

ST. CHRISTOPHER AND NEVIS

IN THE HIGH COURT OF JUSTICE

ST. CHRISTOPHER CIRCUIT

(CIVIL)

CLAIM NO. SKBHCV 2003/0170

BETWEEN

PREMIER LEAGUE LIMITED

CLAIMANT

and

THE ATTORNEY GENERAL

DEFENDANT

Appearances:

Mr. John Fuller for the Claimant

Mrs Cynthia Hinkson-Oulah, Crown Counsel for the Defendant

2005: Dec 13, July 14

JUDGMENT

[1] **BELLE J.** The parties in this matter by memorandum dated 25th August 2005 agreed on the following facts with the exception of the statement made in paragraph 8:

"1. On the 5th day of September, 2001 the claimant Premier League Ltd. filed an action in Suit No. 122/2001 against defendants E. Payments Solutions Ltd. and Digital Courier Technologies Limited, claiming the sum of US\$349,618.37 being monies alleged to be the property of the claimant collected and held by the 1st and 2nd defendants respectively.

2. On the 23rd day of November 2001, the claimant obtained judgment in default of appearance against E. Payments Solutions Ltd.

3. On the 28th day of December 2001, the claimant was granted a provisional attachment of debt order against garnishee, Data Bank Int'l Inc.

4. On the 8th day of February 2002, the claimant was granted leave to amend the name of the 1st defendant in Suit No. 122/2001 to E. Payments Solutions Inc. The court also granted a freeze order against garnishee, Data Bank Int'l Inc.

5. By the said order dated the 8th day of February 2002, the court further ordered inter alia:

"that Introactive One SRO and Caribbean Casino Corporation be served with the attachment of debt proceedings herein by serving same on the Attorney representing on record in this jurisdiction in Suits No. 29 of 2001 and 39 of 2001 respectively, and on the St. Kitts, Nevis and Anguilla National Bank Ltd. pursuant to Part 50.11 of the CPR 2000."

6. On the 29th April 2002 E. Payments Solutions Inc. obtained an order to set aside the default judgment.

7. The court granted leave to appeal and further ordered that the freeze order of the 8th day of February 2002 continues until the determination of the claimant's appeal.

8. On the 29th day of April 2002 by notation contained in the Registrar's Chambers Book for the period 16th January 2002 to 4th December 2002, the claimant was notified by the court that all other matters in relation to Application for attachment of debts in Suit Nos. 29, 39, 122, and 118 of 2001 would be heard on 31st day of May 2002.

9. On the 13th day of May 2002 the claimant filed its appeal.

10. On the 31st day of May 2002, the court in Suit Nos. 29 and 39 of 2001 lifted the freeze order of 8th February, 2002 to allow the transfer of funds held by the Garnishee Data Bank Int'l Inc, on behalf of the Judgment debtor E. Payment Solutions Inc., to the judgment creditors

in the said suits. There was no appearance entered on the behalf of the claimant.

11. On the 20th day of September 2002 the Court of Appeal allowed the appeal filed by the claimant.

12. On the 7th day of August 2003 the claimant filed the action herein. At paragraph 8 of the affidavit filed in support of its claim the claimant alleges that the order of 31st May 2002 resulted in the total depletion of the frozen funds held by the Garnishee Date Bank Int'l Inc. It contends in paragraph 9 of the affidavit that the said order of 31st May 2002 was made without it being given an opportunity to be heard. The claimant thereby contends that the judicial Branch of the defendant has deprived it of its property and acted in breach of the protection of the law as provided for in sections 8, 10(8) and 3 (a) (c) of the Constitution."

[2] The operative sections of the Constitution of Saint Christopher and Nevis read as follows:

"3. Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, birth, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely-

(a) life, liberty, security of the person, equality before the law and protection of the law;

© protection for his personal privacy, the privacy of his home and other property and from deprivation of property without compensation..."

"8 (1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except for a public purpose and by or under the provisions of a law that prescribes the principles in which and the manner in which compensation therefore is to be determined and given.

