

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2008/019

BETWEEN:

ASOT MICHAEL

Appellant

and

[1] THE ATTORNEY GENERAL

[2] THE DIRECTOR OF ONDCP

[3] THE COMMISSIONER OF POLICE

Respondents

Before:

The Hon. Mde. Ola Mae Edwards

Justice of Appeal [Ag.]

The Hon. Mr. Michael Gordon, QC

Justice of Appeal [Ag.]

The Hon. Mde. Indra Hariprashad-Charles

Justice of Appeal [Ag.]

Appearances:

Mr. Anthony Astaphan SC with Mr. John Fuller for the appellant

Sir Gerald Watt QC with Dr. David Dorsett for the respondents

2008: November 28;

2009: January 12.

Civil Appeal – Judicial Review – disclosure of financial information – Interim relief – injunctions – stay of proceedings –

The appellant instituted judicial proceedings against the respondents some four years ago, by way of an application for leave to institute judicial review proceedings. Leave was granted and a Fixed Date Claim Form was filed. Various interlocutory proceedings thereafter took place. The appellant now challenges the decision of the learned trial judge who dismissed the most recent application for interim injunctive relief and/or a stay of proceedings and awarded costs to the respondents. The respondents are seeking financial information on the appellant both in Antigua and Barbuda and Bermuda. The appellant challenges the lawfulness of the request by either country's authorities to obtain confidential financial information about him and Bellwood Services S.A.

Held:

1. the appeal is allowed with costs both in the court of appeal and the high court to the appellant.
2. the injunctions are granted in favour of the appellant but not Bellwood Services S.A.
3. the Order of Thomas J dated 2nd December 2004 granting the appellant leave for Judicial Review in this action shall operate as a stay of proceedings pending the determination of the appeal:
 - (a) Once there is disclosure of the information sought, that information would be broadcast to an audience wider than that presently having access to it. Therefore the appeal is allowed to maintain the status quo.
 - (b) Bellwood Services S.A. is not a party to these proceedings, nor is there any evidence of who or what Bellwood is, nor of its relationship to the parties or issues in this action. In light of this, this court is not clothed with any jurisdiction in respect of making orders that affect Bellwood.

American Cyanamid Co v Ethicon Ltd [1975] AC 396 followed

JUDGMENT

[1] **GORDON, J.A. [AG.]:** The appellant, by application dated 7th March 2008 sought three injunctions, or alternatively a stay. The Notice of Application sought relief in the following terms:

- (1) An injunction pending the determination of the issues in this action restraining the Attorney General of Antigua and Barbuda; and/or the Director of the ONDCP and/or the Commissioner of Police their servants from requesting or seeking or pursuing an assistance for information from the relevant authorities of Bermuda pursuant to any request for assistance made by the Defendants in relation to or concerning the Claimant and/or a company called Bellwood Services S.A.

- (2) An injunction pending the determination of the issues in this action restraining the Attorney General of Antigua and Barbuda; and/or the Director of the ONDCP and/or the Commissioner of Police their servants and or agents from disclosing to the relevant authorities in Bermuda pursuant to any request for assistance made by those authorities in Bermuda, any information or related material concerning the Claimant and/or a company called Bellwood Services S.A. and/or bank accounts held at Bank of Nova Scotia, St. John's, Antigua as identified in such request for assistance.
- (3) An injunction pending the determination of the issues in this action restraining the Attorney General of Antigua and Barbuda; and/or the Director of the ONDCP and/or the Commissioner of Police their servants and or agents and/or other authorities of the Government of Antigua and Barbuda from invoking, applying or seeking to enforce the provisions of the Mutual Assistance in **Criminal Matters Act No 2 of 1993**, the **Proceeds of Crime Act No 13 of 1993**, the **Money Laundering Act No 9 of 1996** as amended or the **Office of National Drug and Money Laundering Control Policy Act No 11 of 2003** in relation to the Claimant and/or Bellwood Services SA and/or any bank accounts owned or controlled by him pending the determination of this matter.
- (4) An Order that the Order of Mr. Justice Errol Thomas dated 2nd December 2004 granting the Claimant leave to apply for Judicial Review in this action pursuant to CPR 56.4 (8) operate as a stay of the proceedings pending the determination of the lawfulness of the Defendants' conduct as challenged in this action. For the avoidance of any doubt the reference to the stay of proceedings refers to any or all steps by way of furtherance of any and all requests for assistance made by the relevant authorities in Bermuda to Antigua and Barbuda and requests for assistance made by Antigua and Barbuda to

