

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.11 OF 2005

BETWEEN:

THE BARBUDA COUNCIL

Appellant

and

[1] ANTIGUA AGGREGATES LIMITED
[2] SANDCO LIMITED

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Hugh A. Rawlins

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Mrs. Eleanor Clarke-Solomon for the Appellant
Mr. Hugh C. Marshall Jr. with him Mrs. Cherissa Thomas for the Respondents

2007: March 14;
May 14.

JUDGMENT

[1] **RAWLINS, J.A.:** This appeal is against a decision in which the Master dismissed a claim which the appellant Council instituted in May 2003 against the respondents. The Council's claim is for outstanding tonnage dues in the sum of EC\$7,586,513.28 on shipments of sand from Barbuda for the period April 1983 to August 1993. The respondents sought an order to dismiss the claim on the ground that it was statute barred by virtue of section 11(1) of the Limitation Act 1997, which precludes the institution of an action to recover money after the expiration of 6 years from the date on which the cause of action accrued.

[2] It would be helpful to reproduce the Master's reasons for decision. She stated:¹

"[11] The Council is a statutory body incorporated pursuant to S.123(1) of the Antigua and Barbuda Constitution to administer the functions of local government in Barbuda. It is clothed with the status of a body corporate with perpetual succession and a common seal and has the power to purchase and otherwise deal with land and other property. The objects and powers of the Council are set out in the Act and it is bound by its terms. [12] Generally a corporation created by an Act of Parliament will not be entitled to Crown immunities as being a servant or agent of the Crown, unless the statute creating the corporation expressly enacts that it acts on behalf of the Crown, or unless the corporation is otherwise rightly regarded as such a servant or agent, or the title to the immunity is the logical and necessary consequence of the character of the corporation's powers and responsibilities. (See **Halsbury's Laws of England, Volume 9(2), Fourth Edition Reissue**). [13] It is clear then that the first step is to examine the relevant statute to determine whether it is expressly enacted that the Barbuda Council acts on behalf of the Crown. Inasmuch as the control test assists in determining the relationship between a Corporation and the Crown, the first hurdle to be met before the need to consider this test is the intention of the legislature. An examination of the Act leads me to conclude the Council does not act on behalf of the Crown as its servant or agent. This position is further bolstered by the fact that there is a specific provision in the Act that actually attributes Crown immunity in relation to collection of land and house taxes. [14] Section 43 of the Act states that in default of the payment of taxes imposed in respect of houses or land in Barbuda, the procedure specified in sections 41 to 45 of the Property Tax Act would *mutatis mutandis* apply for the purpose of recovery of the said taxes. Section 44 of the **Property Tax Act Cap 348 of the Laws of Antigua and Barbuda** states that the tax may be recovered as a debt due to the Crown from the owner. Obviously, the provisions of section 35(2) and (3) of the Limitation Act would apply here. Parliament in its wisdom, clearly and specifically stated its intention that this provision apply to the collection of house and land taxes. ... [16] A reading of the Act does not extend any Crown privileges on the Barbuda Council except where expressly stipulated in S. 43."

[3] The Council appealed on the following grounds:

- a. The learned Master erred in law in that she failed to consider or sufficiently consider the case of the Barbuda Council in light of a judgment dated 19th September, 1994 of the Honourable Mr. Justice Albert Redhead of the High Court of Justice Antigua.

¹ In paragraphs 11-13 and paragraph 14 of her judgment.

- b. The learned Master erred in law in dismissing the claim by failing to consider or sufficiently consider the said judgment of the Honourable Mr. Justice Redhead.
- c. The learned Master erred in law in that she failed to consider the distinction between an ordinary statutory corporation and a statutory corporation which is a local authority.

Grounds a and b

[4] In my view, these grounds are unimportant in this appeal. The judgment of Redhead J (as he then was) to which reference is made in these grounds was given in **The Barbuda Council v Attorney General, Antigua Aggregates Limited and Sandco Limited**.² In that suit, which was instituted in December 1988, the Council sought a declaration against the respondents that the Council was entitled to collect revenue from them for mining and exporting sand from Barbuda. The Council also sought an inquiry as to the quantum of sand that the respondents removed between June and December 1988; an account of the value of the sand; an order that the respondents should pay the sum found due on the determination of the value; various other declarations and damages for wrongful excavation of sand from below the water mark at Palmetto Point, Barbuda.

