

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

Claim No. ANUHCv2003/0440

BETWEEN:

EUSTACE BROWNE and
FRANKLIN FRANCIS - Claimants

and

E. ALEX BENJAMIN LTD. (IN RECEIVERSHIP) - Defendant

Appearances:

Nelleen Rogers Murdoch for the Claimants

Nicholas Fuller for the Defendant

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2004: July 7
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JUDGMENT

[1] FERDINAND, J : The issue for decision in this case relates to the extent of the priority afforded to severance payment entitlement of employees under the applicable legislation in Antigua & Barbuda.

- [2] The facts in this matter are described by both parties' Counsel as being very simple and they are for the most part undisputed. The Defendant Company was placed into receivership under several debenture securities on the 11th day of June 2003.
- [3] The Claimants at the date of the receivership were employees of the Defendant Company. The Claimants were terminated as employees of the said Defendant by reason of redundancy on the 11th day of July 2003.
- [4] The Claimants became entitled to severance pay in respect of their employment with the Defendant Company. Each Claimant was paid severance pay equivalent to 45 days wages by the Defendant.
- [5] The Claimants claim that they are entitled to severance pay as expressed in the Collective Agreement between the parties and that such payment (which exceeds 45 days wages) takes priority over all other debts of the Defendant Company, pursuant to Section C55 (2) of the Antigua and Barbuda Labour Code, Cap. 27. The Claimants contend that the relevant legislation is Section C55 (2) of Cap. 27. Their Counsel's submission is that under that statutory provision any and all amounts owing to an employee as severance pay shall be paid in priority to other debts owed by an employer.
- [6] The Defendant maintains that Sections 299 and 457 of the Companies Act, 1995 restrict prioritised severance pay to 45 days wages maximum. Thereafter, the debenture holder takes priority. In the alternative to the primary submission that the severance payment priority is limited to a maximum of 45 days wages, the Defendant submits that severance pay due to the Claimants holds no priority at all ahead of the debenture holder. The decision in Herde v Mahabirsingh (1992) 41 WIR 409 is cited by the Defendant in support of this latter alternative submission.
- [7] E. Alex Benjamin Ltd. was a company duly incorporated and doing business in Antigua and Barbuda (herein called variously "*the Company*", "*the Defendant*" or "*the Defendant Company*"). Between October 1993 and December 1998 the Company borrowed monies

from Caribbean Banking Corporation, now RBTT Caribbean Limited (hereinafter called “the Bank”) which monies were secured by three debentures dated 22 October 1993, 1 May 1997, and 31 December 1998 respectively, and duly registered.

- [8] By the 1993 debenture, the Company in clause 3 thereof charged with the payment of all monies and liabilities owed to the Bank:

“FIRSTLY, The freehold property of the Company known as the Premises described in the Schedule and the fixed plant and machinery and fixtures (including trade fixtures) from time to time thereon;

SECONDLY, The goodwill and the uncalled capital of the Company both present and future;

THIRDLY, The undertaking and all other property and assets of the Company both present and future”;

and further declared that:

“The charge hereby created shall as regards the property firstly and secondly described be a fixed charge (and as regards all those parts of the premises firstly described now vested in the Company shall constitute a charge by way of legal mortgage thereon) and as to the property thirdly described shall be a floating charge...”

- [9] The two subsequent debentures were both expressed as creating, like the first, a fixed charge in respect of the Company’s real and leasehold property, fixed plant machinery and fixtures, goodwill and uncalled capital; and a floating charge in respect of the Company’s undertaking and all other property and assets. The debentures were therefore expressed to be not limited to creating a floating charge.

- [10] In appointing the Receivers, the Bank in its Instrument of Appointment dated June 11, 2003 referred to the clauses in the respective debentures which expressly empowered a receiver so appointed to, *inter alia*, carry on and manage the business of the Company and to sell or lease any of the property of the Company.

[11] The Receivers duly took possession of all the property of the Company and by letter dated July 11, 2003 advised the Claimants of their closure of the printery division of the Company's operations and further advised them that their services had been terminated by reason of redundancy effective July 11, 2003.