Bermuda with regard to the Claimant and any of his controlled or allegedly controlled accounts as identified in the respective requests.

- [2] The genesis of this suit was an application for leave to file judicial review proceedings against the respondents which application was filed in November 2004, or some four years ago. Leave was granted and a Fixed Date Claim Form was filed in January 2005. Thereafter, a considerable number of interlocutory proceedings took place culminating with the application of 7th March 2008, referred to above.
- [3] The learned trial judge dismissed the application for interim relief in its entirety with costs (pursuant to **CPR 2000**) to the respondents and it is against that decision that the appellant has appealed to this court.
- [4] A short statement of the factual background would be helpful in the understanding of the issues before the court. I take these facts from the fourth affidavit of the appellant filed on 7th March 2008. I make the point that I am not to be understood as finding any fact by the repeating of the facts as stated in the mentioned affidavit.

“Following the elections in 2004 the Attorney General of Antigua and Barbuda and/or the second or third defendants appear to have made a request for assistance to the Central Authority of Bermuda purportedly pursuant to the **Mutual Assistance in Criminal Matters Act No 2 of 1993** in order to investigate certain bank accounts as part of the investigation which the current Government had brought into the financial affairs of a number of public officials of the last Government including myself.”

“Further on a date presently unknown but shortly after the March 2004 election, the Financial Investigation Unit of Bermuda apparently made a request itself to the Attorney General of Antigua and Barbuda. This request was purportedly made pursuant to an agreement between the United Kingdom and Antigua and Barbuda concerning the Investigation, Restraint and Confiscation of the Proceeds of Crime made on 10th March 1997. This request is referred to and relied up by the Attorney General in his affidavit dated 6th May 2005, in this action.”

In short, the pith and substance of this litigation is that the Government of Antigua and Barbuda is seeking financial information concerning the appellant and the appellant is resisting the provision of such information. According to the affidavit of the appellant the resistance is being pursued in both the Antigua and Barbuda jurisdiction and the Bermudan jurisdiction.

[5] Learned Queen's Counsel for the respondents conceded in the court below, that the Agreement concerning the Investigation, Restraint and Confiscation of Proceeds and Instruments of Crime (hereinafter called "the Agreement") had no application to this case¹ and further conceded that the **Mutual Assistance in Criminal Matters Act No. 2 of 1993** (hereinafter "the Act") did not permit the Attorney General of Antigua and Barbuda to pursue the request for information directly from Bermuda.² These two concessions set the scene for the narrow point of difference between the opposing parties. On the one hand learned Queen's Counsel for the respondents argued that notwithstanding the concessions, and notwithstanding the existence of the Act and the Agreement there is nothing in the law which precludes the government of Antigua and Barbuda from requesting such information from the Government of Bermuda. Learned counsel for the respondents argued that even though the Attorney General purported to act pursuant to the Act, and there was no legal basis for his so doing, that in and of itself did not make his action unlawful at large.

[6] Learned Senior Counsel for the appellant, however, argued the contrary view, that where parliament provides a legislative framework and government negotiates an Agreement/Treaty to achieve certain ends, it is not intended that any public authority should have the power to circumvent the Act.

