JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 38/89

BEFORE: THE HON. MR. JUSTICE ROWE, PRESIDENT
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A.

BETWEEN	EVERTON BIRD	PLAINTIFF/APPELLANT
A N D	PAUL GOLDSON & CO. ET AL	DEFENDANT/RESPONDENT

Arthur Kitchin and B.E. Frankson instructed by Gaynair & Fraser for Appellant

Dennis Goffe instructed by Myers, Fletcher & Gordon for Respondent

March 16, 17 and April 9, 1992

ROWE P.:

Bernard Lodge Sugar Workers Co-operative Council Limited, Reid's Pen Cane Farmers Co-operative Society Limited, Half-Way-Tree Sugar Workers Co-operative Society Limited, Windsor Park Sugar Workers Co-operative Society Limited, Salt Pond Sugar Workers Co-operative Society Limited and March Pen Sugar Workers Co-operative Society Limited were dissolved by order of the Registrar of Co-operative Societies in November 1981. At that time these Co-operatives had a membership of about seven hundred persons. They made various claims for compensation. First they appealed in 1983 to the Co-operative Societies (Appeals) Tribunal under the Chairmanship of Mr. Carol Ramsay, Attorney-at-Law, but did not succeed in their claims. Next the matters were referred to a Board of Enquiry under the Chairmanship of Mr. Dan Kelly which decided that the interested parties should look to the Liquidator for redress. Before the Appeal Tribunal and again before the Board

of Enquiry the sugar workers were represented by Mr. Roy Fairclough, Attorney-at-Law, instructed by the B.I.T.U. and N.W.U.

The appellant, an Attorney-at-Law, was retained by a number of persons who described themselves as "the former members of the now disbanded Bernard Lodge Sugar Workers Co-operative of Salt Pen, March Pen, Windsor Park, Half-Way-Tree, Reid's Pen, and Tractor and Transport" to represent their claim for payment of redundancy payment and fourteen weeks pay as well as for other benefits which they claimed were due to them upon the dissolution of the Co-operatives. Mr. Bird wrote a number of letters to government departments and attended the appeal hearing as also the Board of Enquiry. Mr. Bird obtained two written agreements for the payment of his legal fees, both drafted by him and dated July 19, 1982.

One agreement to which was appended some two hundred and fifty-four signatures stated that the signatories "hereby contract to pay to Mr. Everton S. Bird of No. 1 Duke Street, Kingston, our Attorney-at-Law, 20% of whatever money shall come to our hands as payment to us in respect of our years of service to the Co-operative and 14 weeks pay and other benefits received, as payment for his legal services in assisting us to obtain these payments."

When examined it was apparent that one hundred and eleven of these names were written by one person.

A second agreement was entered into between the appellant and six men who purported to act on behalf of the ex-members of the now disbanded Sugar Workers Co-operative. That agreement signed by Easton Dorman, Salt Pond S.W.C.C.; James Edwards, Windsor Park

S.W.C.C., People Representative; Roderick Robinson, March Pen S.W.C.C.; Melvin Repold, Windsor Park S.W.C.C.; Kenneth Richards, Windsor Park S.W.C.C.; Derrick Taylor, People Representative, was in these terms:

> "On behalf of the ex-members of the now disbanded Sugar Workers Co-operative we hereby promise to pay to **MR. EVERTON S. BIRD** Attorney-at-Law of No. 1 Duke Street, Kingston twenty percent (20%) of the proceeds of any financial settlement made in their favour as a result of their appeal against the dissolution of the Bernard Lodge Workers Co-operative in November 1981. We further agreed that this sum will be paid to **MR. BIRD** prior to distribution of the proceeds among the ex-co-operators as payment for his services in obtaining these payments.
>
> Dated this 19th day of July 1982."

On February 8, 1983 the Permanent Secretary to the Ministry of Agriculture advised the appellant that in connection with a claim which he had made on behalf of the ex-co-operators at Bernard Lodge for redundancy and notice pay consequent on the dissolution of the Co-operative, the Attorney-General had tendered advice from which it was clear that government had no obligation to meet redundancy and notice payments claimed by the ex-co-operators who should therefore look to the Liquidator who had been appointed to wind-up the affairs of the Co-operatives.

