

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.10 OF 2006

BETWEEN:

PREMIER LEAGUE LIMITED

Appellant

and

THE ATTORNEY GENERAL

Respondent

Before:

The Hon. Mr. Denys Barrow, SC

Justice of Appeal

The Hon. Mr. Hugh A. Rawlins

Justice of Appeal

The Hon. Ms. Ola Mae Edwards

Justice of Appeal [Ag.]

Appearances:

Mr. John Fuller for the Appellant

Mrs. Cynthia Hinkson-Ouhla and Ms. Shelley Isles for the Respondent

2007: July 3;
September 17.

JUDGMENT

- [1] **BARROW, J.A.:** In dismissing the appellant's claim for damages for breach of its constitutional rights caused by an allegedly wrongful decision of Baptiste J, Belle J. decided that the appellant had no property in a fund over which the appellant had obtained a freezing order. Belle J further held that although Baptiste J had discharged the freezing order without notice to the appellant and, therefore, in breach of natural justice, the appellant had other adequate means of redress available and should not be granted a remedy under the Constitution. The appellant asked this court to decide that it had a right of property in the fund and that it was entitled to redress under the constitution because it had no meaningful alternative redress. After this appeal had been argued and the court had reserved its decision, counsel for the appellant very helpfully informed the court the

following day that he conceded that the appellant had no right of property in the fund and he abandoned that ground.

Chronology of litigation events

- [2] Counsel produced an agreed statement of facts to the court below on the basis of which Belle J made his decision and from which the following chronology and descriptions of events are drawn.

5 November 2001: appellant (or claimant) files claim No. 122/2001 against E. Payments Solutions Ltd. and another claiming US\$349,613.37.

23 November 2001: claimant obtains judgment in default of acknowledgment of service.

28 December 2001: claimant obtains Provisional Attachment of debt order against Data Bank International Inc (the garnishee).

8 February 2002: court grants a freezing order against the garnishee and adjourns further hearing of provisional attachment of debt order to 5 April 2002. Court orders the claimant to serve each of the claimants in each of High Court claims Nos. 29/2001 and 39/2001 with the attachment of debt proceedings pursuant to Part 50.11 of the Civil Procedure Rules 2000 (CPR 2000).

29 April 2002: court sets aside the default judgment; grants leave to appeal; and orders freezing order to continue until the determination of the appeal.

13 May 2002: claimant files notice of appeal against the setting aside of the default judgment.

31 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]... to the judgment creditors in the said suits." (Emphasis added.)

20 September 2002: court of appeal allows claimant's appeal, restores the default judgment, and orders that the freezing order made on 8th February 2002 shall continue until payment of the judgment debt.

[3] Two significant pieces of information must be added to that chronology. It is now common ground that on 29th April 2002 a number of claims were called on for hearing together, including Nos. 29, 39 and 122 of 2001. In each of these, Provisional Attachment orders had previously been made in respect of the funds held by the garnishee. Counsel in each claim, therefore, knew of the provisional attachment orders made in the other claims. Indeed the judge had ordered the claimant in claim no. 122 to give notice to the claimants in the other two claims, as is stated in the chronology in the entry for 8th February 2002. On the said date, 29th April 2002, that the three claims came on together for hearing, after the court set aside the default judgment in claim No. 122, gave leave to appeal against its decision to set aside the default judgment and ordered the freezing order pronounced in that claim to continue, the court continued with proceedings in claims nos. 29 and 39. (I will hereafter sometimes refer to these as "the other two claims".) However, counsel for the claimant in claim no. 122 left the chambers of the court after the court had made its orders in that claim.

[4] Counsel was not present when the court set 31st May as the date for the hearing of the applications to make final the provisional attachment orders it had made in the other two claims. It is accepted that counsel for the claimant was not aware of this fixture. The solicitor general submits that was counsel's own fault; he knew that the claimants in those claims were seeking final attachment orders and satisfaction of their judgments out of the same funds the appellant was seeking to attach. The appellant's director who swore the affidavit in support of its claim deposed that Baptiste J made his orders on 31st May 2002 "without the Claimant being afforded an opportunity to be heard and in breach of the Claimant's right to the protection of the Law and due process..." That contention suggests that there

was some requirement for the court to notify counsel of the date set for the further hearing in claims nos. 29 and 39 and I will address this thought shortly.