[7] At paragraph 12 of the judgment the trial judge came down firmly on the side of the respondents. He said:

"I, however, accept the proposition that the Government's right to engage any other country or authority on matters, the subject of this application, is

¹ See paragraph 6 of judgment of court below

² See paragraph 8 of judgment of court below.

not ousted or fettered by the treaty or Act unless expressly or by clear implication so ousted or fettered. The Acts and treaty referred to are, it appears, intended to facilitate the cooperation between states by providing a preferred statutory framework and procedure to make more efficient and timely that process, rather than circumscribing a limited and definitive procedure available to a country or other defined authority to facilitate cooperation of the type detailed in this action.”

[8] In **C. O. Williams Construction Ltd v Donald George Blackman and another**³

Lord Bridge of Harwich giving the judgment of the Privy Council had this to say:

“The contention advanced by Mr. Newman, on behalf of the second respondent, that in awarding the contract to Rayside, the cabinet was exercising a prerogative power, seems to their Lordships to be quite untenable. It is trite law that when the exercise of some governmental function is regulated by statute, the prerogative power under which the same function might previously have been exercised is superseded and so long as the statute remains in force the function can only be exercised in accordance with its provisions. Accordingly the cabinet’s only relevant power was that which it was both enabled and required to exercise under rule 148 of the **Rules of 1971**.

[9] This court has expressed the same principle in different words in **The Attorney General of St. Lucia v Martinus Francois**⁴ at paragraph 109 et seq:

“In this case, although the authority of Government to enter into contracts is the exercise of executive power, some aspects that relate to the power to borrow and to execute a guarantee are provided by statute. These are particularly encompassed in sections 38 to 42 of the **1997 Act**. Any action or decision that a Minister or any other person or body takes that is not in accordance with these provisions may be declared illegal, void and of no effect. The **1997 Act** and the Constitution also speak to the procedures by which moneys may be expended from the Consolidated Fund. A court may therefore declare any action that is not in keeping with these provisions unconstitutional, illegal, and void and of no effect.

The essential legal imperative for this purview of the court is that any power that is granted by the Constitution or any statute must be observed. This is central to the rule of law, the sovereignty of Parliament and the supremacy of our Constitutions. The last mentioned notion is enshrined expressly by section 120 of the Constitution and impliedly by other provisions including section 40 of the Constitution. This latter provision creates Parliament and confers upon it sovereign law making power. The

³ WLR [1995] 102

⁴ Civil Appeal SLU No. 37 of 2003 delivered March 2004 at paragraph 109 et seq

Court will uphold the Supremacy of the Constitution and ensure that the sovereign law making power of Parliament remains inviolate.”

[10] In the light of the authorities, I am of the clear view that the learned trial judge erred in his conclusion quoted at paragraph [7] above. That, however, is not the end of the matter.

[11] Learned Queen’s Counsel for the respondents chose, in his skeleton arguments, to characterize the appellant’s appeal in this way:

“The appeal, therefore, notwithstanding 17 grounds and multiple sub-grounds of appeal, is nothing other than an appeal against the exercise of judicial discretion.”

Learned counsel correctly stated the principle that an appellate court would, ordinarily, not interfere with the exercise of a judicial discretion unless it could be shown that the trial judge erred in principle in his approach or has left out of account or taken into account some factors which he ought or ought not to have taken into account. In this case, however, as I have said above, in my opinion the learned trial judge did err in principle in a sufficiently egregious way as to require this court to apply its own discretion, but based on correct principle.

[12] It is unfortunate that the Fixed Date Claim filed pursuant to the leave of the court in January 2005 was not included as part of the record and so one is uncertain of the exact tenor of that claim. However, at paragraph 14 of the fourth affidavit of the appellant there appears what presumably is the core of the claim:

“At the heart of the matter are two straightforward legal issues.

(a) First that the Attorney General of Antigua and Barbuda had no power to make such a request for assistance to Bermuda. **The Mutual Assistance in Criminal Matters Act no 2 of 1993** applies only to sovereign independent states of the Commonwealth and there is no mutual assistance treaty between Antigua and Barbuda and Bermuda. Bermuda is not itself a sovereign independent state. I attach hereto a letter dated 23rd August 2004 from the Office of the Deputy Governor’s Office in Bermuda which confirms this (“**AM 18**”).