[5] When Redhead J heard the case, he declared that the Council was entitled to the protection of the island's ground water reserves in the area where the respondents mined sand. He also declared that the Council was entitled to collect tonnage dues from the respondents. However, he made no order for the taking account; for the determination of the value of the amount which the respondents owed the Council or for the payment of any sum to the Council. The Council appealed, but the court office did not deliver the notes of evidence to Solicitors for the Council until November 2002, notwithstanding that the judgment was delivered in 1994. In the meantime, in January 2002, the Council had issued the claim in the present

² Antigua and Barbuda Civil Suit No. 456 of 1988 (19th September 1984).

proceedings against the respondents, claiming for outstanding tonnage dues for the period between April 1983 and August 1993.³

[6] The appeal against the judgment of Redhead J came before this court in 2003 on an application by Antigua Aggregates Limited to dismiss it for want of prosecution. This court dismissed the appeal with no order as to costs. In the judgment,⁴ Sir Dennis Byron, CJ, noted the declaration by the trial judge that the respondents were liable to pay the Council for mining and exporting sand. He also noted that all the parties conceded that the only issue which the appeal raised concerned the quantification and the payment of outstanding tonnage dues.

[7] It is not clear what impact those proceedings, and, in particular, the judgment of Redhead J should have had on the issue on which the learned Master ruled in the present proceedings. I see no connection between the judgment of Redhead J and the question whether the Council's claim in the present proceedings is statute barred. The former proceedings ended when the appeal against the judgment of Redhead J was dismissed for want of prosecution. It could not therefore be asserted that, by extension, the declaration that Redhead J made that the Council was entitled to collect the outstanding sums from the respondents also entitles the Council to collect the dues claimed in the present claim.

[8] The claim in the former suit was for an outstanding amount for a period of 6 months in 1988. The claim in the present case is for a specific sum for outstanding tonnage dues for the shipment of sand over a 10 year period. There was therefore no good reason why the learned Master ought to have considered the judgment of Redhead J in her decision in which the only issue was whether the Council's present claim is statute barred. I would therefore dismiss this appeal on grounds a and b.

³ In Claim No. ANUHCV2002/0029.

⁴ In *The Barbuda Council v The Attorney General, Antigua Aggregates Limited and Sandco Limited*, Antigua and Barbuda Civil Appeal No. 12 of 1994 (15th January 2004).

Ground c - Limitation

- [9] This ground is the focal point of the appeal. The central issue which arises on this ground is whether section 11(1) of the Limitation Act is applicable so as to bar the Council from instituting the action for the recovery of the tonnage dues which was brought after 6 years from the date on which the cause of action accrued. This subsection states:

“11(1) An action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of six years from the date on which the cause of action accrued.”

Section 35(1) of the said Limitation Act then provides that the Act is applicable to proceedings by or against the Crown, except as otherwise provided in the Act. Section 35(2) states that notwithstanding subsection (1), the Limitation Act does not apply to any proceedings by the Crown to recover any taxes or duties. Section 35(3) states that, for the purposes of section 35, proceedings by (or against) the Crown include proceedings by (or against) any government department or any officer of the Crown acting as an officer of the Crown or any person acting on behalf of the Crown. I do not think that any of the parties doubt that the tonnage dues which the Council is seeking to recover is a tax or duty. The question, therefore, is whether the Council has the benefit of exemption from section 11(1) of the Limitation Act as “Crown body” or agent that acts on behalf of the Crown for the purpose of collecting tonnage dues.

Is the Council “the Crown”?

- [10] It is sometimes quite difficult to determine whether and/or in what circumstances a person or body may be referred to as “the Crown” or an agent of the Crown for the purpose of enjoying the immunities and privileges that that entity enjoys in the litigation process, as in the present case, to bring action without regard to a limitation period. I have on a prior occasion reflected on the complexity of the considerations and principles on which a decision will hinge as to whether a body

is a "Crown body".⁵ In this regard I noted⁶ an explanation of the term 'the Crown' which was given by the authors Bradley and Ewing, which states:⁷

"'The Crown' is a convenient term in constitutional law for the collectivity that now comprises the Sovereign in her governmental capacity, ministers, civil servants and the armed forces. When the Sovereign governed in person, it was understandable that royal officials should benefit from many of the Sovereign's immunities and privileges. But despite the increase in the scale of government and the ending of personal government by the Sovereign, the personnel of central government continued to benefit from Crown status. The shield of the Crown extended to what was described not very satisfactorily as the general government of the country or 'the province of government', but not to local authorities nor to many public corporations. Although the *Crown Proceedings Act 1947* deprived government departments of their immunity from being sued, for several reasons it may be necessary to know whether a public authority has Crown status. It is good legislative practice for an Act which creates a new public body to state whether and to what extent it should enjoy Crown status, but this does not always happen. Whether because of express legislation or judicial interpretation, **a public agency may be regarded as having Crown status for some purposes, but not for others.**" (Emphasis added).