[12] It is necessary to set out in some detail the legislative context in which the issues in this case fall to be decided.

[13] Section A2 thereof establishes the intent of the Antigua & Barbuda Labour Code:

"A2 It is the intent of the legislature to bring together in so far as is practicable, all legislation applicable to employment, employment standards, and industrial relations in Antigua and Barbuda and that:

(a) employers and employees can more expeditiously ascertain information as to their rights and responsibilities;

(b) legislation can be more amenable to revision when revision is appropriate".

[14] Section A3 addresses the national policy underlying the Code:

"A3 It is hereby declared that the following expressions of national policy underlie and shall be used in the interpretation of the various provisions of this Code:

(a) the interests of workers, employers, and the public should be taken into account and their representative organizations duly consulted in connection with the formulation and periodic revision of the law relating to labour and in connection with the resolution of issues arising in the enforcement of said laws".

[15] Section A10 declares how conflicts between the provisions of the Code and other laws shall be dealt with:

“A10 To the extent that there may be conflict between any provision of this Code and any provision of existing law not specially repealed in one or another of the Divisions herein, the applicable provision of this Code, as of its effective date, shall prevail over said provision of existing law”.

- [16] Section C2 articulates the public policy which underlies and is to be used in the interpretation of Division C of the Code as follows:

*“C2. It is hereby declared that ...
(f) as an individual works at a job he gradually earns an equity therein above and beyond his periodic wages, privileges, and allowances; and the maintenance of this equity requires protection;”*

- [17] Section C3 of the Code provides as follows:

“redundancy” means a situation in which by virtue of lack of customers orders, retrenchment, the installation of labour saving machinery, an employer’s going out of business, a force majeure, or any other reason, work which a person was last employed to perform has ceased or diminished”.

- [18] Part 4 of the Code deals with severance pay both generally and specifically.

By Section C40:

“C40 Every employee whose terms of employment with an employer and his predecessors has in the aggregate exceeded one year is entitled to severance pay upon termination of said employment by employer for reasons of redundancy”.

- [19] Section C42 provides:

“C42. (1) Subject to the other provisions of this section, simultaneously upon the termination of employment of any employee entitled to severance pay under section C40, the employer shall remit to that employee severance pay computed in accordance with section C41.”

[20] Section C55 provides for the recovery of severance pay and in particular provides:

“C55 (2) In the event of bankruptcy or liquidation of the business of the employer, or on any other closure of business the amount owing to an employee as severance pay shall be paid in priority to other debts”.

Section C55 of the Labour Code is the statutory provision which is the primary focus of attention in this case.

[21] The Companies Act, No. 18 of 1995, provides in Section 299(1):

“Where a receiver is appointed on behalf of the holder of any debentures of a company that are secured by a floating charge, or where possession is taken, by or on behalf of any debenture holders of a company, of any property of the company that is subject to a floating charge, then if the company is not at the time in the course of being wound up the debts that in every winding up are under Part IV and the regulations relating to preferential payments to be paid in order of priority to all other debts shall be paid in order of priority forthwith out of any assets coming into the hands of the receiver or person taking possession of that property, as the circumstances require, in priority to any claim for principal or interest in respect of the debentures of the company secured by the floating charge”.

[22] Section 457 of the said Companies Act provides as follows:

*“457 (1) In a winding up of a company there shall be paid in priority to
all other debts*

(a)

(b)....

(c) all severance benefits, not exceeding the equivalent of forty five days basic wages or salary, due or accruing to an employee, not being a director, whether retrenched by an employer, a receiver, a liquidator or some other person”.

