

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCV2016/0036

BETWEEN:

CERISE JACOBS

Claimant

and

(1) MINISTER OF TOURISM
(2) COMMISSIONER OF POLICE
(3) CHIEF MAGISTRATE

Defendants

Appearances:

Dr. David Dorsett for the Claimant

Ms. Bridget Nelson for the Defendants.

2017: November 21st
2019: February 7th

JUDGMENT

[1] WILKINSON J.: The Claimant, Ms. Cerise Jacobs (Ms. Jacobs) filed her fixed date claim and affidavit in support on 3rd March 2016. Therein she challenges the regulation and the decision to prosecute her for the commission of the offence of vending without a permit contrary to regulation 3(1) (a) of the **St. John's Development Corporation (Heritage Quay) Regulations 2010**. She sought the following relief:

(i) a declaration that regulation 3(1)(a) of the **St. John's Development Corporation (Heritage Quay) Regulations 2010** is ultra vires section 26 of the **St. John's Development Act**.

(ii) a declaration that the First Defendant, the Minister of Tourism (the Minister of Tourism) in issuing regulations creating offences acted unlawfully and in contravention of section 46 of the Constitution.

(iii) an order certiorari quashing the charge laid by the Second Defendant, the Commissioner of Police (the Commissioner of Police) against Ms. Jacobs and where Ms. Jacobs was charged with the commission of an offence contrary to regulation 3(1)(a) of the **St. John's Development Corporation (Heritage Quay) Regulations 2010**.

(iv) an order of prohibition staying criminal proceedings before the Third Defendant, the Chief Magistrate (the Magistrate) as it relates to the prosecution of complaints brought by the Commissioner of Police against Ms. Jacobs that Ms. Jacobs had committed an offence contrary to regulation 3(1)(a) of the **St. John's Development Corporation (Heritage Quay) Regulations 2010**.

(v) a declaration that the decision of the Magistrate to impose as a condition of bail the condition that Ms. Jacobs be barred from returning to her place of employment was irrational and in contravention of:

(a) Ms. Jacobs' right to liberty as guaranteed for by section 3 of the Constitution of Antigua and Barbuda (the Constitution).

(b) Ms. Jacobs' **right to** personal liberty as guaranteed by section 5(1) (k) and section 5(6) of the Constitution.

(c) **Ms. Jacobs'** right to freedom of movement as guaranteed by section 8(3)(c) of the Constitution.

(vi) Special and general damages on the footing of aggravated damages and vindicatory damages to be assessed.

(vii) Costs pursuant to CPR 2000 rule 56.13(5)

(viii) Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act.

(ix) Interest pursuant to section 7 of the Judgments Act.

(x) Any other relief that the Court deems fit pursuant to sections 18 and 119 of the Constitution and section 20 of the Eastern Caribbean Supreme Court Act.

Issue

- [2] The agreed single issue was whether the Minister had the authority to make a regulation imposing penal consequences –regulations 3(1) and (2).