Paul Goldson and Co. one of the respondents herein, had been appointed Liquidator of Co-operative Societies on 29th January, 1988 and on March 9, 1989 they were in possession of a liquidation sum of $3,821,544.00 of which $2,556,190.00 represented redundancy payments and other employee benefits for the ex-co-operators of the liquidated Co-operatives referred to herein.

Two Trade Unions, the B.I.T.U. and N.W.U. made formal representations to the Liquidators as representing the ex-co-operators of these Societies. While the Liquidators were treating with these Unions, the appellant, by letter of December 20, 1988, written by

his attorney, Andrea C. M. King-Bird, submitted a formal claim on behalf of those same persons. On January 3, 1989 the Liquidators advised the appellant inter alia that:

> "Please assure your clients that the matter is being attended to by the Liquidators in accordance with the Law. We have also engaged legal advisers in connection with the matter. It is, therefore, not necessary for any further representations to be made on their behalf. As a matter of fact it would be quite impracticable for the Liquidators to deal with the two Trade Unions and yourself simultaneously to this matter."

It is to be recalled that at the sitting of the Board of Enquiry on April 6, 1984 both Mr. Francis who appeared for one of the Unions as well as Mr. Fairclough, Attorney-at-Law for both Unions had clearly disclaimed any relationship with the appellant. Mr. Francis is reported as saying:

> "The Unions' position, sir, is that both Unions had retained Mr. Fairclough to present the arguments for those people represented by the B.I.T.U. and N.W.U. We have not retained Mr. Bird. We view Mr. Bird's presence here in a similar way we would view a sugar worker cousin or granny. If he has some interest in the matter then it must be with some other Board of Enquiry or with some other Terms of Reference. We have not retained him, we are not aware that our legal representative has retained him either, so we don't know what other role he plays other than being an observer or a citizen."

Mr. Fairclough was no less forthright in dissociating himself from the appellant. He said:

> "It must be observed that Mr. Bird has a different Brief. I don't appear here with Mr. Bird in the sense of representing the same client, as Mr. Francis has properly pointed out. My clients for the purpose of this Enquiry is the Bustamante Industrial Trade Union and the National Workers' Union. Mr. Bird, I think has a separate Brief."

From those early days the battle lines were drawn in that the Unions were pressing claims for the workers quite independently of any efforts on the part of the appellant.

Two incidents flowed from the Liquidators' advisory of January 3, 1989 There was a conference between the appellant and the Liquidators on January 10, 1989 and the appellant's aide-memoire of January 12, 1989 It was at that conference that the appellant raised his personal interest in the liquidation sum in the hands of the Liquidator and enclosed a copy of the contingency retainers referred to earlier, with the aide-memoire. There was an explicit proposal by the appellant that his legal fees be deducted from the amounts due to the ex-co-operators. Then and there the Liquidators intimated that they would require legal advice on this aspect of the matter, which when received was conveyed to the appellant by letter of February 27, 1989 stating, inter alia:

> "With reference to your letter of January 12, 1989, we are advised that we cannot rely on the retainer agreements submitted by you to make any deductions from the payment due to the persons in question. They do not constitute proper authorisation to the Liquidators.
>
> We therefore, cannot act on the agreement submitted."

A potentially explosive situation in the Sugar Industry had developed which could only be averted by fast, decisive action on the part of the Liquidators. This is how they read the situation as it existed on March 8, 1989.

> "... unrest has continually festered in the Sugar Industry. The present crop has been seriously hampered by industrial unrest. There have been stoppages and threats of stoppages. As a result, the production goals of the 1988-89 crop are well behind schedule and the Sugar Industry Management is apprehensive that the crop for 1988-89 will fall short of

> "target and that the foreign exchange earnings of the nation will be eroded.
>
> At a conciliatory meeting at the Ministry of Labour in January 1989, the workers were promised that a payment of the redundancy would be made by the 31st March, 1989. Plans were being made to this end when a claim by Mr. Everton Bird, Attorney-at-Law, was received stating that he was entitled to 20% of whatever monies were payable to certain workers at Bernard Lodge Estate."

Some five thousand five hundred workers were involved and considerable paper-work was involved in arriving at the entitlement of each person. The Liquidators felt that:

> "... if the matter is delayed and Mr. Bird's fee is retained by the Liquidator until the matter is determined some time after the 31st March, 1989 the workers will certainly explode into industrial action."

