THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
TERRITORY OF ANGUILLA
(CIVIL)
AD 2008

Claim No. AXA HCV 2008/0015

BETWEEN:

PAUL WEBSTER

MARJORIE MCCLEAN

(AND OTHERS)

Claimants/ Respondents

AND

THE ATTORNEY GENERAL
(FOR THE GOVERNMENT OF ANGUILLA)

Defendant/Applicant

APPEARANCES:

Mr. Ivor Greene for the Applicant

Ms. Tameka Davis and Mr. Harry Wiggin for the Respondents.

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Date: 2008: 30th September
28th October

JUDGMENT

[1] **GEORGE-CREQUE, J.:** On 5th May, 2008, this matter came on for hearing on an application for leave for Judicial Review brought by nine Claimants, all of whom are property owners ("the Property Owners") in the Blowing Point area in which they seek review of various decisions said to be taken by various governmental bodies or persons giving rise to the construction of a dolphin pier or dolphinarium at Sandy Point Beach which is within the area delimited as the port of Blowing Point.

[2] The Application for leave first came before the court ex-parte on 16th April, 2008, but the court, being of the view that the matter raised issues which were of general public importance, directed an inter partes hearing in open court and fixed 5th May for the hearing. Directions were also given as to the giving of notice to the Attorney General and for the filing and service of affidavit evidence by the parties. Notice was also given to the general public by publication in the local newspaper. At the hearing on 5th May, the Attorney General was represented by counsel and had prior to that date filed affidavit evidence on which he relied in respect of the application for leave. Counsel for Dolphin Discovery holding a watching brief was also present throughout the hearing.

[3] At the conclusion of the hearing, I was satisfied that a case had been made out warranting judicial review and the application was granted. The court also made an order ("the Order") on the oral application of the Property Owners directing the cessation of all construction works of piers or structures or any encroachment of the foreshore or floor of the sea at the Sandy Point Beach or the waters forming the Port of Blowing Point ***in violation*** *(my emphasis)* of the requisite licensing provisions of the Beach Control Act and the Ports Harbours and Piers Act when it became clear during the hearing, in the face of the clear admissions by Counsel for the Defendant, that no permissions and licences had been granted to Dolphin Discovery or indeed anyone else to engage in such activity. In fact, on this basis, counsel argued that in as much as no decisions had been made there was no basis for the application for leave seeking judicial review. This was in the face of clear uncontroverted evidence that construction of a pier or dolphinarium was underway at Sandy Point Beach and within the waters of the Blowing Point Port which required licences and permits in order for such activity to be undertaken. The inescapable conclusion was that such activity was being carried out in clear breach of the laws. The court felt compelled to step in.

[4] A copy of the order was directed to be served on Dolphin Discovery being a party appearing to the court to be affected by the Order.

[5] Case management took place on June 13th, 2008, and various directions for trial were given. A Pre-Trial Review date was set and was eventually scheduled to take place on 26th September, 2008. On 25th September, 2008, the Defendant applied to discharge the Order.

[6] The grounds for discharge may be succinctly stated as follows:

(1) Material change in circumstances since the date of making of the Order;

(2) Material non-disclosure on the part of the Property Owners on the making of the Application;

(3) Prejudice to the Defendant in the maintenance of the Order; and

(4) The lack of an undertaking in damages given by the Property Owners.

[7] It bears note that Dolphin Discovery, on whose behalf an affidavit was filed in support of the Attorney General's application to discharge, has never sought to set aside the Order of its own motion, notwithstanding that it clearly was able to do so. Such a right is well recognised under CPR 42.12(6). They would have had 28 days from the grant of the Order to do so. That time has long since passed. They have also not sought an extension of time in which to do so.

The guiding principles on the setting aside of an order made at a hearing inter-partes.

[8] Where an order has been made on an inter- partes hearing and a party wishes to discharge such an order, an application to set it aside can only be entertained on the basis that:

(i) There has been a material change in circumstances; or

(ii) The court on the hearing inter-partes was misled, whether innocently or otherwise, as to the true state of facts.

With respect to the first ground, what must be shown is a material change in the factual circumstances and not a change coming about in the party's awareness or understanding

of his legal rights or possible defences open to him on the claim made against him[1]. In respect of the second ground, material non-disclosure would certainly come into play. However, the court ought not to entertain any attempt or invitation to review the same material with a view to being persuaded to come to a different conclusion thereon as that would be inviting the court to act as a court of appeal in respect of its own order. It is not open to a party to the earlier application to seek to re-litigate or, in essence, re-argue the application by relying on submissions and evidence which were available at the time of the earlier hearing but which, for whatever reason, he chose not to put forward. The case of **Collier -v-Williams and Another[2]** which approved the dictum of Patten J in **Lloyds Investment (Scandinavia) Ltd. –v- Ager- Hanssen[3]** is instructive in this regard. Even though CPR has no equivalent to CPR 3.1(7) of the UK, it is accepted that the court may exercise these powers under its inherent jurisdiction. Hariprashad-Charles J adopted and applied these principles in **Michael Wilson & Partners Limited -v- Temujin International Limited and others[4]** a case in our court in the British Virgin Islands**.** I adopt those principles for the purposes of this application as being the correct principles applicable to this case. I propose to deal with the grounds in the inverse order in which they have been set out.