[5] The other significant piece of information is of an event that took place in the other two claims. In the chronology appearing above it is indicated, based on the agreed statement of facts, that on 31st May 2002 the court “lifted the freezing order”. The true position appears differently in the actual orders that the court pronounced in those claims.

[6] On 31st May 2002 in claim 29/2001 the court ordered, “the Provisional Attachment of Debts Order made on March 22, 2002 is made final.” That order directed the garnishee to pay the claimant in that claim the sum of US \$1,005,107.79. The order then stated:

“For the avoidance of doubt the injunctions granted in suits No. 39 of 2001, 122 of 2001, 118 of 2001 and 175 of 2001 are hereby superseded.”

[7] On the same 31st May 2002 in claim 39/2001 the court made an order to similar effect as in claim no. 29, for the garnishee to pay US \$366,072.35 and declared, as well, that

“For the avoidance of doubt this order supersedes various injunctive orders granted by this court in High Court suits 2001/0029, 2001/0118, 2001/175, 2001/0122.”

[8] Pursuant to these Final Attachment orders the garnishee paid out substantially the entire fund held by the garnishee. A balance of US \$16.50 remained.

The claim for constitutional redress

[9] The claimant sought redress under the provisions of section 18 of the **Saint Christopher and Nevis Constitution Order 1983**, including a declaration that the judicial branch of the Federation had contravened its fundamental rights to the protection of law guaranteed by the provisions of sections 3 (a) and 10 (8) of the

Constitution and an order that the Federation pay it compensation in the sum of US \$349,618.37.

[10] The sections referred to 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;
- (b) protection for his personal privacy, the privacy of his home and other property and from deprivation of property without compensation...”

“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 “

[11] In a reserved judgment¹ Belle J stated the factual premise on which he considered the claim that the appellant’s rights were breached. He stated:

“[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.”

[12] The judge went on to find 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 and, hence, the right to a fair hearing under section 10 (8) of the Constitution. However, the judge stated, he agreed with the submission of crown counsel for the Federation that the claimant could not rely on the argument that he was deprived

¹ St. Christopher and Nevis High Court Claim No. SKBHCV 2003/0170, judgment delivered 14 July 2006

of the protection of the law and of his property and cited as authority **Maharaj v Attorney General of Trinidad and Tobago (No. 2)**², **Attorney General v McLeod**³ and **Kent Garment Factory Ltd. v Attorney General of Guyana**.⁴ The judge quoted Lord Diplock in **Maharaj** that

“... even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6⁵ 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.”

[13] As indicated, the judge decided that the appellant had no property rights in the fund “at the time of the discharge of the “freeze order”.⁶ The judge continued:

“[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.”

The judge decided that there were other adequate means of redress available to the claimant and declined to grant any relief.

Breach of natural justice

[14] No doubt based on the agreed statement of facts Belle J decided that the “discharge” of the freezing order, as he called it⁷, or “the decision to remove the freezing order”, as he also called it⁸, was done in breach of natural justice and the appellant’s right to due process. As appears from the true statement of facts above, Baptiste J did not lift or discharge or remove the freezing order in claim no.

² (1978) 30 WIR 310

³ (1984) 32 WIR 450

⁴ [1993] 3 LRC 240

⁵ This is the redress provision in the (former) Constitution of Trinidad and Tobago; similar to section 8 of the Constitution of the Federation.

⁶ At [19] of the judgment

⁷ At paragraphs [19] and [20] of the judgment

⁸ At paragraph [9] of the judgment.

122/2001. Baptiste J made orders for payment, in the other two claims. No question arises on this appeal as to the merits of the decisions and orders that Baptiste J made in claims nos. 29/2001 and 39/2001 and this court must take it that those decisions and orders were properly made.