On March 10, 1989 the Liquidators filed an Interpleader Summons in which they sought directions as to:

(a) whether the above-mentioned agreements constitute proper authorisation to the plaintiff as Liquidator to make the deductions proposed by Mr. Bird;

(b) whether pursuant to the above-mentioned agreements the plaintiff as Liquidator may properly pay by deduction to and in favour of Mr. Bird 20% of the respective amounts due to the relevant workers from the redundancy sum;

(c) whether the redundancy sum should be paid to the relevant workers in their respective amounts free from deductions in respect of legal fees.

For his part the appellant filed an Originating Summons on March 28, returnable on March 30, 1989 seeking a determination of the question:

> "Whether by virtue of agreements made between the Applicant on the one hand and the ex-co-operators on the other hand and reduced to writing on July 19th, 1982, the Applicant is entitled to 20% of all monies presently held by the first Defendant for payment over to the class of persons numbering around seven hundred ex-co-operators of the now disbanded Bernard Lodge Sugar Workers' Co-operative Society Limited, Reid's Pen Cane Farmers Co-operative Society Limited, Half-Way-Tree Sugar Workers' Co-operative Society Limited, Windsor Park Sugar Workers' Co-operative Society Limited, Salt Pond Sugar Workers' Co-operative Society Limited and March Pen Sugar Workers' Co-operative Society Limited."

The two summonses came on for hearing on March 30, 1989 and were adjourned to April 3, 1989, when they were consolidated. At that hearing the appellant was represented by David Muirhead Q.C., and Donald Scharschmidt. Mr. Samuda made submissions on behalf of the Liquidator followed by Mr. Scharschmidt for the appellant. Submissions continued on April 4, 1989 at which time Mr. Scharschmidt referred the Court to Order 4 Rule 10 of the 1966 Supreme Court Practice and appears to have doubted the correctness of the Order for consolidation. In the ensuing exchange between Bench and Bar the Court intimated that in view of all the circumstances, there was nothing to militate against the consolidation Order already made. At the close of the submissions the Court in an oral judgment answered the questions posed thus:

> "The Court answers the questions asked by the Liquidator Paul Goldson & Company at paragraph 11 of the Affidavit of Dennis P. Goldson dated 9th March, 1989, by confining itself to (c) of the questions asked and it is hereby ordered that the Liquidator, Paul Goldson & Company pay the redundancy sum to the relevant workers of the Sugar Co-operatives named in the title to this suit in their respective amounts free from deductions in respect of legal fees."

Malcolm J. declined to answer questions (a) and (b) raised in paragraph 11 on the basis that they became unnecessary. He said nothing about the appellant's summons.

Dis-satisfied with the Order of Malcolm J. the appellant appealed. In the meantime, as stay of execution pending appeal was refused, the Liquidator paid the sum of $2,018,694.90 to some of the workers and has in hand the amount of $117,748.81 due to ninety-seven persons who have not yet been located.

Three original grounds complained that the trial judge failed to construe the appellant's summons, that he wrongly stated that the agreements for legal fees ought to be construed on equitable principles and that he wrongly claimed that he had a discretion whether or not to grant the appellant's declarations.

These grounds were abandoned in favour of grounds 1 - 4 filed on March 12, 1992 that:

> "1. The Learned Judge erred in law by failing or neglecting to make the Order and/or Declaration as prayed for and/or any Order or Declaration at all in the Originating Summons filed by the Plaintiff/Appellant in Suit No. E 95 of 1989.
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> 2. The Learned Judge erred in law by failing or neglecting to give directions as to (a) and (b) of paragraph 11 aforesaid.
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> 3. The Learned Judge erred in law by failing or neglecting to address the key issues common to or in respect of both Originating Summonses, namely:
>
> (a) Whether the Plaintiff/Appellant was entitled to receive 20% of all monies held by the First Defendant/Respondent.
>
> (b) Whether the agreements dated the 19th day of July, 1982 constituted authorisation to the First Defendant/Respondent to pay by deduction to and in favour of the Plaintiff/Appellant 20% of the respective amounts due to the relevant workers from the redundancy sum.

"4. The Learned Judge erred in law in ordering that the redundancy sum be disbursed free from deductions of the Plaintiff/Appellant's legal fees, in that the evidence disclosed that the agreements dated the 19th day of July, 1982 were valid and enforceable."