[9] ***Lack of undertaking in damages.***

This is a matter of public law. I have already stated above the circumstances in which the Order was made. In **Serbian -v- Westminster City Council[5]** it was said by Dillon LJ citing Lord Denning MR with approval in **Smith -v- Inner London Education Authority** [1978] 1 All ER 411, that the ordinary Cyanamid test in terms of the financial considerations, though relevant to some extent, cannot outweigh the countervailing public interest which is of considerable importance in matters of this kind where the issue arising is the lawfulness of the activities complained of. The Order sought only to restrain unlawful activity. In my view, it would be quite wrong to require an undertaking in

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[1] See: Gordon Lester Braithwaite –v- Anthony Potter (Civil Appeal No. 18/ 2002 Grenada (unreported)
[2] [2006] All ER 177
[3] [2003] EWHC 1740 (Ch)
[4] BVIHCV 2006/0307 – (Judgment delivered on 2nd March, 2007 – unreported)
[5] (1987) 86 L.G.R. 431

damages in restraining the undertaking of admitted unlawful activity. A loss suffered by a party in such circumstances cannot be the type of loss or damages suffered by an offending party of which the court must take note. Such a course would be tantamount to an attack on the lawfulness or legal efficacy of the very laws themselves which are being sought to be upheld by ordering such restraint.

[10] **Prejudice to the Defendant**

The Attorney General contends that maintaining the Order causes prejudice and that the balance of convenience lies with the Attorney General representing the Government of Anguilla and Dolphin Discovery in the non-continuation of the Order and says that the Dolphinarium project is substantially completed and thus would cause no additional hardship to the Property Owners. Reliance is further placed on the losses which Dolphin Discovery may suffer from the loss of visits of cruise ship guests to the Dolphinarium as well as loss of income and employment opportunities to other ancillary service providers who are Anguillians, of the Dolphin Discovery business which it is said results in a loss of revenue to the Government of Anguilla. Counsel also urges that I take judicial notice of the general slow down in the world economy and that of Anguilla. On this basis, counsel argues that the Order is currently having an oppressive effect on the people and government of Anguilla and should be discharged on this basis. I must confess to having great difficulty with this line of argument. I agree with counsel for the Claimants that this would, in essence, be tantamount to saying, '***never mind it was commenced admittedly unlawfully, it has reached such an advanced stage that it ought to be considered as lawful and be allowed to continue'.*** Such an approach appears to me to be a very dangerous approach and one which must be resoundingly rejected as being inimical to the interest of justice. It is unfortunate that counsel for the Defendant found it necessary to advance this argument. This cannot, under any circumstances, afford a proper basis for the discharge of the Order granted in the circumstances as pertain here. As I understand the matter, it is not the case that there be no Dolphinarium in Anguilla. At the heart of the matter is the propriety or correctness of the decisions taken regarding **the location or the site** of the Dolphinarium. Furthermore, the Attorney General, in the making of this application,

appears to have either overlooked or has misconceived the wording and purport of that part of the Order which in clear terms states as follows:

" All construction of all piers or structures… on the foreshore or floor of the sea… at Sandy Point Beach or in the waters forming the Port of Blowing Point by any persons…. in violation of the requisite licensing provisions of the Beach Control Act and the Ports Harbours and Piers Act cease forthwith… ."

Clearly, the Order does not seek to restrain activity which is in compliance with those Acts. Indeed, the question as to whether the activity being conducted is in accordance with those Acts is a live issue for determination in the substantive claim which is well under way to final determination.

[11] ***Material Non Disclosure***

Whether a fact is material or not is to be determined by the court and not a party. It is trite law that it is the duty of a party making an application on a without notice basis to make full and frank disclosure of all material facts relevant to the application including all matters, whether of fact or law, which may be adverse to the applicant's case.[6] The extent to which this duty extends to a hearing on full notice is somewhat obscure. I, for my part, am inclined to the view that a duty to make full and fair disclosure still governs an application even on a hearing on full notice although that duty ought not to be placed as high such as to require the making of reasonable inquiries and the like. Material facts or information are those facts which may bear on the outcome of the matter. The hearing in this matter was a hearing on full notice of more than fourteen days which gave the Attorney General ample opportunity to put all matters and deploy his full case before the court.