- [15] When Baptiste J included in his orders in the other two claims the provision that “for the avoidance of doubt” the orders for payment superseded the freezing orders he had made in other claims in relation to the funds held by the garnishee, he was doing no more than helpfully stating, for the benefit of the garnishee, the effect of the orders for payment that he was making. I am not sure if counsel appreciated that the freezing order Baptiste J made in claim no. 122 did not bind the claimants in the other two claims, who were not parties in claim no. 122, or disentitle those claimants to the benefit of their final attachment of debt orders. The “freezing order” was directed to the garnishee. It ordered

“That Data Bank International Limited is hereby restrained from disposing of any funds held by it ... whereby the amount so held decreases below US\$394,000.00 until further Order.”

- [16] The object of that order was to prevent the garnishee from honouring any instruction from the defendant to dispose of the funds below the stated level. That was undoubtedly for the protection of the appellant but that protection never extended to preventing the court from determining the priority of competing claims to, and ordering the payment of those claims out of, the funds.

- [17] Consideration of the matter of competing claims and the appellant's contention, mentioned above, that the appellant should have been given notice of the hearing of the applications for final attachment orders in the other two claims is informed by the provisions of Part 50.11. This rule deals with attachment of debts orders and provides that the court may order, after it has made a provisional order, that notice of the hearing for the final order and a copy of the application for the attachment order be served on any person who may have a claim to the debt. The judge made such an order in claim no. 122, for the claimants in the other two

claims to be served. This court does not know whether the judge made such orders in claims nos. 29 and 39 for the appellant to be given notice, and, if the appellant was given notice, what the appellant did, if anything. It is understandable that this information was not placed before this court because the appellant did not challenge the propriety of the orders in the other two claims. The appellant challenged the “lifting” of the freezing order. In the absence of any information in this regard we are not permitted to speculate.

[18] We do know, however, that counsel for the appellant knew that the claimants in claims nos. 29 and 39 had applied for and obtained provisional attachment of debts orders. We also know that the judge knew, if not otherwise then certainly from his hearing on 29th April 2002 of all 3 claims together, that the appellant, through its counsel, knew of those provisional orders and knew that there would, necessarily, be a hearing to decide whether to grant a final order that would direct payment out of the fund. In that state of knowledge it was eminently a matter for the judge to decide whether the intention behind rule 50.11 had been satisfied and, therefore, whether it was fair to make the final attachment orders in claims nos. 29 and 39. Also, we must not overlook that the judge would most likely have formed a view of the merits of the appellant’s claim to be paid out of the fund⁹ and must have formed a view of the merits of the claims in the other two claims and what should be the priority of payments. We have no basis for reviewing the judge’s decision to proceed as he did in claims nos. 29 and 39.

[19] The judge thought it reasonable for the claimant to assume that nothing would be done to upset the freezing order pending its appeal. This assumption is probably the explanation for the claimant not objecting to the making of the final attachment orders in the other two claims. However reasonable it may have been it was a false assumption based on an imperfect appreciation of the limits of the freezing order, which I have stated.¹⁰

⁹ Or whether such a claim continued to exist after the appellant’s judgment had been set aside and the provisional attachment order in its favour had fallen away.

¹⁰ At paragraphs [15] and [16], above.

Wrong premise

- [20] It follows from my conclusion that Baptiste J did not lift or discharge the freezing order, that the freezing order remained in place in claim no. 122/2001, in which it was made. The garnishee bank continued to be bound by the freezing order and to be prevented from complying with any payment instructions coming from the defendant, the owner of the fund. That was all that was ever the effect of the freezing order. The freezing order never purported to forestall the claims of others to the funds. The “for the avoidance of doubt” provision that Baptiste J included in his order was really no more than recognition of that fact.
- [21] In my view, therefore, Baptiste J did not deny due process of law or a fair trial to the appellant. The factual premise of the appellant’s claim does not exist. That conclusion makes it unnecessary for me to consider whether, the appellant having properly conceded that there was no breach of its right to property, it could claim redress for the fact that it was denied due process of law.
- [22] I would dismiss the appeal. Rule 56.13 (6) states the general rule to be that no order for costs may be made against an unsuccessful applicant for constitutional redress. The appellant did not act unreasonably in making or conducting the claim, for which the rule permits the court to depart from the general rule. I would therefore make no order as to costs.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal

I concur.

Ola Mae Edwards
Justice of Appeal [Ag.]