The Facts

- [3] There was no cross-examination of the witnesses. As a result, there remains a conflict of evidence on whether or not Ms. Jacobs was vending in her own business or was as she describes herself, a person who works with her sister as a shop assistant and who joyfully performs her work and occasionally invites passers-by to visit her sister's store.
- [4] There is established pursuant to the **St. John's Development Corporation Act** (the Act) section 3 a body corporate called the **St. John's Development Corporation (SJDC)**. By section 4 of the Act, the functions of the SJDC include power to carry out or secure the laying out and development of areas designated under section 14 of the Act. The SJDC amongst its undertakings is the landlord of premises described as "Vendors Mall" in Heritage Quay and situate on Thames Street in the City of **St. John's**. The Vendors Mall is a popular small vendors mall with tourists and local shoppers.
- [5] By section 5 of the Act, the responsible Minister, being the Minister for Tourism may after consultation with the chairman of SJDC give the SJDC directions of a general character as to the policy to be followed in the performance of its functions in relation to matters appearing to him to concern the public interest.
- [6] By section 26 of the Act the Minister may make regulations generally for the proper carrying out of the provisions and purposes of the Act.
- [7] According to Ms. Jacobs, she is a shop assistant in the employ of her sister, Ms. Islyn Stafford who operates a business trading as "**I shall tell my Friends**" at # 5B Vendors Mall. Ms. Stafford she says holds a permit from the SJDC. As a shop assistant Ms. Jacob says that she joyfully performs her work and occasionally invites passers-by to visit Ms. **Stafford's store**.
- [8] According to Ms. Jacobs, in October 2015, she was charged pursuant to section 4 of the Vendors Act Cap. 463 with vending without a licence. She retained Counsel to appear on her behalf before the Magistrate. Her Counsel submitted that upon the plain reading of the law and upon the Magistrate taking judicial notice of certain notorious facts, namely that Heritage Quay was not a beach, it was impossible for her to have committed the offence with which she was charged. At that hearing the Police sought an adjournment to consider the submission made by Counsel and it was granted. On resumption of the hearing the Police conceded the point advanced by her Counsel and withdrew the charge laid against her.
- [9] Subsequently, three further charges were laid against Ms. Jacobs.
- [10] The first of the three charges read that Ms. Jacobs was charged with committing an offence contrary the Vendors Act Cap. 463. The particulars of the charge were that she was charged pursuant to section 4 of the Vendors Act of being a vendor without licence for that she between 1st July 2015 and 30th September 2015, at the **Vendors Mall in St. John's** did carry on the business of a vendor without being the holder of a licence issued by the Director General.
- [11] The second of the three charges read that Ms. Jacobs was charged with committing the offence of vending without a permit. The particulars of that charge were that she was charged pursuant to section 24(2) of the Small Charges Act Cap. 405 being a vendor without permit for she between the 1st July 2015 and 30th September 2015, at the **Vendors Mall in St. John's** did conduct business or trade when not being the holder of a valid permit issued by the Executive Director of the SJDC.

- [12] The third of the three charges read that Ms. Jacobs was charged with committing the offence of vending without a permit. The particulars of that charge were that she was charged pursuant to section 4 of the Vendors Act Cap. 463 being a vendor without a licence for she between 30th September 2015 and 20th October 2015, at the Vendors Mall not being the holder of a licence issued by the Director General did carry on the business of a vendor.
- [13] According to Ms. Jacobs, whereas previously on the earlier charges she was admitted to bail on her own recognisance, with the imposition of the later charges it was a condition of her bail, at the insistence of the Prosecutor that she was not to attend Heritage Quay for any purpose whatsoever. Her Counsel objected to the imposition of such a condition on the ground that it would mean that it had the practical effect of throwing her out of work and depriving her of her liberty of working and earning a livelihood to provide for herself and her family. The Chief Magistrate indicated that Ms. Jacobs was to either accept the condition of staying away from Heritage Quay or that she be **remanded to Her Majesty's Prison.**
- [14] At the hearing before the Magistrate on 20th **January 2016, Ms. Jacobs' Counsel made the** submission that the charge relating to section 24(2) of the Small Charges Act was not one, upon the plain reading of the law and the substance of the charge, which could properly proceed. **Counsel accepted the Police's concession that the** Small Charges Act charge had been inadvertently served on Counsel and that the only charges before the Magistrate were the charges in relation to regulation 3(1)(a) of the **St. John's Development Corporation** (Heritage Quay) Regulations 2010 (the Regulations).
- [15] Corporal Otis Archibald of the Antigua and Barbuda Police Force filed an affidavit on behalf of the Minister of Tourism, Commissioner of Police and the Magistrate in reply.
- [16] Corporal Archibald was the prosecutor of two of the charges against Ms. Jacobs. On 28th September 2015, the Police received a report that Ms. Jacobs was vending in the Vendors Mall without a licence to do so. Ms. Jacobs was arrested and charged on 30th September, 2015 for the offence of vending without a permit between 1st July, 2015 and 30th September, 2015. Ms. Jacobs was granted bail and admonished by the Court to refrain from any further commission of the offence.
- [17] On 1st October 2015, the Coordinator of the SJDC reported to the Police that Ms. Jacobs had returned to the Vendors Mall on 30th September, 2015 and continued to vend without a licence until 20th October 2015. This all being while on bail for the first offence.
- [18] Ms. Jacobs was **taken to the St. John's Police Station**, cautioned and told about the report of her vending without a licence. **Ms. Jacobs' response was "Nobody can't stop me."** She was then arrested and charged for the 2nd offence of vending without a permit between 30th September, 2015 and 20th October 2015.
- [19] Ms. Jacobs appeared before the Magistrate and made an application for bail. The application was objected to on the ground that whilst Ms. Jacobs was on bail for the first offence of vending without a permit, she resumed vending without a permit at the Vendors Mall. The Magistrate denied Ms. Jacobs bail on the grounds advanced by the Prosecutor and Ms. Jacobs was remanded into custody.

