

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2014/0119

BETWEEN:

DAMIAN KELSICK

Claimant

and

1. KERSTIN PETTY
(In her capacity as Director General
of the Financial Services Department)
2. THE ATTORNEY GENERAL OF SAINT CHRISTOPHER
AND NEVIS

Defendants

Appearances:-

Mr. Damian Kelsick in person
Ms. Simone Bullen Thompson, Solicitor General, for the Defendant

2018: November 12

JUDGMENT

- [1] **VENTOSE, J.:** The Claimant is an attorney at law who was registered on 29 January 2014 as an authorized person under the Financial Services (Regulations) Order, CAP 21.05 (Seventh Schedule) (the “**Companies Order**”) for the calendar year 2014. The Claimant failed to file annual audited accounts, certificate of

compliance and other documents (together “**Annual Audited Accounts**”) as required by Reg. 17(1) of the Companies Order. As a result, the acting Director of the Financial Services and Regulatory Commission (the “**Commission**”) wrote him on 14 May 2014 directing him to submit the Annual Audited Accounts as soon as possible or be subject to criminal prosecution under Reg. 17(5). The Claimant sought relief via amended fixed date claim filed on 21 August 2014 seeking, among other things, a declaration that: (1) section 244 of the Companies Act CAP 21.03 of the Laws of the Federation of Saint Christopher and Nevis is unconstitutional because it offends the separation of powers doctrine; and (2) Regs. 17 and 28 do not apply to a person authorised to carry on corporate business. Similar declarations to declaration (1) were sought in relation to section 107 of the Trusts Act and section 55 of the Limited Partnerships Act.

The Power of Minister

- [2] The Companies Order was made by the Minister pursuant to sections 240 and 244 of the Companies Act and is found in the Seventh Schedule to the Companies Act. Sections 240 and 240 of the Companies Act are as follows:

240. Orders.

- (1) The Minister may, by Order, make provision for the purpose of carrying this Act into effect and, in particular, but without prejudice to the generality of the foregoing, for prescribing any matter which may be prescribed by this Act.
- (2) Except insofar as this Act otherwise provides, any power conferred thereby to make any Order may be exercised
 - (a) either in relation to all cases to which the power extends, or in relation to all those cases subject to specified exceptions, or in relation to any specified cases or classes of case; and
 - (b) so as to make in relation to the cases in relation to which it is exercised
 - (i) the full provision to which the power extends or any less provision (whether by way of exception or otherwise),

- (ii) the same provision for all cases in relation to which the power is exercised or different provisions for different cases or classes of case, or different provisions as respects the same case or class of case for different purposes of this Act, or
 - (iii) any such provision either unconditionally or subject to any specified conditions.
- (3) Without prejudice to any specific provision of this Act, any Order under this Act may contain such transitional, consequential, incidental or supplementary provisions as appear to the Minister to be necessary or expedient for the purposes of the Order.

244. Regulation of finance business.

- (1) The Minister may, by Order, provide that **companies**, which intend to carry on or which are carrying on any business specified in the Order as being finance business, shall be subject to such regulations as the Minister may prescribe.
- (2) An Order under this section may provide for the payment of annual and other fees and for the imposition of fines and daily default fines for breaches of the matters specified in the Order.
- (3) Where **a company** is to be incorporated for the purpose of carrying on business that falls within the provisions of subsection (1) of this section, then the subscribers to the Memorandum and Articles of Association shall, before delivering the Memorandum and Articles of Association to the Registrar pursuant to subsection (1) of section 5 of this Act, obtain the authorisation that is required to carry on finance business.
- (4) An **existing company** or **external company** which intends or wishes, as the case may be, to carry on finance business that falls within the provisions of subsection (1) of this section shall, before carrying on such finance business, obtain the authorisation that is required to carry on finance business. (Emphasis added)

[3] The power to make orders generally is conferred upon the Minister by section 240. Section 244 specifically empowers the Minister to regulate finance business. However, the power is circumscribed because it specifically relates to “**companies**” that “intend to carry on or which are carrying on any business specified in the Order as being finance business”. The Companies Act defines as “**company**” as “a body corporate registered under this Act, or an existing

company". An "existing company" is defined as "a company registered under the Companies Act, Cap. 335 or the International Business Companies Act", both of which were repealed by section 241 of the Companies Act. Therefore, the Minister under section 244 may by order regulate only finance business of **a company** registered under the Companies Act.