These too were abandoned during the hearing and the prayer for relief was reduced to an application for an Order that:

(i) The Order of the learned trial judge dated the 4th day of April 1989 be set aside; and

(ii) That the first defendant/respondent do pay the costs of the appeal.

Leave was granted to add two new grounds to raise the issue of the validity of the Interpleader Summons. Mr. Goffe objected to the addition of the new grounds on the basis that if the appellant wished to object to the validity of the Interpleader Summons that ought to have been done at the trial stage and not at the appellate stage for the very first time. We were referred to Manuel Misa v. Raikes Currie et al [1875-76] 1 A.C. 554. This case concerned the validity of a Bill of Exchange. On appeal it was said that in no way whatever was the original document of any value as it was not properly stamped. At p. 559 the House of Lords held:

"As this was a point which had not been argued in the Court below, the objection was taken that it could not be introduced now. But it was answered that no new matter was proposed to be now introduced into the case, that the objection arose upon matter which was before the Court below, though this particular argument upon that matter was not there presented for consideration and that consequently it might properly be discussed here; and the cases Withy v. Mangles, 10 Cl. & F. 215, Blain v. Whitehaven Railway Company 3 H.L.C. 1; Marquis of Bristol v. Robinson 4 H.L.C. 1088 and Fitzmaurice v. Bayley 9 H.L.C. 78, were referred to. The argument was allowed to proceed."

Much more guidance is to be derived from the speech of Lord Herschell in The Tasmania [1890] XV A.C. 223 at 225. He said:

> "At the trial no other point was taken for the plaintiffs except that which I have mentioned. It was not argued, or suggested, that even if the City of Corinth was to blame for improperly starboarding, the Tasmania was also to blame. But in the Court of Appeal this point was for the first time raised. It was contended that the Tasmania had kept her course too long, and that she ought to have earlier taken the step which she ultimately did, viz., putting her helm down, and so coming up to the wind.
>
> My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box."

It is well-established law that the objection that the tribunal has no jurisdiction to enter upon the hearing of a case may be taken at anytime - Norwich Corporation v. Norwich Electric Tramways Company Limited [1906] 2 K.B. 119 at 125 per Vaughan Williams L.J. All the evidence of the circumstances which gave rise to the issue of the Interpleader Summons was before Malcolm J. Although the point was not taken then that the conditions precedent in Section 547(a) of the Judicature (Civil Procedure Code) Act did not exist to enable the Liquidator to bring an Interpleader Summons, we were of the view that

all the evidence available to the parties was placed before the Court in their affidavits. This Court was at no disadvantage in deciding the points raised on appeal. These points were:

"5. The Interpleader Originating Summons filed by the First Defendant/Respondent in Suit No. E. 69A of 1989 is a nullity in law and void ab initio, in that:

(a) There was no evidence before the Learned Judge of two or more claimants making adverse claims to the redundancy sum, contrary to Section 547 of the Judicature (Civil Procedure Code) Law.

(b) There was no evidence before the Learned Judge that the First Defendant/Respondent was sued or expected to be sued by two or more claimants making adverse claims to the redundancy sum, contrary to Section 547 of the Judicature (Civil Procedure Code) Law.

(c) Even if there was evidence that the Plaintiff/Appellant and the Second Defendants/Respondents were claimants making adverse claims to the redundancy sum, no issue was ever stated and tried by the Learned Judge, in breach of Section 553 of the Judicature (Civil Procedure Code) Law.

(d) Even if there was evidence of two or more claimants as aforesaid, the Learned Judge erred in law by failing to dispose of the merits of the claimants' claims and to decide the same in a summary manner, in breach of Section 554 of the Judicature (Civil Procedure Code) Law.

6. The nature and defects in law of the said Interpleader Originating Summons precluded the Learned Judge from making the said Order herein appealed from and against or any Order at all."

As it is put in Halsbury's Laws of England, Vol. 22 of the Third Edition, at paras. 902 and 911, where a person is faced with at least two adverse claims to money in his possession wherein he claims no interest he is entitled to invoke the jurisdiction of the Court in order to compel the claimants to litigate their differences. The stake-holder must genuinely expect to be sued by two or more parties. It is not necessary that he be actually sued but there must be some real foundation for the expectation. A mere anticipation, without any intimation having been received is not enough, nor when the allegation of a threatened action is known to be groundless. Title 44 of the Judicature (Civil Procedure Code) Act makes provision for relief by way of interpleader in Sections 547 to 564. Section 547(a) of the Judicature (Civil Procedure Code) Act is in pari materia with O. 17 r. 1(1)(a) of the Rules of the Supreme Court and essentially similar to the statement of the law in Halsbury's Laws referred to herein.