- [20] On **Ms. Jacobs'** second application for bail the request was made of the Magistrate that it be made a condition of **Ms. Jacobs'** bail that she be debarred from returning to the Vendors Mall in order to prevent her from repeating the offences she had committed in the past.
- [21] According to Corporal Archibald, section 26 of the Act empowers the Minister to make regulations for the proper carrying out of the provisions of the said Act. In the exercise of this power, the Minister made it a requirement that a person who wished to engage in business at Heritage Quay must have a permit from the SJDC to do so and made failure to obtain a licence was an offence punishable by fine.
- [22] He said that while it was admitted that the Act does not create offences or state that offences may be created by way of regulations, section 17 of the Interpretation Act provides that where an enactment confers a power to make a statutory instrument there may be annexed a breach of that statutory instrument punishment by way of a fine not exceeding \$5,000.00. For this reason the Regulations were not ultra vires the Act.
- [23] Ms. Jacobs filed an affidavit in reply to Mr. Archibald's on 27th April 2016. Therein she reiterated that **she was a shop assistant. She said that she accepted Mr. Archibald's evidence on the point that the Act does not create offences or state that offences may be created by way of regulation and that section 17 of the Interpretation Act provides that where an enactment confers a power to make a statutory instrument, there may be annexed to it a breach of that statutory instrument with punishment by way of a fine not exceeding \$5000.00.**

The Law

- [24] It is uncontested that the Constitution at section 3 et seq provides for fundamental rights and which include liberty, security of person, enjoyment of property, protection of the law and personal privacy.
- [25] By the Act it is provided:
26. The Minister may make regulations generally for the proper carrying out of the provisions and purposes of this Act and in particular but without prejudice to the generality of the foregoing may make regulations –
- (a) for securing the proper laying out and development of the designated area;
- (b) prescribing the form of any notice or other document authorized or required by this Act to be served or issued;
- (c) prescribing any other matter which may be, or is required by this Act to be, prescribed.
- [26] The Law Revision (Miscellaneous) (Amendments) (No.2) Act 2000 included an amendment to the Act. Section 4 of the Act was amended as follows: -

“8. The **St. John’s Development Corporation Act** is amended as follows:

(a) in section 4 by deletion of the full stop after subsection (3)(f) and by insertion therefor of a semicolon and by the addition of immediately after subsection (3)(f) of the following new subparagraph –

“(g) provide and maintain places within a designated area for the purpose of carrying on the business of a vendor and to issue licences to such business.”

(b) in section 26 by renumbering of paragraph (c) as “(e)” and by the insertion after paragraph (b) of the following –

“(c) prescribing the fees to be charged for licences issued to persons permitted to carry on the business of a vendor within designated areas;

(d) prohibiting the carrying on of the business of a vendor within the designated area and fixing the penalty for contravening such prohibition.”

[27] In 2010, the Regulations were made and provide:

Part 2 – Regulation of Businesses and Transportation

3. Permit to do business etc. at Heritage Quay

(1) A person shall not engage in –

(a) any business or trade; or

(b) ply for hire in a public service vehicle;

In Heritage Quay unless he has been issued with a valid permit by the Corporation under these regulations.

(2) A person who contravenes subregulation (1) commits an offence and is liable on summary conviction to a fine of \$5000.00.

Part 3 – Public Order

11. Offences

(1)

(a) ...

(2) A person commits an offence and is liable on summary conviction to a fine not exceeding \$5000.00 if that person –

(a) without any lawful excuse, contravenes any lawful direction given by an employee of the Corporation or a police officer;

(b) without the permission of the Corporation, hawks, sells or exposes for sale any article;”

[28] The Vendors Act provides at section 2 that it is applicable to vendors on all beaches and in the national parks and any other place which the Minister may prescribe.

[29] The Court was not provided with any authority showing that any places other than that named in the The Vendors Act had been subsequently added as being prescribed by the Minister and so **subject to a vendor's licence pursuant to that Act.**

[30] The Interpretation Act Cap. 224 provides:

“17. (1) Where an enactment confers a power to make any statutory instrument there may be annexed to a breach of that statutory instrument, in the absence from the enactment conferring the power of any specific provision to the contrary, a punishment by way of a fine not exceeding five thousand dollars.