(2) Every person having an interest in or right over property that is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for-

(a) the determination of his interest in or right, the legality of the taking of possession or acquisition of the property, interest or right and the amount of any compensation to which he is entitled; and

(b) the purpose of enforcing his right to prompt payment of the compensation.

(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1)

(a) to the extent that the law in question makes provision for the taking or possession of or acquisition of any property, interest or right-

(iii) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract.

(iv) in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations.

10 (8) Any court or other authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time."

[3] The case, which arises on the facts as they are stated above, presents two issues for determination. They are: 1. Was the claimant given a fair hearing

by the court and 2. If the answer to number 1 is in the negative then were the claimant's constitutional rights to the protection of law and against the deprivation of its property contravened by the court's failure to grant or provide for a fair hearing?

- [4] The claimant has come to the court by way of Fixed Date Claim Form and this approach has not been challenged by the respondent. In its Fixed Date Claim the claimant claimed:

"1. A declaration that the Judicial Branch of the Defendant has contravened the claimant's fundamental rights to the protection of the law and protection of property and from deprivation of property without compensation guaranteed by the provisions of section 3(a) and (c), section 8 and section 10(8) of the Constitution of Saint Christopher and Nevis.

2. An order that the Claimant has been deprived of its property without the protection of law contrary to the provisions of section 3(a) and (c) and /or in contravention of the provisions of section 8 of the Constitution of Saint Christopher and Nevis.

3. An order that the Respondent do forthwith pay compensation in the sum of \$349,618.37 US together with interest at a rate of 8% per annum from the first day of August 2000 until payment and damages for the contraventions of the fundamental rights and freedoms of the Claimant."

- [5] The claimant exhibited with its application in support of the Claim a number of documents, which assist the court in piecing together the facts, and indeed verifying the facts as stated in the "agreed statement" of facts. I note firstly the order of 8th February 2002 in which a number of amendments are granted to the name of the First Defendant and to the name of the Garnishee Bank. It is

also notable that the freezing order as it has come to be called does not impose any conditions. Indeed the injunction is granted in the bald terms:

"That Data Bank International Limited is hereby restrained from disposing of any funds held by it in the St. Kitts Nevis and Anguilla National Bank whereby the amount so held decreases below US\$394, 000.00 until further order."

The said order also provided for the further hearing of the provisional attachment of Debt Order made 28th December 2001 to be adjourned to the 5th April 2002. Finally the order provided that Introactive One SRO and, Caribbean Casino Corporation be served with the attachment of debt proceedings herein by serving the same on the Attorney representing on record in the jurisdiction in Suits No. 29 of 2001 and 39 of 2001 respectively; and on the St. Kitts, Nevis and Anguilla National Bank Ltd pursuant to Part 50. 11 of CPR 2000.

[6] The relevant rules of Part 50.11 state as follows:

"(1) This rule has effect where the court is aware from information supplied by the garnishee or from any other source that someone other than the judgment debtor-

(a) is or claims to be entitled to the debt or

(b) has or claims to have a charge or lien on it.

.....

(3) Where this rule has effect, the court may require the judgment creditor to serve notice of-

(a) any hearing fixed by the court; and

(b) the application for an attachment of debts order; on any person who may have such an interest as is set out in paragraph (1).

(4) The notice must be served personally unless the person is a body corporate.

.....

(6) A notice under this rule must contain a warning to every person on whom it is served that, if that person does not attend court, the court may proceed to decide the issue in that person's absence."

[7] The claimant also exhibits an order dated 29th April 2002 in which it is ordered that 1. leave be granted to claimant to appeal the order made on the 29th April 2002; 2. the application for stay is granted for 14 days pending the filing of an appeal and 3. the freeze order to continue pending the determination of the matter. I do not find exhibited any order giving notice to the Claimant of a hearing of May 31st to determine the various interests in the funds held by the Garnishee Bank.