(b) Secondly, the Bermudian authorities had no power to make a request for assistance to Antigua and Barbuda. The March

1997 Agreement was not in force at the time the request for assistance was made (before 1st October 2004). Further and in any event, pursuant to Article 3 of the Treaty, the Request for Assistance has to be made by the Secretary of State for the Home Department in the United Kingdom and the request can only be executed to the extent permitted under the law of the United Kingdom (Article 5).

In the light of these matters I brought legal proceedings in both Bermuda and in Antigua to challenge the lawfulness of either country's authorities proceeding to obtain confidential financial information pursuant to these requests."

[13] Thus, I divine that at issue in the present application before us is whether information being sought by the Government of Antigua and Barbuda can properly be demanded. The issue which this court must now resolve is whether on the basis of the criteria established in **American Cyanamid Co v Ethicon Ltd**⁵ the appellant is entitled to the interlocutory relief he seeks. As it was expressed by Lord Diplock:

"My Lords, when an application for an interlocutory injunction to restrain a defendant from doing acts alleged to be in violation of the plaintiff's legal right is made upon contested facts, the decision whether or not to grant an interlocutory injunction has to be taken at a time when ex hypothesi the existence of the right or the violation of it, or both, is uncertain and will remain uncertain until final judgment is given in the action. It was to mitigate the risk of injustice to the plaintiff during the period before that uncertainty could be resolved that the practice arose of granting him relief by way of interlocutory injunction; but since the middle of the 19th century this has been made subject to his undertaking to pay damages to the defendant for any loss sustained by reason of the injunction if it should be held at the trial that the plaintiff had not been entitled to restrain the defendant from doing what he was threatening to do. The object of the interlocutory injunction is to protect the plaintiff against injury by violation of his right for which he could not be adequately compensated in damages recoverable in the action if the uncertainty were resolved in his favour at the trial; but the plaintiff's need for such protection must be weighed against the corresponding need of the defendant to be protected against injury resulting from his having been prevented from exercising his own legal rights for which he could not be adequately compensated under the plaintiff's undertaking in damages if the uncertainty were resolved in the

⁵ [1975] AC 396

defendant's favour at the trial. The court must weigh one need against another and determine where "the balance of convenience" lies.⁶

[14] The learned Law Lord continued:

"So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is being sought."

"As to that, the governing principle is that the court should first consider whether, if the plaintiff were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant continuing to do what was sought to be enjoined between the time of the application and the time of the trial."⁷

[15] Based on the material before the court, and in particular the lack of any affidavit evidence in support of the respondents' contentions, I find it impossible to say that the application "fails to disclose that the [claimant] has any real prospect in succeeding in his claim for a permanent injunction." Thus one must embark on the exercise of determining where the balance of convenience lies.

[16] As stated above, the respondents did not file any affidavit in response to that sworn to by and filed on behalf of the appellant. At this interlocutory stage, it is unnecessary to come to any firm finding of fact. However, absent controverting evidence on the part of the respondents, I am of the firm view that this court is entitled to conclude that the appellant has established, *prima facie*, those facts which he alleges in support of his application.

[17] The appellant offers in the course of his affidavit a reason why the application for judicial review has been dealt with in such a desultory fashion. I neither accept nor deny the explanation of the appellant, but in the absence of an affidavit by the respondents, whilst the delay is a factor in the balance of convenience exercise, I am inclined to ascribe little weight to it.