Financial Services (Regulations) Order

- [4] Regulation 4(1) of the Companies Order provides that:

Subject to the provisions of this Order, no **person** shall carry on or hold himself or herself out as carrying on any finance business in or from within St. Kitts unless that person is for the time being authorised under this Order. (emphasis added)

- [5] Regulation 4(2) of the Companies Order states that Reg. 4(1) shall not apply to the doing of anything by or on behalf of certain listed entities. Reg. 4(3) states that Reg. 4(1) shall not apply to any transaction prescribed by the Minister (which may be done by Order: Reg. 4(4)).

- [6] On the payment of a fee, a person may apply to the Minister under Reg. 5((1) for authorization under Reg. 4(1) to carry on or hold himself or herself out as carrying on any finance business in or from within St. Kitts. Any such authorization lasts for one calendar year (Reg. 4(2)) and Regs. 4(3) and 4(4) contain the particulars of the statement that any new application must contain. Any grant of authorization by the Minister may be subject to conditions (Reg. 6) and the Minister is given the power to refuse and to revoke authorizations (Reg. 7). A person who is granted authorization by the Minister receives an authorization certificate and that person's name must be published in the Gazette (Reg. 8) and that person must display that certificate at in a prominent place in public view at its place of business (Reg. 9(1)(a))

- [7] Regulation 2(1) of the Companies Order defines a "person" as:

"person" includes any

- (a) individual;
- (b) company;

- (c) partnership; or
- (d) trust;

[8] The effect of this definition of a “person” is to provide for the types of entities who may apply to the Minister for authorization under Reg. 4(1) of the Companies Order to carry on finance business.

Ultra Vires and Delegated Legislation

[9] The essential question that arises for consideration is whether the Minister acted outside the powers conferred upon him or her by section 244 of the Companies Act when the Companies Order was made. In **F Hoffmann-La Roche & Co AG v Secretary of State for Trade and Industry** [1975] AC 295 Lord Diplock (at p. 365) stated:

... in constitutional law a clear distinction can be drawn between an Act of Parliament and subordinate legislation, even though the latter is contained in an order made by statutory instrument approved by resolutions of both Houses of Parliament. Despite this indication that the majority of members of both houses of the contemporary Parliament regard the order as being for the common weal, I entertain no doubt that the courts have jurisdiction to declare it to be invalid if they are satisfied that in making it the Minister who did so acted outwith the legislative powers conferred on him by the previous Act of Parliament under which the order purported to be made; and this is so whether the order is ultra vires by reason of its contents (patent defects) or by reason of defects in the procedure followed prior to its being made (latent defects).

[10] Similarly in **R (Public Law Project) v Lord Chancellor (Office of the Children's Commissioner intervening)** [2016] AC 1531, Lord Neuburger explained (at [23]) that:

Subordinate legislation will be held by a court to be invalid if it has an effect, or is made for a purpose, which is ultra vires, that is, outside the scope of the statutory power pursuant to which it was purportedly made. In declaring subordinate legislation to be invalid in such a case, the court is upholding the supremacy of Parliament over the Executive. That is because the court is preventing a member of the Executive from making an order which is outside the scope of the power which Parliament has given him or her by means of the statute concerned. Accordingly, when, as in this case, it is contended that actual or intended subordinate

legislation is *ultra vires*, it is necessary for a court to determine the scope of the statutorily conferred power to make that legislation.

- [11] The Applicant submits that section 244 makes it clear that the Minister may by order regulate companies but the Minister has purported to regulate the Claimant who is an individual. The Respondents seem to concede the point albeit indirectly when they state that section 244 “clearly circumscribes the power of the Minister to only make orders in **relation to companies** carrying on finance business” (emphasis added). Counsel for the Applicant and the Solicitor General declined the invitation of the court on 26 October 2018 to file and serve submissions and authorities on whether the Minister acted outside of the powers conferred upon him or her by section 244 of the Companies Act when he or she made the Companies Order that applied to entities other than companies. This was perfectly understandable because of the clear wording of section 244.
- [12] If a provision in delegated legislation is found to go beyond the scope of the statutory power pursuant to which it was purportedly made it will be held to be invalid. The power of the Minister to make regulations pursuant to section 244 of the Companies Act is only in relation to **companies** that intend to carry on or which are carrying on any finance business. The Companies Order purports to regulate specific persons who intend to carry on or who are carrying on finance business. The definition of the word “person” in the Companies Order includes entities that are not companies, namely, **individuals, partnerships and trusts**. To the extent to which the Companies Order seeks to regulate entities other than companies, it is *ultra vires* section 244 of the Companies Act.

