Minister nor the Controller of Supplies.

I agree entirely with this submission because if the minister in exercising his discretion under S.4 of this Act were to take into consideration the resolutions of the Council of Ministers or the Treaty of Chaguramas he would be taking into consideration irrelevant matters.

In **J.K. RAYNER LTD. v DEPARTMENT OF TRADE (1990) A.C. 418 at 499-500**

Lord Oliver said:

**"It is aximotic that municipal Courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law...**

**On the domestic plane, the power of the Crown to conclude treaties with other sovereign states is an exercise of the Royal Prerogative, the validity of which cannot be challenged...**

**That is the first of the underlying principle. The second is that, the Royal Prerogative whilst it embraces the making of treaties does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it sometimes expressed, are not self executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation."**

Mr. Williams argued that on a reading of Sections 3 and 4 of the Act,; Section 3 can stand on its own and Section 4 can also stand on its own and that the minister can exercise his discretion under Section 4 independently of Section 3.

I do not agree with Mr. Williams' argument. It is my view that Section 4 as crafted cannot stand independently of S.3.

Mr. Williams in support of his contention that S-4 stands independently of S.3 and that the minister may make an order outside of S.3, argued that the minister may also make an order in relation to S 32 and the long title of the Act.

I do not agree. Section 32 empowers the minister to make regulations:

- "(a) prescribing the forms of licences and any other forms to be used.
- (b) for prescribing any thing that needs to be prescribed under this Act and
- (c) generally for the carrying out of the purposes of this Act."

The long title states:

**"An Act to provide for the maintenance and regulation of supplies and for other matters incidental thereto and connected therewith."**

I am of the opinion that S.32 has absolutely no relationship with S. 4 of the Act. How could a power granted to the minister under S 4 to exercise a discretion to make order have any connection under Section 32 which gives the minister power to make Regulations prescribing the forms of licences or any other forms to be used? Neither can the long title of the Act standing alone provide the minister with power to exercise his discretion under S. 4.

Finally Mr. Williams submitted that given the ambit of the minister's discretion under S. 4 he can implement matters such as contained in S.2 of Article 3 of chapter 17.01 which deals with the Treaty of the Organisation of Eastern Caribbean States. S. 2 states inter alia that a member states will endeavor to co-ordinate, harmonise and pursue joint policies particularly in the field of -

- (a) \_\_\_\_\_
  - (b) International Trade Agreements and other External Economic Relations.
- (Seventeen other subjects are listed.)

**"Member states shall take all appropriate measures whether general or particular to ensure the carrying out of obligations arising out of this Treaty or decisions taken by the institutions of the Organisation."**

Article 4 provides inter alia:

**"..... each member states shall take all necessary steps to secure the enactment of such legislation as is necessary to give effect to this treaty."**

It is admitted that by both sides that the Government of Dominica did not enact the Treaty of the Organisation of Eastern Caribbean States.

It is quite clear from the affidavit evidence of Larocque that the minister in exercising his discretion under S. 4 of the Act took into consideration the Treaty of Chaguaramas and the resolutions of the council of Ministers. He therefore took into consideration irrelevant considerations in making the impugned orders Le S.R.O. 33 of 1987; S.R.O. 21 of 1988 and S.R.O. 20 OF 1990.

The appeal is therefore allowed.

The judgment and order of the learned trial judge is hereby set aside.

It is hereby declared that the orders made by the minister pursuant to Section 4(1)(b) of the Supplies Control Act cap. 20:01, namely S.R.O. 33 OF 1987; S.R.O. 21 of 1988 and S.R.O. 20 of 1990 in so far as they relate to wheat flour are ultra vires the powers of the minister and are null and void.

There will be costs to the appellant in the Court below and in the Court of Appeal to be taxed if not agreed.

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Albert J. Redhead  
Justice of Appeal

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Satrohan Singh  
Justice of Appeal - President

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Lyle St.Paul, O.B.E., C.B.E.  
Justice of Appeal (A.g)