[8] I should add that there are exhibited two orders of the court of May 31st 2002 in the Suits Nos. 2001/0029 and 2001/0039 ordering that the sums of US\$1,005,107.79 and US\$366,072.35 be paid out of the frozen account to the respective judgment creditors in the two suits. There was also an affidavit of Ernest E. Pistana date 16 January 2003 attesting to the fact that the payments pursuant to the court's orders were in fact made.

[9] I conclude in the premises that it was reasonable for the claimant to expect to receive written notice of the hearing of May 31st 2002 especially after receiving an order from the court that the freezing order would continue

pending determination of the matter. It was therefore reasonable for the claimant to assume that nothing would be done to upset the freeze order which it had obtained pending the appeal on the matter of the setting aside of the default judgment. Indeed the success of the claimant's appeal did nothing to mitigate the shock caused by the release of the funds. Having resolved that factual issue, it becomes necessary to look at the constitutional implications of the decision to remove the freeze order.

[10] It must have been clear to all parties concerned that the claimant's interest in the proceeds of the funds which were released was of paramount importance to the Claimant and that loss of any kind of "control" over the property would be seen as very damaging indeed.

[11] I am therefore of the view that the failure to give the claimant proper notice of the hearing on 31st May was a breach of natural justice and the *audi alteram partem* rule referred to in **Cooper v Wandsworth Board of Works** (1863) 14 CB (NS) 180 and in modern times established in **Ridge v Baldwin** [1964] AC 40. I do not accept that because the attempt to prevent the release of the funds would have failed that there was no breach of natural justice. The right to a fair hearing is maintained both at common law and under section 10 (8) of the Constitution of Saint Christopher and Nevis. I note the defendant's submission on this point but I find that the circumstances in the instant case differ somewhat from those in **Cheall v Association of Professional, Clerical and Computer Staff** [1983] 2 All ER 1130 where a Trade Union had no option but to terminate the membership of its member, the respondent in the appeal, because it was in breach of a union agreement. But the trade union member was not himself privy to that agreement and his conduct was

not the subject of the dispute between the unions he therefore had no right to a hearing. But there is no evidence in the case at bar that the court was acting in breach of any rule whatsoever in imposing the freezing order and the claimant's absence from the hearing of May the 31st cannot be characterized as such a breach. Indeed the prior conduct of the proceedings being subject to Part 50.11 of the CPR would have implied that all parties to the proceedings would be given appropriate notice of any relevant hearing. No such notice has been exhibited by the defendant in these proceedings.

[12] Indeed it is somewhat dangerous to argue as the defendant has, that a hearing would have made no difference. As is stated in HRW Wade's Administrative Law at page 534, it is vital that the procedure and the merits should be kept strictly apart, since otherwise the merits may be prejudiced unfairly. Lord Wright's dictum in **General Medical Council v Spackman** [1943] AC 627 at 644 is therefore poignantly relevant.

"If the principles of natural justice are vitiated in respect of any decision it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."

In the case of **John v Rees** [1970] Ch 345 at 402 , Megarry J had this to say,

"As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; or unanswerable charges which, in any event, were completely answered; or inexplicable conduct which was fully explained; or fixed and unalterable determinations that, by discussion, suffered a change."

[13] I do however agree with the defendant that that the claimant cannot rely on the arguments that he was deprived of the protection of the law and of his property see: **Maharaj v Attorney General of Trinidad and Tobago (No.2) (1978) 30 WIR 310, Attorney General and Another v McLeod (1984) 32 WIR 450, Kent Garment Factory Ltd v Attorney General of Guyana and Another [1993] 3 LRC 240.** In the **Maharaj** decision Lord Diplock speaking on the behalf of the Board held at page 321 e-f,

".. even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 unless it has resulted , is resulting or is likely to result in a person being deprived of life , liberty, security of the person or enjoyment of property."

[14] Section 6 (1) of the Trinidad and Tobago Constitution at the time read as follows:

"6-(1 For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or section of this Constitution has been , is being, or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress."

Section 18 (1) of the Saint Christopher and Nevis Constitution states the law in very similar terms and then goes on to add:

"(2) The High Court shall have original jurisdiction-

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any

(c) person that is referred to it in pursuance of subsection (3)

and may make declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive).