Severance and the Order

- [13] In **Dunkley v Evans** [1981] 1 WLR 1522, legislation gave the Minister the power to make orders prohibiting fishing within an area of the British fisheries limits. That power did not extend over a defined area of the sea adjacent to the coast of Northern Ireland. The order made by the Minister prohibited fishing for herring within the area of the sea that included waters adjoining Northern Ireland. The defendants fished for herring in the prohibited area and were prosecuted for so

doing. They argued that the order was *ultra vires* the minister who purported to make it under the terms of the legislation. The prosecution conceded that the Minister's power to make regulations did not extend over this relatively small area of the sea.

- [14] The Court of Appeal of England and Wales accepted the following principles (at 1524-1525) as applicable:

Unless the invalid part is inextricably interconnected with the valid, a court is entitled to set aside or disregard the invalid part, leaving the rest intact.

If the enactment, with the invalid portion omitted, is so radically or substantially different a law as to the subject-matter dealt with by what remains from what it would be with the omitted portions forming part of it as to warrant a belief that the legislative body intended it as a whole only, or, in other words, to warrant a belief that if all could not be carried into effect the legislative body would not have enacted the remainder independently, then the whole must fail.

- [15] The invalid part of the Companies Order is its purported regulation of persons other than companies. The definition of person includes entities that are not companies. However, the invalid part of the Companies Order is not so inextricably connected with the valid part so the court can set aside the invalid part leaving the rest of the Companies Order intact. Therefore, it is possible to leave the Companies Order intact by deleting the definition of "person" in Reg. 2(1) of the Companies Order and replacing it with:

"person" means any company

The Limited Partnership Act

- [16] The equivalent of sections 244(1) and (2) of the Companies Act in the Limited Partnership Act CAP 21.12 of the Laws of the Federation of Saint. Christopher and Nevis is section 75 which states:

75. Regulation of finance business.

- (1) The Minister may, by Order, provide that the general partners of a limited partnership shall be subject to such regulations as he or she may prescribe if they are in respect of the limited partnership

intending to carry on or are carrying on any business specified in the Order as being finance business.

- (2) An Order made under this section may provide for the payment of annual and other fees and for the imposition of fines and daily default fines for breaches of the matters specified in the Order.

[17] The order made by the Minister pursuant to section 75 of the Limited Partnership Act is identical to the Companies Order and is found in the Third Schedule of the Limited Partnership Act (the “**Partnership Order**”). The Partnership Order defines a person in the same way as the Companies Order. Regulation 2(1) of the Partnership Act defined a “partner” as “a limited partner or a general partner”. The power of the Minister to make regulations pursuant to section 75 of the Limited Partnership Act is only in relation to **limited partners** that intend to carry on or which are carrying on any finance business. The Partnership Order purports to regulate specific persons who are carrying on or who intend to carry on finance business. The definition of the word “person” includes entities that are not partnerships, namely, **individuals, companies and trusts**.

[18] To the extent to which the Partnership Order seeks to regulate entities other than partnerships, it is *ultra vires* section 75 of the Limited Partnership Act. It is also possible to leave the Partnership Order intact by deleting the definition of “person” in Reg. 2(1) of the Partnership Order and substituting:

“person” means any partnership

The Trusts Act

[19] Section 207 of the Trusts Act CAP 5.19 of the Laws of the Federation of Saint Christopher of St. Christopher and Nevis is identical to sections 244(1) and (2) of the Companies Act and section 75 of the Limited Partnership Act. Section 207 provides that:

107. Regulation of finance business.

- (1) The Minister may, by Order, provide that the trustees of a trust shall be subject to such regulations as he or she may prescribe if they are in respect of the trust intending to carry on or are

carrying on any business specified in the Order as being finance business.

- (2) An Order made under this section may provide for the payment of annual and other fees and for the imposition of fines and daily default fines for breaches of the matters specified in the Order.

[20] The order made by the Minister pursuant to section 107 of the Trusts Act is identical to the Companies Order and the Partnership Order and is found in the First Schedule of the Trusts Act (the “**Trusts Order**”). The Trusts Order defines a person in the same way as the Companies Order and the Partnership Order. Section 2(1) of the Trusts Act defines “trustee” as “a person who is named as such in the attestation and if more than one shall mean each trustee”. The power of the Minister to make regulations pursuant to section 107 of the Trusts Act is only in relation to **trustees** that intend to carry on or which are carrying on any finance business. Like the Companies Order and the Partnership Order, the Trusts Order purports to regulate specific persons who are carrying on or who intend to carry on finance business. The definition of the word “person” includes entities that are not trustees, namely, **individuals, companies and partnerships**.