[11] In case law, the difficulty in determining whether a body or person is entitled to the protections and immunities which the Crown enjoys was very succinctly alluded to by Scott LJ in **London County Territorial & Auxiliary Forces Association v Nichols and Another**⁸ by reference to an article published by Sir William Harrison Moore.⁹ Scott LJ stated that the article acknowledges and illustrates the obscurity of the question who is to be treated as the Crown or as a body "around which the Crown's shield is to be thrown".

[12] It is noteworthy that section 35(3) of the Limitation Act includes proceedings by any government department or by any officer of the Crown acting as an officer of the Crown or any person acting on behalf of the Crown as proceedings which are exempted from the 6 year limitation requirement. The Barbuda Council is not an

⁵ In an article entitled "State Proceedings in the Commonwealth Caribbean" (1997) 7(2) Caribbean Law Review 497, at pages 500-503.

⁶ *Ibid.*, at pages 502-503.

⁷ In the text, Wade and Bradley's Constitutional and Administrative Law (11th edn. 1993), at pages 749-750.

⁸ [1948] 2 All E.R. 432 at page 434G.

⁹ The article is published in 23 Law Quarterly Review, at page 12.

officer of the Crown. There is a Ministry of Barbuda Affairs, but the Council is not a government department that falls under that Ministry. At first blush I was inclined to think of the Council as an arm of the government of Antigua and Barbuda because it was constituted by section 123(1) of the Constitution of Antigua and Barbuda, which created it as an organ of local government for the island of Barbuda. Section 123(1) of the Constitution states as follows:

“123(1) There shall be a Council for Barbuda which shall be the principal organ of local government in that island.

(2) The Council shall have such membership and functions as Parliament may prescribe.”

The complicating factor is presented by the Barbuda Local Government Act, which constituted the Council as a corporation.¹⁰ Section 3(2) of the Barbuda Act states:

“3(2) The Council shall be a body corporate by the name of “the Barbuda Council” with perpetual succession and a common seal, and power to purchase, acquire, hold, mortgage and dispose of land and other property”.

- [13] Mrs. Clarke-Solomon, learned Counsel for the appellant Council, submitted that section 3(2) of the Barbuda Act constituted the Council as a corporation sole. With respect, I disagree because a corporation sole consists of only one member at a time: a Bishop, for example. Section 4 of the Barbuda Act provides that the Council shall be composed of the Barbuda member of the House of Representatives of Antigua and Barbuda, a Senator who is qualified to be elected to the Barbuda Council¹¹ and 9 elected members. I am therefore inclined to agree with Mr. Marshal, learned Counsel for the respondents, that section 3(2) constituted the Council as a body in the nature of a corporation aggregate. However, the Council may still fall within the exemption from section 11(1) of the Limitation Act, which section 35(3) of that Act provides, if for the purpose of collecting the tonnage dues it could be categorized as a person acting on behalf of the Crown.

¹⁰ Cap. 44 of the Laws of Antigua and Barbuda, Revised Edition, 1991. This Act is hereinafter referred to as “the Barbuda Act”.

¹¹ See section 6(1) of the Barbuda Act.

[14] Mrs. Clarke-Solomon submitted, in effect, that for the purpose of collecting the tonnage dues, the Council is an agent of the Crown. Mr. Marshall disagreed. The learned Master in her judgment, as well as counsel for the parties, in their submissions, relied for this determination on at least a part of a passage from Halsbury's Laws of England. I shall reproduce extensively for the elucidation which it could bring to the question whether the Council is entitled to the exemption from section 11(1) of the Limitation Act, which section 35(3) of that Act provides for the Crown, for the purpose of collecting the tonnage dues. The passage states:¹²

“Unlike Ministers of the Crown (who are often corporations sole and are part of ‘the Crown’ when that term is used in the sense of ‘the government’), a corporation aggregate created by Act of Parliament such as the Civil Aviation Authority, **will not be entitled to Crown immunities, as being a servant or agent of the Crown, unless the statute creating the corporation expressly enacts that it acts on behalf of the Crown, or unless the corporation is otherwise rightly regarded as such a servant or agent, or the title to immunity is the logical and necessary consequence of the character of the corporation’s powers and responsibilities.** ... A corporation not subject to control by the Crown is not entitled to Crown immunities on the ground that it is performing a public duty or providing a public service.” (Emphasis added).