- [23] The Claimants argue that Section 299 (1) of the Companies Act is not applicable to the circumstances in this case since the Section is restricted in its application to assets taken possession of under a floating charge, not assets taken possession of under a fixed charge or indeed a charge that is both fixed and floating, as the debentures proclaim in the instant case.
- [24] Counsel for the Defendant disagrees with the Claimants' argument and urges this Court to find that the requirements of Section 299 (1) of the Companies Act 1995 have been met in that the Receivers were appointed by the holder of the debentures issued by the Defendant Company which said debentures are secured by floating charges, and the Receivers have also taken possession of property of the Defendant Company, which said property is subject to the aforementioned floating charges. The Defendant's Counsel submits that Section 299 is satisfied in that the debenture security in question does contain a floating charge and the Receivers have taken possession of the property of the Defendant Company.
- [25] I agree with the submissions of the Defendant's Counsel on this point. Section 299 (1) of the Companies Act 1995 does not state that its operation is confined to situations where a floating charge *alone* constitutes the security held. In addition, as Counsel for the Defendant has pointed out, Sections 3 and 64 of the Registered Land Act renders void any attempt to create a fixed charge over real property through the use of a debenture.
- [26] Furthermore, no rationale has been advanced on behalf of the Claimants as to why a security that purports to have components of both a fixed charge and a floating charge should not be covered by Section 299 (1) of the Companies Act.
- [27] Accordingly, I hold that the said provisions of the Companies Act 1995 apply to the security held in this case, and that the requirements of those provisions are satisfied in this case.

- [28] I will now consider the issue as to whether the priority afforded to employees' rights to receive severance pay is governed by the Antigua and Barbuda Labour Code or by the Companies Act 1995.
- [29] The directly relevant provision of the Labour Code is Section C55 (2), which I accept must be read in the context of the entire Code. Both Counsel have indicated that Section C55 (2) became law in 1989 when the Labour Code was amended by the Antigua and Barbuda Legislature.
- [30] The relevant provisions of the Companies Act are Sections 299 and 457 (1) (c) These provisions became law in 1995 when the Companies Act 1995 was enacted.
- [31] It is common ground between both Counsel in this case that there is clearly a conflict between the principles set forth in these two Acts on the question of the priority to be accorded to the severance payment entitlement of employees. Both sets of legislative provisions cannot be given effect to because the Labour Code accords an unlimited priority to severance payments, whereas the Companies Act restricts such priority to a maximum of 45 days wages.
- [32] The Claimants accept in their written submissions that if Sections 299 (1) and 457 (1) of the Companies Act apply to the circumstances in this case, as I have held they do, then Section 457 conflicts with Section C55 (2) of the Labour Code. The Claimants' Counsel recognizes that it may be considered that Section 457 (1) of the Companies Act 1995 in its conjoint operation with Section 299 (1) has the effect of repealing or curtailing Section C55 (2) of the Labour Code since the said statutory provisions conflict and the Companies Act provisions are the later enactment in time, having been passed in 1995.
- [33] However, on behalf of the Claimants it is submitted that a close reading of the Labour Code shows that the aforementioned provisions of the Companies Act ought not to be held to have impliedly repealed Section C55 (2) of the Labour Code. In support of the Claimants' contentions in this regard, reference is made to Sections A2 (a), A2 (c), A3 (a),

A10 and C2 (f) of the Labour Code, and also to section 36 of the Interpretation Act, Cap. 224.

- [34] In summary, the Claimant argues that Sections A2 (a) and (c), and A3 (a) of the Labour Code show that the Legislature's intent in passing the Code was to provide one comprehensive document in which employers and employees could easily ascertain their rights, duties and responsibilities. It is argued that this view concerning the intention of the Code finds support in Section A10 which, the Claimants' Counsel contends, provides that all conflicts between a provision of the Code and any other provision of "existing law", not expressly repealed by the Code, should be resolved in favour of the provisions of the Code.
- [35] The Claimants submit that section A10 provides "a continuous protection against implied or other repeal of the Code". By the wording of Section A10 and by its intention in enacting the Code as expressed in Sections A2 (a) and (c) and A3 (a), the Legislature is said to have "restricted itself" to amending or repealing the provisions of the Code only by amending or repealing the Code itself. This is the contention of the Claimants' Counsel. In essence, it is being contended that the Labour Code accords itself primacy over other legislation, and that it also precludes the application of the principle of implied repeal.
- [36] The Claimants' submission that, by virtue of Section 36 of the Interpretation Act, the expression "existing law" as used in Section A10 of the Labour Code is not confined to laws which pre-dated the enactment of Section A10 is not supported by any authority presented to this Court. If the Claimants' contention in this regard is correct, the Antigua and Barbuda Labour Code would be the only legislation in which the expression "existing law" bears a prospective meaning in addition to embracing laws in force at the date of enactment of the provision in which the expression is used. See in contrast the judgments in Attorney General of St Christopher, Nevis and Anguilla v Reynolds (1979) 43 WIR 108, and Smith v Commissioner of Police (1984) 50 WIR 1 where, although the legislative language was different to that in the instant case, the concept of "existing law" there considered does admit of some comparison.

