

GRENADA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.9 OF 1994

BETWEEN:

ATTORNEY - GENERAL

Appellant

V

ERIC GAIRY

Respondent

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice

The Hon. Mr. C. M. Dennis Byron - Justice of Appeal

The Hon. Mr. Satrohan Singh - Justice of Appeal

Appearances: Dr. F. Alexis, Attorney-General, Mr. E.A. Heyliger, Q.C. and Miss T. Gill for the Appellant

Mr. D. Knight, Q.C. and Miss D. Campbell for the Respondent

1994: July 6th;

JUDGMENT

BYRON, J.A.

This is an appeal against a consent order dated and entered 29th April, 1994 and made before Moore J. upon hearing Derek Knight Q.C. for the respondent and Denis Lambert Solicitor General for the appellant.

The terms of the order are set out:

"(1) That the report of Mr. Joachim St.John, the arbitrator appointed pursuant to the order of the Court dated the 31st day of July, 1993 be adopted.

(2) That judgment be entered for the Plaintiff in the sum of \$3,649,414.00 being the amount awarded the Plaintiff by the arbitrator.

(3) That interest on the said amount be' paid at the rate of \$6.00 per centum per annum from the 1st day of November 1990 until payment.

(4) That the costs of the proceedings before the arbitrator be provided for.

(5) That the Minister of Finance be directed to issue a warrant under his hand forthwith for the prompt payment of the above amounts from the consolidated fund.

(6) Liberty to apply."

The grounds of appeal were as follows:

"(1) That the order directing the Minister of Finance to issue a warrant under his hand forthwith for the prompt payment of \$3,649,414.00 from the consolidated fund is contrary to law, in that:

(i) The Minister of Finance may not be directed to issue a warrant as directed in paragraph 5 of the said Order.

(ii) The Minister of Finance was not a party to the proceedings in which the said Order was made.

(2) That the said Order is wholly inconsistent with the fact stated on page 4 of the arbitrator's report that Counsel appearing for the Respondent/Appellant before the arbitrator asked for an adjournment of one month but this application was refused by the arbitrator thus denying the Respondent/Appellant a fair hearing."

The arguments on ground one of the appeal were interesting and dealt with important issues. However, it has become unnecessary to adjudicate on this point as, after argument, Counsel for the respondent conceded that the mandatory order against the Minister of Finance should not have been made and entered. Both sides agreed that a suitable wording for paragraph

(5) of the order would be:

"(5) That there be prompt payment of the above amounts."

And I accordingly so order.

The second ground of appeal remained contentious. The learned Attorney-General submitted that the entire order should be set aside because the arbitrator's report is null and void for breach of the rules of natural justice as the appellant was denied a fair hearing when its application for an adjournment was refused. It is necessary to briefly look at the background in order to place this issue in context.

This matter commenced in 1979, when by a decree styled People's Law No. 95 of 1979 - "Proclamation by the People's Revolutionary Government", certain properties of the respondent were confiscated.

On the 14th October, 1987 the respondent filed a motion for redress. The matter came on for hearing before St.Paul J. and on 10th November, 1990 he ruled as follows:

"Having considered the conjoint effect of sections 6 and 16 of the Grenada Constitution, this Court doth order and declare as follows:

ttl. All properties of the Applicant which were confiscated under the provision of People's Law No.95 of 1979, which by consent of the parties the Court declares to be null and void, be forthwith returned to the applicant.

2. The Applicant be compensated for the unlawful confiscation of the said properties. Such compensation to be determined by an arbitrator to be agreed on by the Applicant and the Respondent, in default of agreement by a referee appointed by the Court.

3. Costs of this application to be paid by the Respondent. Such costs to be taxed if cannot agreed to by the parties.

4. Liberty to apply."

Apparently, there is no dispute under the order for the return of the property. The record reveals that the property has been returned apart from two parcels of land of Point Salines International Airport which are in the process of acquisition in accordance with the constitutional provisions.

By letter dated 24th June, 1993 Mr. Joachim St.John was appointed Arbitrator by order of the High Court, to determine the compensation to be paid to the respondent for the confiscation of the said properties.

The venue of the arbitration was the Conference Room of the Ministry of Finance, Lagoon Road, St.Georges, Grenada. The respondent was represented by Mr.Derek Knight Q.C. and the appellant by Mr. Edwin Heyliger Q.C. The first meeting of the arbitration was held on 29th July 1993.

At that meeting, after Counsel for the respondent had opened his case counsel for the appellant applied for and obtained an adjournment to allow him to be briefed and to obtain a valuation of the properties involved.

After this adjournment was granted the progress of the arbitration was continually frustrated by the appellant's lack of readiness. This is described in the arbitration report where the arbitrator explained his position.

"Strenuous efforts were made to have the hearing resumed but the Government representative continued to complain that he was not ready. However, with the assistance of the Hon. Attorney-General two officers were appointed by Cabinet to evaluate the properties for government and to give evidence on behalf of government.

Unfortunately the officers neither submitted an evaluation nor appeared before the Arbitrator. I had no alternative but to proceed with the arbitration."

The second meeting was held on 14th December, 1993 after more than four months had elapsed. At that time counsel for the appellant unsuccessfully applied for a three month adjournment on the ground that he was not ready. As a simple factual comment, it seems to me that four months was a more than adequate time span for the purpose of allowing counsel to be briefed and to obtain a valuation of the properties involved.