[15] The last highlighted aspect of the forgoing passage is important because it points to 3 separate inquiries in deciding whether a body would be a “Crown body” for the particular purpose which is under consideration. The inquiry does not cease if the court finds that a body is not one around which the Crown’s shield is to be thrown by express statutory provision. The court should then enquire whether the shield is to be thrown around the body because the body acted on behalf of the Crown or was an agent of the Crown. If the answer on that inquiry is no, the enquiry should then be whether it is to have that shield because it is the logical and necessary consequence of the character of the corporation’s powers and responsibilities.

¹² Volume 9(2) Fourth Edition Reissue, 1998, at paragraph 1011, under the rubric “Corporation and Crown status”.

[16] In her judgment, the Master found, correctly, that the Barbuda Act did not expressly state that the Council is not a “Crown body” or agent entitled to Crown immunities. While, however, she correctly considered this question to be the first step in the inquiry,¹³ it also became her last consideration. She saw it as a first hurdle and found that the Council did not clear it because there was no specific provision that equated the Council with the Crown, or which provided for the recovery of tonnage dues as a debt due to the Crown. She noted, on the other hand, that section 43 of the Barbuda Act provides that a debt owed to the Council for land and house tax may be recovered as a debt due to the Crown.

[17] The Master did not embark upon the other 2 inquiries because she saw it purely as a question of statutory interpretation and applied the maxim: the express mention of a thing in one place is the exclusion of it where it is not mentioned.¹⁴ I do not think, however, that the maxim was applicable. This is because flowing from the passage in Halsbury’s Laws of England,¹⁵ which the Master referred to in her judgment¹⁶ the applicable principles required further inquiry whether, in the absence of specific statutory provision, the Council could be regarded as a servant or agent of the Crown, or whether the shield of the Crown is to be thrown around the Council for the purpose of recovering tonnage dues because this is the logical and necessary consequence of the character of the Council’s functions.

Servant or agent

[18] Mr. Marshall submitted that the Council is not an agent of the Crown and does not act on behalf of the Crown because, first, the executive exercises no control over the Council, and, second, the Council collects tonnage dues for its own purpose and benefit, rather than for the central government.

¹³ In paragraphs 13 and 14 of her judgment.

¹⁴ On this maxim, see for example, *Blackburn v Flavelle* (1886) 6 App. Cas. 628, at page 634.

¹⁵ Reproduced in paragraph 13 of this judgment.

¹⁶ At paragraph 12.

[19] In relation to the absence of control, Mr. Marshall referred to section 18(2) of the Barbuda Act, which sets out the functions of the Council. This subsection confers responsibility upon the Council to administer agriculture, forestry, public health, medical and sanitary facilities and services and to provide electricity and water services and other public utilities. The Council also has the responsibility to construct, improve and maintain roads. Importantly, section 18(2)(e) confers upon the Council the responsibility to raise revenue from which, in addition to subventions received from the Parliament of Antigua and Barbuda, the Council is to meet its own expenditure. The Council has unlimited responsibility for these matters because section 18(1) of the Barbuda Act states that save in these matters, the Cabinet of Antigua and Barbuda may give general and special directions to the Council on matters of policy. The Council is not under the control of the government of Antigua and Barbuda, particularly for the purpose of collecting tonnage dues.¹⁷

[20] I agree with Mr. Marshall that the central government does not control the Council, particularly for the purpose of collecting tonnage dues. I also agree with him that the Council collects tonnage dues and other rates for its own benefit and expenditure. This is clear from subsections 18(2)(e) and 18(4) of the Barbuda Act.¹⁸ Additionally, as Mr. Marshall pointed out, section 24 of the Tonnage Dues Act authorizes the Council to collect tonnage dues and other rates and taxes for its own use and for its functions in Barbuda. He also said that whereas tonnage dues collected by the central government are usually collected by the Comptroller of Customs and deposited into the Consolidated Fund, such monies collected for the Council are placed in a deposit account at a Bank approved by Cabinet.¹⁹ It is noteworthy that payments may only be made out of the deposit account under the

¹⁷ I think that this point is buttressed by section 18(4) of the Barbuda Act, which imposes a duty upon the Council to improve and maintain public buildings, wharves and harbour facilities, to promote tourism development, foreign investment and tax incentives; to apply monies that it collects to pay its expenses and to keep accounts of monies collected and disbursed. This subsection is also subject to section 18(1) and the only responsibility that the Council expressly has to the central government in relation to these matters is to deliver abstracts of accounts to the Ministry through the Director of Audit and to deliver information relating to land occupancy to the Minister.