- [37] In addition to the lack of any supporting authority, the use of the words “as of its effective date” in Section C55 (2) of the Antigua and Barbuda Labour Code clearly exposes the Claimants’ contention on this point as untenable.
- [38] Accordingly, I have no doubt whatsoever that the phrase “existing law” in Section A10 of the Antigua and Barbuda Labour Code is a reference to any other law (whether common law or statutory) which was already in existence at the time of passage of Section A10. I so hold. I agree with Counsel for the Defendant that in order for the Labour Code to specially repeal an existing law in one of its Divisions (see Section A10) , the law being repealed must already exist.
- [39] The principle of implied repeal is founded upon a fundamental constitutional concept that obtains in Antigua and Barbuda: the Legislature cannot, by enactment of a law via its ordinary law-making procedure of a simple majority vote, restrict or curtail the power of a subsequent Legislature (or indeed itself) to amend or repeal any earlier Act, whether expressly or by necessary implication.
- [40] There is a presumption of law against implied repeal or implied amendment, but where there is a clear conflict between the provisions of two Acts of Parliament, the later in time prevails over the former.
- [41] This fundamental constitutional concept cannot be ousted by an Act passed by Parliament’s ordinary law-making process, irrespective of how important or comprehensive such Act may declare itself to be. This principle is as securely rooted in Antigua and Barbuda where the Constitution is supreme, as it is in England where the fundamental constitutional concept is said to be that of parliamentary sovereignty.
- [42] “Where two Acts are inconsistent or repugnant, the later will be read as having impliedly repealed the earlier ... ‘The latest expression of the will of Parliament

must always prevail' [Goodwin v Phillips (1907) 7 C.L.R.1 (Aus.)]" : from "Craies on Statute Law," 7th ed., page 366.

- [43] "If a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed
- 'The test of whether there has been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent with, or repugnant to, the provisions of an earlier Act that the two cannot stand together?' (West Ham Church Wardens and Overseas v Fourth City Mutual Building Society (1892) 1 Q B 654, per A.L. Smith J. at 658). This principle is a logical necessity, since two inconsistent laws cannot both be valid without contravening the principle of contradiction":
- from "Statutory Interpretation", 4th ed., 2002, by F. A. R. Bennington.

- [44] However, the Court leans against implying a repeal.
- "Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time, a repeal will not be implied" : Kuther v Phillips (1891) 2.Q.B. 267, 272 per A. L. Smith J. quoted with approval in Re Berrey (1936) Ch. 274.

- [45] Implied repeal also only operates to the extent of the inconsistency. Therefore, as in this case, the rest of the Labour Code will remain a valid and effective law. Even Section C55 (2) of the Labour Code remains a valid law, save and except that its scope of operation is curtailed in so far as its application to companies is concerned, in which case severance benefits which exceed the equivalent of 45 days basic wages or salary is not accorded priority over all other debts.

- [46] It may be that in 1995 when the Legislature enacted Sections 299 and 457 of the Companies Act it recognised that to accord unlimited priority to severance payment entitlements of employees of companies would unduly hamstring or curtail the commercial borrowing capacity of such employment – generating entities. Whatever was the rationale

of the Legislature when passing Section C55 of the Labour Code and the aforesaid provisions of the Companies Act 1995, Section A3 of the Code clearly contemplates that “periodic revision of the law relating to labour” would take place from time to time, after taking account of consultation of organisations representative of the interests of workers, employers and the public.