[21] As was reasoned above in relation to the Companies Order and the Partnership Order, the Trust Order is *ultra vires* section 107 of the Trusts Act to the extent to which it seeks to regulate entities other than trustees. As above, the Trusts Order can be kept intact by deleting the definition of “person” in Reg. 2(1) of the Trusts Order and replacing it with:

“person” means any trust

Financial Services Regulatory Commission

[22] Section 3(1) of the Financial Services Regulatory Commission Act CAP 21.10 of the Laws of the Federation of Saint Kitts and Nevis (the “**Commission Act**”) provides for the establishment of the Commission. Pursuant to section 4(1) of the Commission Act, the Commission has responsibility for the administration of, *inter alia*, the Companies Order, the Partnership Order and the Trusts Order. The orders made below will have no effect on the regulation of finance business for trusts, companies and partnerships.

- [23] Since the Companies Act, the Limited Partnership Act and the Trusts Act sought unlawfully to regulate entities other than the ones for which they were specifically enacted, the regulation of “individuals” who intend to carry on or are carrying on finance business is now unregulated. The confusion of the Applicant when he received the letter from the acting Director of the Commission is understandable since he was being treated as if he were a company for the purposes of the Companies Order. The acting Director acted properly pursuant to Reg. 17(1) that mandated all authorized persons to submit to the Director General the Annual Audited Accounts within 3 months of the end of each financial year.
- [24] If the National Assembly wishes to regulate individuals who intend to carry on or who are carrying on finance business, it needs to enact primary legislation to do so. The regulation of individuals who intend to carry on or who are carrying on finance business cannot lawfully be achieved under the Companies Order, the Partnership Order or the Trusts Order.

Judicial Review of Legislation

- [25] This issue is examined for completeness since it formed a significant part of the submissions filed by the parties in this matter. Section 37(1) of the Constitution of Saint Christopher and Nevis provides that, “subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Saint Christopher and Nevis”. The Claimants seeks to impugn the Companies Order on the basis that it was made pursuant to sections 240 and 244 of the Companies Act that he submits are unconstitutional because they violate the separation of powers doctrine. The Claimant cited in support the decision of Chief Justice Sir Vincent Floissac in **J. Astaphan & Co (1970) Ltd v The Comptroller of Customs and the Attorney General of the Commonwealth of Dominica** [1999] 2 LRC 569 (**Astaphan**). Chief Justice Sir Vincent Floissac stated (at pp. 574-575) as follows:

It is now well established that the basic principle of separation of powers is implicit in the Constitution of the Commonwealth of Dominica and that any law which is inconsistent with that basic principle is unconstitutional and invalid. The authority for that legal proposition is *John v DPP* (1985) 32

WIR 230 where the Privy Council applied to the Constitution of Dominica what they had previously said in *Hinds v R* [1976] 1 All ER 353 [1977] AC 195 at 212.

The power to impose taxes and duties is inherently a legislative power constitutionally vested in the legislature. If the 'further sum' which s 27(4) of the Act has authorised the proper officer to demand is a tax or a duty, the legislature of Dominica has delegated or transferred its legislative power of taxation to the executive (ie the proper officer). The question thus arises as to whether such delegation or transfer of legislative power offends the basic principle of separation of powers.

I concede that the delegation or transfer of legislative power by the legislature to the executive is not per se inconsistent with the principle of separation of powers. **There is no such inconsistency if the legislature retains effective control over the executive in the latter's exercise of the delegated or transferred legislative power. Such effective control may be retained by circumscribing the power or by prescribing guidelines or a policy for the exercise of the power.** (emphasis added)

- [26] The Claimant relies on this highlighted dictum to argue that section 244 of the Companies Act does not enable the National Assembly to retain effective control over the Minister's exercise of the delegated authority in making the Companies Order because: (1) there is a complete lack of policies or guidelines in the Companies Act in accordance with which the Minister is required to exercise the delegated legislative authority; (2) the definition of "finance business" is not defined in section 244 which leaves it entirely up to the Minister to define what it is; (3) the nature and scope of the regulation is left up to the Minister; (3) there are no parameters within which the power to impose license and other fees must be exercised; (4) the Minister in the Companies Order imposed various penalties for late payment of the annual fee or licence fee; (5) the various penalties are completely arbitrary figures pursuant to no guidance or parameters in the enabling legislation; (6) the criteria for registration of an entity is left entirely to the discretion of the Minister in formulating the Companies Order; and (7) many other instances can be identified because there is a complete lack of the necessary limitations, policies and parameters in the Companies Act. As a result of these, the Claimant submits that sections 240 and 244, insofar as they purport to confer authority on the Minister to regulate finance business, are contrary to the constitutional principle of the separation of powers.