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."

- [15] The additional issue, which arises at this point, therefore is whether the claimant had other adequate means of redress. The claimant was involved in Claim No. SKBHCV 2001/ 0122 in which it had obtained a judgment, which was later set aside. At all times these orders were obtained by way of court hearings and notice of the relevant attachment order would have been given to the parties to the other matters. There appeared to have been no order to consolidate the Claims No. 29 of 2001 and 39 of 2001 with 2001/0122 and the claimant had not intervened in those matters. Indeed intervention in the matters at the time when it discovered what had taken place was somewhat useless since the money in which it was interested had been dissipated. So did this constitute contravention of the constitutional right to the protection of the law?
- [16] Nothing prevented the claimant from continuing to pursue the defendants in the Suit 2001/0122 for its money except of course the fact that the First Defendant presumably no longer had any money. In my view this is not a matter of contravention of the protection of the law, but the consequence of

the failure to provide a fair hearing. There is no doubt that the claimant continued to enjoy access to the courts, even if its task of recovering the money allegedly owed had been made more difficult. The matter therefore boils down to the issue of deprivation of the right to enjoyment of property.

[17] I agree with the defendant, in so far as he argues that the claimant in spite of the freeze order would still have had to prove an entitlement to the property in the funds, which were released. It would have been clear to the Claimant from the date of the order of 5th April 2002 that there were competing interests. It is also true that the “freeze order” was not a prohibition on the release of the funds for other legitimate purposes. See: **Iraqi Ministry of Defence and Others v Arcepey Shipping Co SA (Gillespie Brothers & Co Ltd intervening) The Angel Bell** [1980] 1 All ER 480.

[18] In the **Iraqi Ministry** case GoffJ had this to say at page 485 -486 of the judgment:

*“As was made plain by Mustill J in the **Third Chandris** case, the point of the Mareva jurisdiction is to proceed by stealth, to pre-empt any action by the defendant to remove his assets from the jurisdiction. To achieve that result the injunction must be in a wide form because, for example, a transfer by the defendant to a collaborator in the jurisdiction could lead to the transfer of the assets abroad by that collaborator. But it does not follow that having established the injunction the court should not thereafter permit a qualification to it to allow a transfer of assets by the defendant if the defendant satisfies the court that he requires the money for a purpose which does not conflict with the policy underlying the Mareva jurisdiction.”*

And later the learned judge added:

"In truth, counsel for the plaintiffs, although he disavowed this purpose, was really seeking for his clients a priority to which they are not entitled in English Law."

[19] At the time of the discharge of the "freeze order" the claimant had no judgment and no attachment to the funds, which were released. In order to establish a proprietary interest the claimant must be able to show a definite interest; a mere expectancy as distinguished from a conditional interest is not a subject of property. The claimant did not have and therefore cannot claim any legal interest in the funds: See **Cretanor Maritime Co Ltd v Irish Marine Management Ltd** [1978] 3 All ER 164. Since the Claimant is unable to prove entitlement to a proprietary interest, it stands to reason that it is not entitled to claim that its constitutional right to protection against deprivation of property has been contravened.

[20] There is no doubt then that the discharge of the "freeze order" in the manner in which it was done was irregular and in breach of natural justice. But this does not elevate that act to the status of a contravention of the claimant's fundamental rights to the protection of the law and protection of property and from deprivation of property without compensation guaranteed by the provisions of section 3(a) and (c), section 8 and section 10 (8) of the Constitution of Saint Christopher and Nevis. Indeed under section 18 (2) of the Constitution there is a proviso, which permits the court to decline to exercise its powers under the section if it appears that there are other adequate means of redress available to the claimant.

[21] I therefore in addition to my earlier findings decline to exercise my powers under this section because I believe that there are other adequate, even if

more expensive means of redress available to the claimant. I therefore find for the defendant and dismiss the claimant's claim with costs to the defendant pursuant to Part 65.5 (2) (iii) of the CPR 2000 if not otherwise agreed.

Francis H.V. Belle
High Court Judge