SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 25 OF 2005

BETWEEN

SAINT LUCIA BANANA CORPORATION

Appellant

and

DEAN NICHOLAS

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh Rawlins	Justice of Appeal

Appearances:

Mr. Callistus Vern Gill for the Appellant
Mr. Tonjaka Hinkson for the Respondent

2006: February 6;
April 3.

JUDGMENT

[1] BARROW, J.A.: Legislative as well as contractual provisions were made for the Saint Lucia Banana Corporation (the Corporation) to be responsible for paying termination benefits to employees of the Saint Lucia Banana Growers Association (the Association) subsequent to the dissolution of the Association and its replacement, as employer, by the Corporation. The respondent was one those employees for whom provisions were made. The respondent and the Corporation differed over whether the respondent was to be treated as having been continuously employed by the Corporation for the combined years of service with both the Association and the Corporation.

[2] The respondent claimed in the High Court for a gratuity payment, pursuant to the terms of a collective bargaining agreement that had been made with the Association, calculated on 15 years[1] of continuous service that combined nine years of service to the Association with four years of service to the Corporation. The appellant resisted the claim on the basis that the respondent's service with the Association was terminated by the dissolution of the Association and his termination benefits in respect of that service had been computed and paid. The Corporation's position was that the respondent was not entitled to any termination benefit in respect of his years of service with the Corporation. Shanks J gave judgment for the respondent and the Corporation appealed this decision.

[3] The legislative provision upon which the respondent relied to contend that his service with the Association counted as service with the Corporation was the Saint Lucia Banana Growers Association (Dissolution) Act[2] ("the Dissolution Act"). Section 3 provides:

> "3. Upon the commencement of this Act –
> (a) …;
> (b) all rights, privileges, advantages, obligations and liabilities to which immediately before the commencement of this Act the Association is entitled or subject to as the case may be shall be transferred to and conferred or imposed upon the Corporation;
> (c) any reference in any contract …to the Association shall, upon the coming into operation of this Act, be construed as a reference to the Corporation."

The commencement date of the Act was 1st October 1998.[3]

[4] Clear provision was made for the survival of the Association's obligations notwithstanding its dissolution, by section 4, which states:

> "4. (1) The Saint Lucia Banana Growers Association is hereby dissolved.

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[1] The number of years is derived from the formula established by the collective agreement.
[2] No. 17 of 1998
[3] section 6

> (2) Subsection (1) shall not affect any agreement, undertaking or other contractual obligation or any other matter or thing, duly approved or entered into, or done prior to the commencement of this Act and the same shall be dealt with or carried out as though they were made, approved or entered into by the Corporation."

[5] At the time that the Association was dissolved the respondent had worked for the Association as Internal Auditor for two months short of ten years. The collective agreement that governed employee entitlements provided for the payment of a gratuity to "employees who have given 10 years continuous service to the Association..."

[6] The contractual provision upon which the respondent relied to contend that his service with the Association counted as service with the Corporation was contained in a document called a Deed of Deposit. On 29th September 1998, two days before the commencement date of the Dissolution Act and therefore the date of the dissolution of the Association, the union that represented the employees and the Association entered into the Deed of Deposit that provided for the payment of gratuity to employees. The Deed provided that the Corporation would pay moneys into a fund to be used by trustees to pay gratuities and other benefits to employees when they left the employment of the Corporation. The Deed provided both for employees who had already served ten years and for those who had not yet served ten years.

[7] Shanks J saw the object of the Deed as being to establish a separate and secure fund from which gratuity and other benefits could be paid in so far as they accrued before the dissolution or were in the course of accruing, in the case of employees such as the respondent who had served for more than seven but less than ten years.

[8] In the case of the respondent the Deed set out the sums to which he was then entitled for severance pay and for leave and increment. It also stated the gratuity to which he would become entitled and the qualifying date on which he would

become so entitled. The total of the sums to which the respondent would become entitled at the qualifying date, in respect of his employment with the Association, was stated to be $76,923.86. Included in that sum was $5,000.00 for severance pay. The appellant's general manager said in his witness statement that this total sum was paid to the respondent by cheques dated 21st June 2001, 28th October 2002, 9th December 2002 and 17th January 2003. The respondent's witness statement stated that the payments he received were advances drawn against the sum, paid into the fund to account of the respondent's entitlement, that would be payable to him upon leaving the Corporation's employment.

[9] Shanks J expressed the following view of the effect of the legislative provisions:

> "It seems clear that these provisions were intended to substitute the Corporation for the Association for all legal purposes and to prevent any third party who had dealt with the Association being prejudiced by the dissolution. It follows that unless their contracts were terminated before 1 October 1998 the Claimant and any other existing employees of the Association automatically became employees of the Corporation on that date and that the terms of their contracts and any accrued rights thereunder would automatically transfer and be enforceable against the Corporation. Thus, the Claimant's right to a gratuity and his nine plus years of continuous service for the purposes of qualifying for and calculating the amount of the gratuity would remain in existence against the Corporation and the gratuity would in due course be payable if he achieved a total of ten years continuous service with both the Association and the Corporation. I should add that it also follows that the Association's rights and liabilities under the collective agreement with the union transferred to the Corporation."

[10] On appeal the Corporation argued that the judge did not take into consideration the effect of the employee having been paid and having taken receipt of severance payment from the Association. Counsel for the Corporation argued that the effect of that payment was to confirm that the employment was terminated or severed. Severance payment, it was argued, is only paid upon the severance of employment; therefore, the fact that it was paid meant that the employment was severed. It was argued that his employment having been severed, the respondent could not have been continuously employed.

[11] To that argument I would say that it is impossible to argue away the clear provisions of the Dissolution Act. The fact that the union and the Association arranged for a fund to be created that was to be used in the future to pay the benefits, including severance payment, for which the Association was liable at the time of its dissolution or would become liable (as regards gratuity) cannot alter the express provision and clear intention of the legislation. That provision was that the obligations of the Association survived its dissolution and were imposed upon the Corporation. The transferred obligations included two separate though related obligations. It included the obligation of the Association, under the collective agreement to pay a gratuity to an employee who had already given more than ten years of continuous service to the Association. The effect of s 3(c) of the Dissolution Act the reference in the collective agreement to the Association was to make a reference to the Corporation. By virtue of s 4(2) of that Act the collective agreement was to be carried out as though it had been made or entered into by the Corporation.

[12] In addition, it was specifically recognized in the Deed[4] that the Corporation would be assuming all liabilities of the Association including obligations and rights arising under the Deed. It was specifically agreed[5] in the Deed that employees, such as the respondent, who had worked for the Association for more than seven but less than ten years "shall be considered as being continually employed by the … Corporation." That was the bargain between the employees (by their union) and the Association. It was a newly created obligation that became transferred by the Dissolution Act to the Corporation. It does not matter that the Corporation was not a party to the Deed and, therefore, did not make that bargain. The effect of sections 3 and 4 of the Dissolution Act was to impose that bargain upon the Corporation. There is no room for the Corporation to avoid the obligations that were imposed on it.

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[4] At recital 3.
[5] At clause 10 (a).

[13] In the circumstances I would dismiss the appeal and award prescribed costs to the respondent.

Denys Barrow, SC
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Hugh A. Rawlins
Justice of Appeal