[47] Having decided the main issue in this cases in favour of the Defendant: namely, that the provisions of Sections 299 and 457 (1) of the Companies Act 1995 prevail over those of Section C55 of the Labour Code by virtue of being later in time, it may not be strictly necessary for me to rule on the Defendant’s alternative submission founded on the Trinidadian case of Herde v Mahabirsingh (1992) 41 WIR 409, a decision of the Privy Council. However, I propose to express my view on this alternative contention for completeness, and because the submission has a high degree of superficial attraction.

[48] In Herde v Mahabirsingh receivers of a company were appointed by a bank which held debenture security creating both fixed and floating charges over the company’s assets. Two days after their appointment, the receivers dismissed all the company’s employees. The assets of the company were insufficient to meet the claims of the bank and those of the redundant workers: which is the scenario that statutory priority of workers’ benefits is generally designed to address. The Privy Council ruled that the relevant legislation in Trinidad did not retrospectively operate to accord any priority to the retrenched workers’ severance benefits claims. Although this ruling was sufficient to decide the appeal, the Judicial Committee further said that the workers’ entitlement to terminal benefits, having arisen after the floating charge had become fixed (by the receivers’ appointment two days before the workers’ dismissal), could not rank in priority to the bank’s crystallised charge.

[49] The aforesaid Privy Council case is thus cited by the Defendant as authority for their alternative submission that:

“Severance pay owing to the Claimants does not rank as a priority before the claim of the debenture holder as the Claimants were dismissed as employees after the appointment of the Receivers and the crystallization of the floating charge.

In order for severance pay to rank as a priority over the claim of the debenture holder it must have existed as a debt at the date of the appointment of the Receivers and the crystallization of the floating charge”

[50] In this alternative submission, the Defendant contends that:

- (i) on the appointment of the Receivers by the debenture holder, the floating charge over the assets of the Defendant Company immediately and simultaneously crystallized and affixed to the said Company’s assets;
- (ii) it was approximately one month *after* the appointment of the Receivers that the Claimants were dismissed by reason of redundancy, and therefore only then did they become entitled to severance pay; and
- (iii) the effect of crystallization was that all *existing* claims having lawful priority ranked in priority to the claim of the holder of the debenture, but debts which were incurred *after* the floating charge had crystallised and become fixed no longer ranked prior to the claims of the debenture holder, even if they related to subject matter (such as severance pay) accorded statutory priority.

[51] According to the Defendant’s alternative submission then, the timing of the redundancy termination is a crucially important consideration.

[52] This alternative submission has a considerable logical attraction, particularly in view of the Privy Council’s decision in Herde v Mahabirsingh (*ante*). However, I do not consider it as accurately representing the law in Antigua and Barbuda in light of Section C2 of the Labour Code. Section C2 constitutes a powerful legislative pronouncement and this Court would be failing in its duty to afford protection to the maintenance of the equity which is statutorily declared for the benefit of employees who have toiled over time.

[53] The report of Herde v Mahabirsingh gives no indication that any provision akin to Section C2 of the Antigua and Barbuda Labour Code existed in Trinidad and Tobago, or was brought to the attention of the Privy Council in that case.

- [54] The said employees' statutory "equity" which "requires protection" should be regarded as an accrued right, and it is settled law that statutory provisions ought not to be construed so as to derogate from accrued or vested rights save where this is absolutely unavoidable. This Court holds that the legislative framework created by the combination of the Antigua and Barbuda Labour Code and the Companies Act 1995, does not require or warrant the conclusion that was arrived at by the Privy Council in Herde v Mahabirsingh.
- [55] This Court's ruling on their alternative submission apparently accords with the Defendant Company's own view of the legal position, notwithstanding the said alternative submission made herein, because the Claimants were in fact paid 45 days wages as severance pay by the Defendant, although they were terminated after the Receivers were appointed.
- [56] Counsel in this matter have agreed that, whatever this Court decides in this judgment, each party will bear their own Costs. Accordingly, there will be no order as to Costs.
- [57] The Claimants' claims made herein are dismissed and judgment is hereby given in favour of the Defendant.

J. EMILE FERDINAND
High Court Judge (Acting)