⁶ At page 406

⁷ At page 408

- [18] In addition, the appellant speaks to the political environment in Antigua and Barbuda as providing the principal motivation for the investigation into his financial affairs. He also speaks to a pattern of harassment by the authorities, neither of which allegation is contested.
- [19] Finally, and perhaps most tellingly, there is no allegation on the part of the respondents of a pressing need for the information, nor is there any suggestion that the information being sought might disappear or be destroyed.
- [20] The disclosure of information is like the ringing of a bell. Once rung, it cannot be unrung. Once the information being sought by the respondents is disclosed to them, notwithstanding anything the court may decide in the judicial review proceeding, that information would be broadcast to an audience wider than that presently having access to it. In the circumstances, I would exercise my discretion in favour of maintaining the status quo. In short, I would allow the appeal of the appellant (subject as hereunder) with costs against the respondents both here and in the court below.
- [21] Whilst the above paragraph disposes of substantially all of the issues canvassed by the application and the appeal, there remain two which must yet be dealt with. The first matter is that in the application for interim relief, the relief sought is sought on behalf of the appellant and an entity called in the application “Bellwood Services S.A.” (hereafter referred to as “Bellwood”) Bellwood is not a party to these proceedings, nor is there any evidence of who or what is Bellwood, nor of its relationship to the parties or the issues in this action. The only reference to Bellwood I could find was in the exhibits filed with the appellant’s affidavit. There was no direct reference to Bellwood in the body of the affidavit. In the circumstances, this court is not clothed with any jurisdiction in respect of making orders that affect Bellwood.
- [22] The second matter that needs to be disposed of is that the appellant seeks an order of this court as part of his notice of appeal that the respondents do seal and deliver to the Registrar of the High Court all information in whatever form it takes

received or obtained from the authorities in Bermuda “otherwise that in accordance with the **Mutual Assistance in Criminal Matters Act No 2 of 1993** and the Agreement concerning the Investigation, Restraint and Confiscation of the Proceeds and Instruments of Crime. Such an order was not sought in the court below. To accede to the request of the appellant would be to assume a first instance jurisdiction, which it is well known this court does not have.

[23] The order of this court that I would make is:

- (1) that the appeal is allowed with costs to the appellant to be assessed, if not agreed in the high court and costs at $\frac{2}{3}$ of the high court costs in the court of appeal;
- (2) The appellant is granted an injunction pending the determination of the issues in this action restraining the Attorney General of Antigua and Barbuda; and/or the Director of the ONDCP and/or the Commissioner of Police their servants from requesting or seeking or pursuing an assistance for information from the relevant authorities of Bermuda pursuant to any request for assistance made by the Defendants in relation to or concerning the Claimant.
- (3) The appellant is granted an injunction pending the determination of the issues in this action restraining the Attorney General of Antigua and Barbuda; and/or the Director of the ONDCP and/or the Commissioner of Police their servants and or agents from disclosing to the relevant authorities in Bermuda pursuant to any request for assistance made by those authorities in Bermuda, any information or related material concerning the Claimant and/or bank accounts held at Bank of Nova Scotia, St. John's, Antigua as identified in such request for assistance.
- (4) The appellant is granted an injunction pending the determination of the issues in this action restraining the Attorney General of Antigua

and Barbuda; and/or the Director of the ONDCP and/or the Commissioner of Police their servants and or agents and/or other authorities of the Government of Antigua and Barbuda from invoking, applying or seeking to enforce the provisions of the **Mutual Assistance in Criminal Matters Act No 2 of 1993**, the **Proceeds of Crime Act No 13 of 1993**, the **Money Laundering Act No 9 of 1996** as amended or the **Office of National Drug and Money Laundering Control Policy Act No 11 of 2003** in relation to the Claimant and/or any bank accounts owned or controlled by him pending the determination of this matter.

- (5) The Order of Mr. Justice Errol Thomas dated 2nd December 2004 granting the Claimant leave to apply for Judicial Review in this action pursuant to CPR 56.4 (8) shall operate as a stay of the proceedings pending the determination of the lawfulness of the Defendants' conduct as challenged in this action. For the avoidance of any doubt the reference to the stay of proceedings refers to any or all steps by way of furtherance of any and all requests for assistance made by the relevant authorities in Bermuda to Antigua and Barbuda and requests for assistance made by Antigua and Barbuda to Bermuda with regard to the Claimant and any of his controlled or allegedly controlled accounts as identified in the respective requests.

Michael Gordon, QC
Justice of Appeal [Ag.]

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]

I concur.

Indra Hariprashad-Charles
Justice of Appeal [Ag.]