(2) Where an enactment confers power to make a statutory instrument an offence under that statutory is punishable on summary conviction.”

[31] In Maxwell on The Interpretation of Statutes 10th edition p. 303 states:

“Where Parliament has delegated its legislative function to a Minister of the Crown without retaining any specific control over the exercise of that function by the Minister (such as a condition that an order made by the Minister should be laid before Parliament and be subject to annulment by Parliament) the court has the right and duty to decide whether the Minister has acted within the limits of his delegated power.

Where, however, the power delegated to the Minister is a discretionary power, the exercise of that power within the limits of the discretion will not be open to challenge in a court of **law.**”

[32] According to G.C Thornton in Legislative Drafting¹ :

“THE DELEGATION OF LEGISLATIVE POWER

General principles

The extent to which a power should be delegated always requires careful consideration. The power should not extend to matters of principle on which a decision of Parliament ought to be taken.

... **the central and recurrent problem of delegated legislation** is how to determine what is general and therefore should be left in the Bill for parliamentary consideration and what is particular and therefore should be left for government regulation.

The line traditionally drawn is between principle and detail, between policy and the details or technicalities of its implementation. The distinction is based on the principle that representative democracy demands that supreme legislative authority should be exercised by persons directly responsible to the electorate.

¹ 4th Edition p. 329, 349

One significant benefit of delegated legislation is that it saves the parliamentary time that **would be unnecessarily spent if masses of detail were contained in Bills.**

Penal provisions never stand alone; they form part of the wider criminal law and that must never be disregarded. They are subject to restrictive construction and the benefit of the **doubt in case of possible alternative construction will be given to the accused.”**

[33] **Halsbury’s Laws of** England Vol. 44 provides:

“ 990. Authority equal to that of statutes. If validly made, subordinate legislation has the full force and effect of a statute, whether or not the statute under which it is made provides expressly that it is to have effect as if enacted in it. Thus, if an instrument made in the exercise of delegated powers directs or forbids the doing of a particular thing, then, in the absence of provision to the contrary, the result of a breach is the same as if the command or prohibition has been contained in the enabling statute itself. Similarly, if such an instrument authorises or requires the doing of any act, the principles to be applied in determining whether a person injured by the act has any right of action in respect of the injury are no different from those applicable where damage results from an act done under the direct authority of a statute.”

Findings and Analysis

- [34] The Regulations are described as subsidiary or subordinate legislation. It was created pursuant to powers conferred in the primary act, the Act. The issue is whether the Minister exceeded his authority by the creation of regulation 3.
- [35] On reading legal drafting and interpretation texts, the Court concludes that one does not need to have a provision in the primary legislation expressly authorizing the imposition of penalties in subsidiary legislation but what must be present is the power in the primary legislation to make subsidiary legislation.
- [36] At Antigua and Barbuda, this position is supported by the fact that where an Act is silent on offence and penalties, the fallback position for a Minister creating regulations under the authority of primary legislation can be had to section 17 of the Interpretation Act. Section 17 captures 3 events – (a) the making of the regulations (usual made to cover specific event/s), (b) to make provision the breach of the provisions in the regulations, and (c) to make provision for a penalty on breach of regulations.
- [37] Further, the penalty on breach can be provided for by a fine not exceeding \$5000.00 on summary conviction. It is to be noted that the Interpretation Act makes no provision for the alternative punishment of imprisonment and which would affect the liberty of the citizen.
- [38] It follows naturally that any punishment in the statutory instrument beyond what is stated in the Interpretation Act would need to be authorised by the enabling and primary legislation.

[39] Following on, the amendment to section 26 in the Act confirms the power which the Minister had under the Interpretation Act and provided some details and specifics about what the regulations would be about – fees for licences, prohibiting persons from conducting business without a licence and imposition or fixing of a penalty on those who sought to carry on business without a licence. In his wisdom the minister fixed the penalty as a fine and which fine was not to exceed \$5000.00.

[40] Once again it is to be observed that there is no threat to the liberty of a citizen. This is in keeping with the Interpretation Act.

[41] On the strength of the Interpretation Act and the Act the Court concludes that the Minister had the authority and could make the penal regulation – regulation 3.

[42] **Ms. Jacobs' claim is struck out.**

[43] **Court's order:**

1. **Ms. Jacobs' claim is struck out.**

2. No order for costs.

Rosalyn E. Wilkinson
High Court Judge

By the Court

Registrar