- [27] The Respondents submit that: (1) the doctrine of the separation of powers has not been violated; (2) the legislature has retained effective control by circumscribing the power on the Minister to make orders as set out in section 244 of the Companies Act; and (3) sections 240 and 244 of the Companies Act are *intra vires* the Constitution. The Respondents also submit that section 244 of the Companies Act provides proper guidance, policy directives with sufficient clarity and properly circumscribe the power delegated to the Minister under that section. As mentioned above, the Respondents concede that section 244 “circumscribes the power of the Minister to **only make orders in relation to companies** carrying on finance business”.
- [28] The question is whether the National Assembly has retained effective control over the Minister in his exercise of the power conferred upon him by section 244 of the Companies Act. Chief Justice Sir Vincent Floissac in **Astaphan** stated that effective control might be retained by: (1) circumscribing the power; or (2) prescribing guidelines or a policy for the exercise of the power.
- [29] Section 244 of the Companies act provides that effective control by providing:
- (1) that any order must relate only to companies (section 244(1));
 - (2) that any order must relate only to finance business (section 244(1));
 - (3) that any order made is limited to companies that: (a) intend to carry on; or (b) are carrying on, finance business (section 244(1));
 - (4) for the payment of annual fees and other fees and for the imposition of fines and daily default fines for breaches of matters specified in the order (section 244(2));
 - (5) that any company that is to be incorporated for the purposes of carrying on finance business must obtain the authorization that is required to carry on finance business (section 244(3)); and

- (6) that any existing company or external company that intends to for the purposes of carrying on finance business must obtain the authorization that is required to carry on finance business (section 244(4)).

[30] These requirements in section 244, particularly those in section 244(1) to 244(3), are sufficient to circumscribe the power of the Minister and they do provide sufficient guidelines to the Minister in relation to the exercise of the power to make an order to regulate finance business of companies. I am therefore unable to agree with the Applicant's submission that the National Assembly failed to provide effective control over the Minister's exercise of the power to regulate finance business under section 244. Consequently, section 244 does not offend the separation of powers doctrine. The same reasoning also applies to section 107 of the Trusts Act and section 55 of the Limited Partnerships Act.

Corporate Business

[31] The Applicant's other argument is that persons who engage in corporate business under the Companies Order by, for example, incorporating or establishing companies or partnerships, do not hold funds on behalf of, or owe obligations to, third parties requiring them to submit Annual Audited Accounts to the director under Reg. 17(1) or to maintain books, records, separate accounts under Reg. 28(1). It is unnecessary to resolve this because the Companies Order cannot lawfully apply to individuals.

Disposition

[32] For the reasons explained above, I declare that:

1. Section 244 of the Companies Act, section 107 of the Trusts Act and section 55 of the Limited Partnerships Act do not offend the separation of powers doctrine.

The Companies Order

2. The Companies Order is *ultra vires* section 244 of the Companies Act insofar as it purports to regulate individuals, partnerships and trusts that intend to carry on or are carrying on finance business.
3. The definition of “person” in Reg. 2(1) of the Companies Order is hereby deleted and replaced with: “person” means a company.

The Partnership Order

4. The Partnership Order is *ultra vires* section 75 of the Partnership Act insofar as it purports to regulate individuals, companies and trusts that intend to carry on or which are carrying on finance business.
5. The definition of “person” in Reg. 2(1) of the Partnership Order is hereby deleted and replaced with: “person” means a limited partner.

The Trusts Order

6. The Trusts Order is *ultra vires* section 75 of the Trusts Act insofar as it purports to regulate individuals, partnerships and companies that intend to carry on or which are carrying on finance business.
7. The definition of “person” in Reg. 2(1) of the Trusts Order is hereby deleted and replaced with: “person” means a trust.

Individuals

8. The purported regulation of individuals who intend to carry on or who are carrying on finance business under the Companies Order, the Partnership Order or the Trusts Order is unlawful.
9. No order as to costs.

Eddy D. Ventose
High Court Judge

By the Court

Registrar