[12] The Attorney General says there was failure by Mrs. McClean, one of the Property Owners, to disclose:

(a) The content of telephone conversations with the Permanent Secretary, Ministry of Lands on 22nd January, 2008, in which she stated her objections to the Dolphin Project and being told of the minimum impacts disclosed by the EIA, the

[6] See: Memory Corporation Plc –v- Sidhu [2000] 1WLR 1443 per Mummery J at pg. 1459.

number of Anguillian families employed by the Project and the importance of the Project to the Anguillian Tourism Industry.

(b) The content of a meeting held between Mrs. McClean, the Chief Minister, other Ministers and government advisers on said date in which they explained the need to keep the Project in Anguilla, the background work that went into the approval process including the EIA, representations made by employees of the Project and others who were supportive of the Project and of the potential economic benefit to her property.

(c) The fact she had been approached by Dolphin Discovery with a view to entering into a contract to provide food and beverage services for the numerous cruise ship patrons of the Dolphinarium which she rejected.

This is so whilst they say she took pains to set out in her affidavit what she viewed as potential economic damage to her business.

[13] As the Property Owners rightly contend, the content of these conversations does not sway the court one way or the other in terms of whether approvals or licences had been or were properly granted by the various governmental bodies or persons. Further, it appears to me that the Attorney General had ample opportunity prior to the matter coming on for hearing on 5th May, 2008, to address fully the matters contained in the Affidavit of Mrs. McClean on the question of economic damage raised therein. The Attorney General cannot now seek to rely on matters which were known to him at the time of the hearing but which, for whatever reason, failed to deploy for the purpose of putting their full case forward at the full hearing as a ground for returning to the court alleging material non-disclosure. Such a course is wholly inappropriate and is no more than an attempt to re-argue matters which could and ought to have been argued at the hearing. In any event, the matters complained of are not, in my view, material, as having reviewed that information, I am satisfied that I would not have arrived at a different conclusion than the one to which I arrived on the hearing on 5th May.

Material change of Circumstances

[14] The Attorney General says that since the making of the Order Dolphin Discovery is now in possession of the requisite licences and permissions granted under the Beach Control Act and the Ports Harbours and Piers Act by the various governmental persons concerned. These matters are urged as showing a material change in the factual circumstances warranting a discharge of the Order.

[15] The licences and permissions have been exhibited to the affidavit of Ms. Erica Edwards filed on 25th September, 2008. The Licence said to be granted under the Beach Control Act is dated as of 11th August, 2008. Curiously however, Clause 3 of the Licence states thus:

"This licence shall commence on the date of the discharge or variation of the Order of the court dated 6th day of May, 2008 prohibiting the construction of development at the Site, notwithstanding that this Licence is granted and made the date above written."

[16] The letter from the Ministry responsible for Ports Harbours and Piers granting permission to Dolphin Discovery to construct to completion a Dolphin Pier at Sandy Point is dated 27th August, 2008. This letter ends as follows:

" …. this permission is subject to the Order of Madam Justice George Creque of 6th May, 2008 prohibiting any construction or development at Dolphin Pier at Sandy Point, Blowing Point until further order."

[17] It is a well settled principle of law accepted by both sides that a licence cannot operate retrospectively[7]. The Property Owners rightly contend that the licences and permissions granted on 11th and 27th August, 2008, under the Beach Control Act and the Ports Harbours and Piers Act respectively, cannot validate the previous construction built in violation of the provisions of those Acts and thus it follows that the structure, as it currently stands, is still a structure constructed without the necessary licences and permissions. As such, it is contended there is no change of circumstances.

[7] See: Sovfracht -v- Van Udens Scheepvaart [1943] AC 218.

[18] Regrettably, the grant of the licences and permissions after the construction has already taken place is akin to locking the stable gate after the horse has bolted. Furthermore, it is arguable as to whether the licences and permissions granted in the form that they are, are effective even prospectively from the dates they are said to have been granted since their efficacy is expressed to be contingent upon the discharge or variation of the Order. This state of affairs in and of itself begs the question as to whether there has been a material change of circumstances or whether what has merely been sought to be done is to seek to rectify and render lawful an activity which admittedly prior thereto was unlawful, notwithstanding the currency of the substantive proceedings for judicial review of the very decisions and actions in respect of the said activity. The difficulty into which the construction of the Dolphinarium has become mired is the inability to retroactively legalise the construction which has taken place given the current state of the laws as they exist and must necessarily be applied. This is a difficulty of the Defendant and Dolphin Discovery's own making. In the circumstances, I am constrained to conclude that the licences and permissions, as granted, do not, in the circumstances, amount to a material change of circumstances. This is a sad state of affairs and highlights the pitfalls when activities are undertaken without due regard for the regime of laws governing such activity.

[19] For the reasons given, the Defendant's application is dismissed. I would urge however, that both sides use their best endeavours in seeking a resolution of the substantive claims made herein as early as possible.

Janice M. George-Creque
High Court Judge