For interpleader to arise there must be two or more adverse claims to the same money. Where one auctioneer sued for commission on the sale of a house and a second auctioneer sued for a different sum from the same defendant for commission in respect of the same sale of the same house it was held that interpleader did not lie as the claims were not adverse in the sense of being claims to the same money, but were in fact entirely different claims - Greatorex v. Shackle [1895] 2 Q.B. 249.

In Sun Insurance Office v. Galinsky et al [1914] 2 K.B. 545 an Insurance Company was obliged under a policy of insurance to expend insurance money to rebuild a fire damaged house. The lessee of the house who was a party to the insurance policy and who had spent some money in part restoration of the building wrote to the Insurance Company suggesting that the Company engage his son to carry out the work of repair and thus to pay the insurance money to that son. The Insurance Company issued an Interpleader Summons seeking directions as to whom to pay the money. The Court of Appeal

held that a judge who has to dispose of Interpleader Summons has a discretion, which should not be unduly fettered, and that one of the cases in which a discretion would properly be exercised by refusing to make an Interpleader Order would be where the judge came to the conclusion that neither of the suggested claimants or one of the parties had any claim whatsoever or that the claim put forward was an absurd one.

On the question of the imminence of suit by the claimants, Watson v. Park Royal (Caterers) Ltd. [1961] 2 All E.R. 346 is instructive. There the defendants had received a letter from Waite's Trustee in Bankruptcy stating that in his statement of affairs Waite had shown a debt due to his estate of £1,000 and stating that the trustee would be glad to receive a remittance for this amount from the defendants. Edmund Davies J. held that:

> "From the receipt of the earlier letter, (i.e. the one referred to above) however, although the defendants had not actually been sued by Waite's trustee, there was a real foundation for the expectation that they would be sued - Morgan v. Marsack [1816] 2 Mer. 107."

I can find no substance in the submission of Mr. Kitchin that there were not two adverse claims to the Liquidator upon the liquidation sum. The appellant had by his attorney-at-law on December 20, 1988 submitted a claim to the Liquidators on behalf of the ex-co-operators. These claims could only have been met from the funds in the hands of the Liquidator. The B.I.T.U. and N.W.U. had submitted claims on behalf of the same workers. Then there came the claim from the appellant between the 10th and 12th of January, 1989 for legal fees to be deducted from the fund before its disbursement. In my view these were two adverse claims to the same fund in the possession of the Liquidator.

Mr. Kitchin sought to persuade the Court that the appellant had not threatened suit, that his claim having been rejected by the Liquidator, it could be treated as groundless and consequently the Liquidator was in no dilemma necessitating the invocation of interpleader process. The appellant was obviously pressing his claim, to the extent that he sought a declaration in his originating summons that he was entitled to 20% of the moneys in the hands of the Liquidator. As the case of Watson v. Park Royal (Caterers) Ltd. (supra) shows one does not have to wait to be sued if one has what appears to be a serious claim from an Attorney-at-Law, who to the knowledge of the Liquidator has been fighting a rear guard battle on behalf of his clients for years.

When the appellant's advocate now tells us that the Liquidator ought not to have taken the appellant's claim seriously and should have made payments to the ex-co-operators of the entire sum and save the appellant costs of defending an interpleader action, his voice has a ring of insincerity.

It was never necessary for Malcolm J. to have had recourse to Section 553 or 554 of the Judicature (Civil Procedure Code) Act as the questions which are now raised on appeal fell to be dealt with under Section 555 which provides that:

> "Where the question is a question of law, and the facts are not in dispute, the Court or a Judge may either decide the question without directing the trial of an issue, or order that a special case be stated for the opinion of the Court."

Mr. Kitchin conceded that whether or not the claims were adverse and whether or not there were two or more claimants were questions of law which could be decided under Section 555 of the Judicature (Civil Procedure Code) Act in a summary manner by Malcolm J.

We did not find any of the technical arguments advanced in favour of the appeal meritorious and we consequently dismissed the appeal with costs to be agreed or taxed.

WRIGHT J.A.:

I agree.

GORDON J.A.:

I agree.