¹⁸ Referred to in the foregoing paragraph and in footnote 17 of this judgment.

¹⁹ Pursuant to section 22(1) of the Barbuda Act.

written authority of the Chairman of the Council or another authorized member of the Council and by the Secretary to the Council.²⁰ Any excess funds that is in the account for any year is to be paid to the Accountant General of Antigua and Barbuda who must lodge it in a special account at the treasury.²¹

- [21] In the premises, the Council is not an agent of the Crown, particularly for the purpose of collecting tonnage dues. Notwithstanding this, is it a “Crown body” around which the shield of the Crown should be thrown for the purpose of recovering tonnage dues because its functions are essentially governmental?

Is the Council entitled to the shield of the Crown?

- [22] The case **London County Territorial & Auxiliary Forces Association**²² is instructive in terms of the applicable principles in relation to this principle. The relevant issue in that case was whether a territorial association, like the Crown, was immune from the operation of the Rent Restrictions Act. The English Court of Appeal held that the association was entitled to the immunity of the Crown even when it exercised its powers under territorial forces regulations to lease redundant or unused premises to members of the public. This, said that court, was because, like a Minister or organ of the central government, the association was a direct emanation from the Crown and had acted pursuant to Crown purposes. The court’s inquiry which led to that decision was based on the 2 questions. These were, first, whether the association is a sufficiently intimate “emanation” from the Crown to attract “the contagion of the Crown’s immunity”. This was an inquiry into the status of the association. Second, on the assuming that the association had Crown status, could it claim the immunity in respect of the particular transactions (the lease of property to non-military tenants).²³

²⁰ Pursuant to section 22(3) of the Barbuda Act.

²¹ Pursuant to section 22(2) of the Barbuda Act.

²² Op. cit., at note 8 in paragraph 11 of this judgment.

²³ See page 433 H to 434A of the judgment.

- [23] On the question of status, Scott LJ stated that the association was in no respect comparable with local government authorities, such as a Docks Board, which, in general, do not attract Crown privileges, although they may do so in exceptional circumstances in which they fulfill local functions that are of nation-wide scope and import.²⁴ In relation to immunity for particular transactions, Scott LJ stated that renting property to private individuals was a Crown purpose because its purpose was to lease property which was not needed for occupation by the armed forces to private persons.
- [24] The Council is not a local authority in the nature of a docks board or aviation authority whose functions are mainly commercial. In paragraph 12 of this judgment, I stated that I was inclined to think of the Council as an arm of the government of Antigua and Barbuda constituted as it was by section 123(1) of the Constitution of Antigua and Barbuda. The Constitution has created the Council as an organ of government for Barbuda. Section 3(1) of the Barbuda Act established the Council to administer the system of local government for the island. Paragraphs 19 to 21 of this judgment provide a synopsis of aspects of the functions and responsibilities of the Council. They are uniquely governmental functions. For the purpose of the present case, they include the power, pursuant to section 24(2) of the Barbuda Act, to raise revenue in Barbuda under various national statutes, including the Tonnage Act, to finance the administration of that island.
- [25] Although the executive does not control the Council's functions there is a very close governmental facility and working relationship between them, even in financial matters, as section 22 of the Barbuda Act and aspects of paragraph 20 of this judgment indicate. Additionally, while rules 6, 7, 8 and 9 of the regulations made under the Barbuda Act empower the Council to allot, distribute and divide village lands between villagers; to set apart lands for villagers to use as provision grounds, and to reserve lands for highways and paths, these functions may only

²⁴ See page 434E-G of the judgment.

be carried out with the sanction and approval of the Cabinet of the central government.

[26] It is therefore my view that the Council is a sufficiently intimate “emanation” from the Crown to attract the contagion of the Crown’s immunity. Additionally, undoubtedly, the collection of taxes, including tonnage dues, is a transaction that is a Crown purpose. Tonnage dues are collected under the same national statutes pursuant to which the states’ revenues are collected. They are expended for the purpose of administering the government of the island of Barbuda. These are purposes with which the central government would normally have been charged if the Constitution and the Barbuda Act did not entrust this duty to the Council.

[27] In the premises, I would allow the appeal, set aside the judgment and order of the Master, and order that the Council’s claim against the respondents be reinstated. The respondent companies shall pay \$3,000.00 costs to the Council in this appeal.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal