

THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. ANUHCv2023/0220

BETWEEN:

YULIA GURIEVA-MOTLOKHOV

Applicant/Claimant

and

[1]THE PORT MANAGER OF THE ANTIGUA & BARBUDA PORT AUTHORITY

[2]THE DIRECTOR OF THE ANTIGUA AND BARBUDA DEPARTMENT OF
MARINE AFFAIRS AND MERCHANT SHIPPING

[3]ATTORNEY GENERAL OF ANTIGUA AND BARBUDA

Respondents/Defendants

Appearances:

Dr. David Dorsett and with him Mr. Radford Hill and Ms. Latoya Letlow for the Claimant

Mr. Anthony Astaphan SC and with him Mrs. Carla Brookes-Harris, Mr. Zachary Phillips and Mr. Ryan Johnson for the Defendants

2023: June 23rd

June 29th

JUDGMENT

[1] **WILLIAMS, J.:** The Applicant has by Originating Motion filed on 15th June 2023 commenced proceedings challenging the constitutionality of the Port Authority (Amendment) Act 2023. The Applicant by Notice of Application filed on the same day is also seeking urgent relief. This matter concerns the motor vessel M/Y *Alfa Nero* a luxury yacht “the vessel”.

[2] The Applicant claims to be a beneficiary under a discretionary trust called the Tyne Trust. In her affidavit the Applicant describes that the trust ultimately controls two companies namely Flying

Dutchman Ltd. and Vita Felice Ltd. Flying Dutchman was registered as the owner of the vessel whilst Vita Felice is the owner of certain works of art aboard the vessel.

- [3] In short, the Applicant claims that her property rights in the vessel and the works of art which are guaranteed by sections 3 and 9 of the Constitution of Antigua and Barbuda have been abrogated by the Port Authority (Amendment) Act.¹ The Applicant alleges that her rights to the property are by virtue of being a beneficiary of the trust.

Interim Relief Sought

- [4] The Applicant therefore seeks the following interim relief:

- (1) A **Notice Injunction**: An interim injunction requiring the Respondents to give any proposed purchaser or bidder for the Motor Yacht **Alfa Nero** notice of the prior interests of Flying Dutchman Overseas Limited (**FDOL**) and the Claimant;
- (2) A **Sale Injunction**: A interim injunction restraining:
 - a. Any sale of the **Alfa Nero** by the Respondents until further order or final determination of the matter.
 - b. The 1st Respondent from issuing any certificate under s38A(9) (or otherwise) that the **Alfa Nero** is sold free of any lien or encumbrances.
 - c. The Government (acting through the 3rd Respondent or any agent of the same, or any public body or public officer, to include the 1st and 2nd Respondents) from forfeiting any proceeds of the sale of the **Alfa Nero** and placing the same into the Consolidated Fund, whether under s38A(3) or otherwise.
- (3) **Declarations**: Interim declarations declaring that:
 - a. The **Alfa Nero** is not a ship liable to be registered as an Antiguan and Barbudan ship under section 11 of the Antigua and Barbuda Merchant Shipping Act 2006, as amended.
 - b. The registration of the **Alfa Nero** by the 2nd Respondent under the provisions of the Antigua and Barbuda Merchant Shipping Act 2006, as amended, is unlawful until further order or final determination of the matter.
- (4) A **Sealing Order**: An order that
 - a. The Second Exhibit to the Affidavit of Yulia Andreevna Gurieva-Motlokhov filed on 15th June 2023 (**YGM-2**); and
 - b. The Confidential Schedule to the Affidavit ("the Confidential Schedule") shall remain sealed on the Court file and access by any person (other than the parties to the proceedings and their legal practitioners) shall be forbidden save by order of the Court.

Background

¹ Act No. 1 of 2023

- [5] In or about March 2022 the M/Y **Alfa Nero** “the vessel” a large pleasure yacht entered Falmouth Harbour, Antigua. It remains there to date.
- [6] On 20th March 2023 the Port Authority (Amendment) Act² was enacted by Parliament and published in the Gazette. The 2023 Act inserted a new section 38A into the Port Authority Act 1973.
- [7] The Port Manager published a notice in the Gazette on 21st March 2023 pursuant to section 38A (4)(b) of the 2023 Act which stated that the vessel posed an imminent threat to the harbour and to other vessels and was a risk to the economy of Antigua and Barbuda. The notice further advised that should the owner fail to take all necessary steps to remove the vessel, the Port Manager would move to sell the same. The same notice was published in the Lloyd’s List newspaper on 28th March 2023.
- [8] Flying Dutchman Ltd. and Vita Felice Ltd. applied for leave for judicial review and injunctive relief to challenge the Port Manager’s decision to sell the vessel and the works of art aboard the vessel.³
- [9] Leave was granted to the companies to file judicial review proceedings by decision of this court made on 8th June 2023. However, injunctive relief was refused. The information disclosed by the Respondents reveals that further applications for injunctive relief were subsequently refused by the Court of Appeal and the Privy Council respectively.
- [10] The Applicant’s Solicitors wrote to the Port Manager by letter dated 10th April 2023 indicating the Applicant’s interest in the vessel by virtue of being beneficiary of the Tyne Trust. The Applicant alleges that there was no response to this letter.
- [11] Subsequent to this Court’s order the Port Manager conducted an auction with the highest bid being submitted by Mr. Eric Schmidt a former CEO of Google. It is not clear whether the entire sale transaction has been completed.⁴
- [12] As previously indicated the Applicant commenced these proceedings on 15th June 2023.

Discussion/Analysis

- [13] In the present case I note that the claim is for remedies for pursuant to the redress provision contained at section 18 of the Antigua and Barbuda Constitution 1981. It is settled law going as far back as **Gairy v Attorney General**⁵ that the equivalent of section 18 permits the court to grant many forms of redress including injunctive relief.
- [14] The principles upon which such interim relief are to be granted were considered by the Privy Council in the case of **Belize Alliance Conservation Non-Governmental Organizations v**

² Ibid

³ Claim No. ANUHCv2023/0185

⁴ Affidavit of Darwin Telemaque filed on 20th June 2023

⁵ [2001] UKPC 30

Department of the Environment⁶ where Lord Walker stated at paragraph 36 of the decision as follows:

[36] The Court's approach to the grant of injunctive relief in public law cases was discussed (in particularly striking circumstances) by Lord Goff of Chieveley in R v Secretary of State for Transport, ex parte Factortame Ltd (No 2) [1991] AC 603 to 674. The whole passage calls for careful study. Lord Goff stated (at p 672) that where the Crown is seeking to enforce the law, it may not be thought right to impose upon the Crown the usual undertaking in damages as a condition of the grant of injunctive relief. Lord Goff concluded (at p 674):

'I myself am of the opinion that in these cases, as in others, the discretion conferred upon the court cannot be fettered by a rule; I respectfully doubt whether there is any rule that, in cases such as these, a party challenging the validity of a law must – to resist an application for an interim injunction against him, or to obtain an interim injunction restraining the enforcement of the law – show a strong prima facie case that the law is invalid. It is impossible to foresee what cases may yet come before the courts; I cannot dismiss from my mind the possibility (no doubt remote) that such a party may suffer such serious and irreparable harm in the event of the law being enforced against him that it may be just or convenient to restrain its enforcement by an interim injunction even though so heavy a burden has not been discharged by him. In the end, the matter is one for the discretion of the court, taking into account all the circumstances of the case. Even so, the court should not restrain a public authority by interim injunction from enforcing an apparently authentic law unless it is satisfied, having regard to all the circumstances, that the challenge to the validity of the law is, prima facie, so firmly based as to justify so exceptional a course being taken.'

[15] In that case the Privy Council also held that the principles in **American Cyanamid Company v Ethicon Limited**⁷ (with the necessary modifications) applied to interim injunctions in the public law sphere. Thus, the issues to be considered are:

1. Whether there is a serious issue to be tried?
2. Where does the balance of convenience lie?
3. Whether damages would be adequate?

Serious Issue to be tried.

[16] This case raises the issue of the constitutionality of the Port Authority (Amendment) Act 2023. That Act inserts a new section 38A into the Port Authority Act 1973. Section 38A permits the Port Manager to sell a vessel which has been abandoned in any harbour in Antigua and Barbuda. The term "abandoned" is given specific meaning in the Act.⁸ Further, section 38A (5) permits the proceeds of such sale to be forfeited to the Consolidated Fund.

⁶ [2004] UKPC 6

⁷ [1975] AC 396

⁸ Section 38A(10)

[17] The Claimant has argued several grounds in support of the claim and in support of this application. These include:

1. The Port Authority (Amendment) Act expropriates the Applicant's property without compensation.
2. The Act only permits the Port Manager to take possession of the vessel but does not confer title.
3. The Port Manager is not the holder of an Auctioneer's Licence.
4. The Vessel is not entitled to be registered under the Antigua and Barbuda Merchant Shipping Act.⁹

[18] At this stage of the proceedings, it is not possible to make any definitive rulings on the matters raised in the Applicant's Originating Motion. This as the Respondents have not yet had the opportunity to respond to the substantive claim. As outlined in **Jean Rony-Jean Charles v Carl Bethel**¹⁰ the Respondents must have the opportunity to put their case as to why redress should not be granted.

[19] However, assuming for the time being that the Claimant has some proprietary interest in the vessel and the works of art it is certainly arguable that section 38A of the Act could be construed as taking away this right without compensation. This would be contrary to section 9(1) of the Constitution.

[20] Sections 9(1) of the Constitution provide as follows:

- (1) *No property of any description shall be compulsorily taken possession of, and no interest in or right to or over property of any description shall be compulsorily acquired, except for public use and except in accordance with the provisions of a law applicable to that taking of possession or acquisition and for the payment of fair compensation within a reasonable time.*

[21] In *McKenzie Frank v. Attorney General*¹¹ the Privy Council examined the concept of property in the context in the section 9 of the Constitution. The Board stated:

"Section 9 of the Constitution can only be properly invoked in cases where: (a) property rights already exist; and (b) such rights have been compulsorily taken possession of or compulsorily acquired."

[22] The issue of whether the Applicant has an interest in or right to or over property as contemplated by the Constitution is of relevance. As previously stated, the Applicant asserts that she is beneficiary under a discretionary trust which appears to ultimately control the companies which own the vessel and the works of art.¹² Counsel for the applicant also relies on the Guernsey Trusts Law which provides that a beneficiary's interest in a trust is personal property.

⁹ Act No. 1 of 2006

¹⁰ [2022] UKPC 51

¹¹ [2022] UKPC 25

¹² Applicant's Affidavit filed on 15th June 2023- paragraph 3.10

[23] As a general rule property shareholders of a company are treated as having no right to any property owned by the company. In **Macaura v Northern Assurance Co Ltd**¹³ Lord Buckmaster stated:

“No shareholder has any right to any item of property owned by the company, for he has no legal or equitable interest therein. He is entitled to a share in the profits while the company continues to carry on business and a share in the distribution of the surplus assets when the company is wound up.”

[24] Although the Guernsey Trusts Law may confer an interest in property on the Applicant, this law was only referred to in submissions. In **Ronald Green v. Petter St. Jean**¹⁴ the Court of Appeal held that foreign law must be proven by expert evidence. Accordingly at this stage there is no admissible evidence of Guernsey Law on this matter. Thus, it cannot be said conclusively that the Applicant has an interest in property for the purposes of section 9 of the Constitution.

[25] Further, section 9(4) of the Constitution specifies exceptions to the general principle contained in section 9(1). Thus property may be taken without compensation in cases of “*forfeiture in consequence of breach of the law*” and where “*reasonably necessary so to do because property is in a dangerous state or likely to be injurious to the health of human beings, animals or plants.*” The measures taken must be reasonably justifiable in a democratic society. Again, this issue has to be fully examined at trial.

[26] In the circumstances I am satisfied that there is a serious issue to be tried with respect to the constitutionality of the Port Authority (Amendment) Act 2023, in particular its alleged incompatibility with sections 3 and 9(1) of the Constitution. However, the issue of whether the Claimant has an “*interest in or right to or over property*” and whether the exceptions contained in section 9(4) are applicable can only be decided at trial. These issues are highlighted merely to illustrate that a breach of the Constitution cannot be established at this stage of the proceedings. It is now necessary to examine the issue of the balance of convenience.

Balance of Convenience

[27] Although there is a very important constitutional issue to be tried, the balance of convenience weighs heavily in favour of the Respondents. This is due in large part to the continued risk of environmental damage being caused by the presence of the yacht in Falmouth Harbour. The Port Manager Mr. Darwin Telemaque has in an affidavit filed on 20th June 2023 outlined the risk of ecological damage to the area. His affidavit also identifies the fact that the vessel is not insured, is not being adequately maintained and will be a risk to navigation if left in its present state. This has not been substantially controverted.

[28] This brings into consideration the question of the Applicant’s undertaking in damages. The Applicant has provided information which indicates that she has access to substantial assets. In

¹³ [1925] AC 619, 94 LJPC 154, 31 Com Cas 10

¹⁴ DOMHCVAP2012/0001 at paragraph 41

the interests of protecting the Applicant's privacy I will not describe these at all. However, any damage caused to the environment due to the continued presence of the vessel may in fact be irreparable. Thus, it is doubtful that the undertaking in damages could ever be adequate in such a case.

[29] Further, although delay by itself is not a ground for refusal of an injunction the entire circumstances of the matter must be taken into account. A Claimant who invokes the constitutional jurisdiction of court must act promptly. In **Durity v Attorney General**¹⁵ the Privy Council stated at paragraph 35 as follows:

"When a court is exercising its jurisdiction under s 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction."

[30] It is not disputed that the vessel has been moored in Falmouth Harbour since around March 2022. From then until April 2023 (when a letter was written on her behalf) the Applicant took no steps at all to bring about the release of the vessel. The Applicant also did not utilize the procedure for seeking a stay of any intended sale pursuant to section 38A of the Act within the prescribed time-limits. There is no satisfactory explanation for this.

[31] The Applicant seeks an order that the Respondents should notify any prospective purchaser of the Applicant's interest in the vessel. The Applicant also seeks an order preventing the Port Manager from issuing a certificate to the effect that the vessel is free and clear from any lien or encumbrances.

[32] It is not appropriate to make such an order for two reasons. Firstly, any such order would affect third parties who would not have had the opportunity to be heard in these proceedings. Secondly the Port Authority (Amendment) Act 2023 as an Act of Parliament is presumed to be constitutional.¹⁶ This presumption has not been rebutted by the Applicant. Thus, the court should not make an order requiring the Port Manager to act contrary to an Act of Parliament in these circumstances.

[33] In fact, it appears that the Applicant took no steps until after the court's decision in ANUHCv2023/0185. A party is not entitled to sit back and take no action and then purport to invoke the court's jurisdiction on an urgent basis. Any prejudice suffered by the Applicant is thus through her own inaction. Accordingly, in the exercise of my discretion I refuse the grant of injunctive relief as sought.

Adequacy of Damages

¹⁵ (2002) 60 WIR 448

¹⁶ **Attorney General v Antigua Times** [1975] 3 W.L.R. 232

[34] The issue of adequacy of damages is not usually decisive in considering whether to grant interim injunctions in public law. The Applicant has stated in her affidavit that the vessel is unique and has sentimental value to her. However, unless the Claimant can prove an interest or right to property as recognized by law the issue of sentimental value is of no assistance to her.¹⁷

Interim Declarations

[35] The court has the power to grant interim declarations pursuant to **CPR Rule 17.1(a)**. The Applicant seeks declarations that the vessel does not qualify for registration under the Antigua and Barbuda Merchant Shipping Act 2006. However, the Applicant did not assist the court with the factors that it should take into consideration in determining whether to grant an interim declaration or not.

[36] The fact is that the Port Manager is exercising a power of sale pursuant to the Port Authority (Amendment) Act 2023. Unless that law is declared to be unconstitutional it is to be construed as giving the Port Manager the power to do everything reasonably incidental to facilitating the sale. Thus, this is a matter for trial and is not appropriate for interim relief.

Sealing of Confidential Information

[37] The affidavit of the Applicant contains financial information which is not appropriate for the public domain. The court therefore has no hesitation in ruling that this information is to remain under seal on the E-Litigation Portal until otherwise ordered by the court.

Case Management

[38] This claim concerns the same vessel which is the subject of Claim No. ANUHCV2023/0185. Leave has been granted to file judicial review proceedings in that claim. Accordingly, the First Hearing of this claim will also be set down for that date in order to consider whether these matters should be heard together.

Costs

[39] This is a claim made pursuant to the Constitution of Antigua and Barbuda accordingly although the Applicant has not obtained any of the interim relief sought there shall be no order as to costs pursuant to **CPR Rule 56.13(6)**.

Order

[40] Based on the foregoing, it is hereby ordered as follows:

1. The Application for interim relief as sought in the Notice of Application filed on 15th June 2023 is refused.
2. The substantive claim is set down for first hearing on 20th September 2023.

¹⁷ **The Attorney General v McKenzie Frank** [2020] ECSCJ No. 215

3. The confidential information referred to in and annexed to the affidavit of the Applicant filed on 15th June 2023 shall remain under seal unless otherwise ordered by the court.
4. No order as to costs.

Rene Williams
High Court Judge

By The Court

Registrar