The respondent adduced evidence and relied on Mr. Joseph John, a Consulting Engineer. The arbitrator invited Mr. Heyliger, QC to cross examine the witness and he declined to do so. Instead he applied for a one month adjournment. The hearing was adjourned for one week.

At the third meeting on 21st December, 1993 Mr. Heyliger,

Q.C. again asked for an adjournment for one month which was denied. No evidence was adduced on behalf of the appellant. In his report the arbitrator expressed the view that it did not appear that any further evidence would be obtained from the Government side. He visited the properties himself and made his award on the basis of the evidence available to him. His report was made in February 1994.

The appellant contends that the refusal of the application for the adjournment made on 21st December, 1993 violates his entitlement to a fair opportunity of being heard in accordance with natural justice.

The appellant referred to Aflis v ChiQ (1972) 19 W.I.R. 459, a case in which the Court of Appeal of Jamaica set aside an order of the Solicitor's Disciplinary Committee on the ground inter alia that a refusal of an adjournment was a denial of an opportunity to be heard. I find, however, that the facts of that case were very different from the instant case. In the matter of a complaint against him by one J.T., the appellant had obtained an adjournment to 19th June, 1969 on the basis of a medical certificate relating to his own health. He appeared on 19th June, 1969, without counsel, but with another medical certificate which indicated that he was still ill and recommended a leave of absence from his duties for a further period of two weeks "in order that

he might regain his health". The complainant had to leave the country permanently on 29th June, 1969 and the matter was fixed for 26th June, 1969 for the purpose of taking her evidence whether the appellant could be present or not. On that day after her evidence was taken, the appellant then said "I am ill - I am not well and I have produced a medical certificate on two occasions and I am asking the committee to adjourn the matter to enable me to give evidence when I feel better." His application was refused and the committee reserved its decision.

Immediately after, the committee proceeded to hear the complaint of the respondent. It appears that the appellant had no prior notice that this complaint would have been heard on that day. He applied for an adjournment, unsuccessfully. He left the proceedings and evidence was heard in his absence.

The majority of the Court of Appeal concluded that he had not been fairly treated, and that his application had been rejected without due consideration, as a result of which he had been denied a full and fair opportunity of being heard in answer to the complaint.

The appellant also referred to *R v Thames Magistrates' Court, ex parte POLEMIS* (1974) 2 All E.R. 1219 where the Court quashed a conviction, by certiorari, on the ground that the failure to allow the defendant in a criminal case a reasonable opportunity to prepare his case was a breach of natural justice. The facts of that case were dramatically different from this one. The Greek speaking Captain of a ship was charged with criminal offence of oil pollution which carried a maximum penalty of 150,000.00. The summons was served on him at 10:30 a.m. returnable at 2:00 p.m. on the very same day. His requests for adjournment succeeded to the extent that the matter came on at 4:00 p.m. on the same day and after a hearing the trial resulted in a conviction and fine of 15,000.00.

Lord Widgery, C.J. in explaining the application of the principles of giving a reasonable opportunity to be heard to these facts said at p.1223:

".....the opportunity to present a case to the court is not confined to being given an opportunity to stand up and say what you want to say; it necessarily extends to a reasonable opportunity to prepare your case before you are called on to present it.....

In this instance, on the brief and simple facts that I have related, can it be said that the applicant was given a reasonable opportunity to present his case? It seems to me to be totally unarguable that he was given such a reasonable opportunity. He had no time to take samples, no time to see a report of the samples taken by the prosecution, no time to look for witnesses, no time to prepare any supporting evidence supportive to his own, and that too when he was a man with a very rudimentary knowledge of the English language in a country foreign to his own.

When one just looks at those facts it seems to me to be a case in which any suggestion that he had a reasonable chance to prepare his defence is completely unarguable."

In the instant case the facts are quite different. When the parties first met with the arbitrator in July 1993 an adjournment of over four months was granted for the purpose of enabling the appellant to prepare itself for the hearing. The contents of the arbitrator's report provide information of his involvement in ensuring that an opportunity was given for the appellant to prepare itself for the hearing. Even after that long adjournment, after the expert witness had given his testimony a further adjournment of one week was given. I have no hesitation in supporting the view which the arbitrator adopted. In my opinion the appellant had more than ample time to prepare itself.

It is difficult to resist the view that after so much time had elapsed, the appellant's allegations of unreadiness must have been due to reasons other than the need for reasonable time to prepare itself for the trial. In fact the conduct of learned Queen's Counsel in declining to cross examine the expert witness, especially after so much time had elapsed, and the efforts which had been exerted to have valuation officers appointed by cabinet, were factors which the arbitrator was entitled to take into account, and which could support his conclusion that it was unlikely that any evidence would be led by the appellant.

In my view that conclusion was not unreasonable and I do not think that there would be any justification for concluding that the arbitrator failed to give the appellant a reasonable opportunity to be heard. In my view there was no default of natural justice and I would rule against setting aside this order.

Accordingly, I would dismiss ground two of the appeal. The order of the Court, therefore, is that the consent order be varied only to the extent that paragraph 5 shall read:

"5. That there be prompt payment of the above amounts."

No order as to costs.

C.M. DENNIS BYRON

Justice of Appeal

I concur

SIR VINCENT FLOISSAC

Chief Justice

I concur.

SATROHAN SINGH

Justice of Appeal