IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008/HCV03080

BETWEEN	RIVERWALK LIMITED	1ST CLAIMANT
AND	BIKE MOUNTAIN WATERFALLS TOURS LTD	2ND CLAIMANT
AND	JAMAICA TOURIST BOARD	1ST DEFENDANT
AND	TOURISM PRODUCT DEVELOPMENT COMPANY LIMITED	2ND DEFENDANT
AND	THE ATTORNEY GENERAL	3RD DEFENDANT

N. Jones for the Claimants

D. Kitson and S. Risden-Foster instructed by Grant Stewart Phillips & Company for the Defendants

Heard: April 28 and May 6, 2010

Application for leave to enter judgment against the Crown – whether Jamaica Tourist Board and Tourism Product Development Company Limited are agents of the Crown – setting aside default judgment

Lawrence-Beswick J

1. The Jamaica Tourist Board (JTB) and the Tourism Product Development Company Limited (TPDCo), the first and second defendants in this action, seek to set

aside the judgment which the claimants entered against them in October 2008, consequent upon their failure to file a defence to the claim brought against them in this suit.

2. Counsel for the defendants, Ms. Kitson, asserts that there is a good reason and explanation for the failure to file the defence in the prescribed time and that there is a good prospect of successfully defending the action.

However, before developing that argument, Counsel relies on a preliminary point that the judgment ought to be set aside as being irregular because no leave had been granted by the Court to enter the default judgment.

Mr. Jones argues for the claimants that no such leave is required.

3. Rule 12.3(1) of the Civil Procedure Rules 2002 (CPR) states:

> "A claimant who wishes to obtain a default judgment on any claim which is
> (a) A claim against a State.....
> must obtain the court's permission."

The parties agree that the reference to the State is the same as to the Crown.

4. Ms. Kitson bolsters her argument with the fact that the claimants also sued the Attorney General, pursuant to the Crown Proceedings Act in relation to the activities of the first and second defendants. She states that in so doing, the claimants were acknowledging that JTB and TPDCo. are public authorities or servants and/or agents of the Crown. In my view, whether or not it was necessary/wise/proper to sue the Attorney General is an issue which may need to be determined at some time. However, that determination does not affect the status of the JTB and TPDCo.

I must consider the functions and duties of the JTB and of the TPDCo, to decide if each should be treated as the Crown.

That is the first important issue to be resolved.

Jamaica Tourist Board (JTB)

Ms. Kitson submits that the JTB is a statutory body or entity whose operations are controlled by the Government of Jamaica through the Minister of Tourism and is therefore to be regarded as being part of the Crown.

The Tourist Board Act established the JTB and provides

> "Section 9 (1). The Board shall be a body corporate having perpetual succession ... with power to .....lease or otherwise acquire and hold and dispose of land and other property...."

5. An examination of the Act reveals that the Government controls certain aspects of the management of the JTB.

The Minister of Tourism

(1) appoints the Board and its Chairman[1]
(2) revokes the appointment of any Board member[2]
(3) appoints persons to act temporarily as Board members or Chairman.[3]

The Minister of Finance

(1) approves Board's borrowing power as to amount, source and terms[4]
(2) may guarantee payment of principal and interest or authorized borrowing of Board.[5]

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[1] S.3 (2)
[2] S.7
[3] S.4
[4] S12 (A) (1)
[5] S12B (1)

6. Further, s.12A (1) of the Tourist Board Act stipulates that the Minister must approve projects for which the Board may borrow funds and, in s.13, that the Minister may determine the remuneration of the Board members.

Also, the Minister

(1) may make regulations to carry out the purpose of the Act [6]
(2) may direct the Board as to policy [7]
(3) must approve the auditor who annually audits the Board's accounts.[8]

The Board is required to present to the Minister:

(1) a report yearly as to their proceedings [9]
(2) yearly estimates of revenue and expenditure for his approval.[10]

Further, the Board is subject to the Government of Jamaica Public Sector Procurement Procedures.

7. It is clear to me, that the Government is intimately involved in the composition of the Board, controlling its expenditure and borrowing and policy.

Is this sufficient to cause the JTB to be considered as being the Crown?

"The fact that a Minister of the Crown appoints the members of ... a corporation, is entitled to require them to give him information and is entitled to give them directions of a general nature does not make the corporation his agent."[11]

8. What then would cause a corporation to be properly describes as "the Crown"?

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[6] s.16
[7] s.18
[8] s.20
[9] s.21
[10] s.21
[11] [**Halsbury's Laws of England** 4th edition para. 1011]

"The question whether a corporation is a servant or agent of the Crown depends on the degree of control which the Crown, through its Minister may exercise over it in the performance of its duties." [12]

9. The Tourist Board Act provides

> "Section 11 (1). It shall be the duty of the Board
>
> (a) to develop all aspects of the tourist industry
> (b) to adopt measures to advertise and publicize Jamaica
> (c) to promote and secure ... shipping and airline facilities.
> (d) to secure ... arrangements for the entry of tourists into Jamaica
> (e) to encourage ... the development of such amenities ... to ... enhance the attractiveness of Jamaica to tourists...
> (f) to undertake such research, experiments ... to improve the ... the industry ...
> (g) to encourage ... the highest standards of services ... by persons who ... provide ... to or for tourists...."

10. The varied and comprehensive duties of the JTB cause me to form the view that although the Minister controls certain important aspects of the management of the JTB, its fundamental duties are exercised without reference to the Minister.

Further, the Board can hold property independent of the Crown, and may sue or be sued in their corporate name.[13]

11. In these circumstances, the JTB ought not to be entitled to the privileges or immunities of the Crown. Consequently, it would not be necessary for the claimants to seek leave to enter judgment against it.

12 **Tourism Product Development Co. Ltd. (TPDCo)**

The circumstances of the TPDCo are different from the JTB.

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[12] [**Halsbury's** supra]
[13] s.9

The TPDCo is a private company. Its managing director states that its operations are governed and controlled by the Government through the Minister.

13. Counsel for the TPDCo, Ms. Kitson, urges that the Memorandum of Association shows that the TPDCo ought to be regarded as the Crown.

The objects for which the TPDCo was established are, *inter alia*,

> "3 (A) to carry out whether ... as agent for the JTB or ... Ministry or Department of Government ... any of the duties ... of which the [JTB] or ... Ministry, Department ... is competent to appoint agents ....
> (A1) ... to provide any service ... it may be requested to carry out by the Government or the Minister ... or which [TPDCo] considers that it can carry out ... relative to ... servicing of tourism.
> (A2) ... to stimulate ... such services ... which may be decided by [TPDCo] to be relevant to the advancement of tourism in Jamaica.
> (A3) ... to undertake regulation and advisory functions in respect of the Tourist Industry ...."

The Government owns the majority of the shares and TPDCo is therefore subject to Government Procurement Policies.

14. The Articles of Association direct that

> "77. The number of Directors and the names of the First Directors shall be determined by the Minister ...
> 79 The remuneration of the Directors ... shall be such sum ... as may ... be ... approved by the Minister."

The Articles further provide

> "85. The business of the Company shall be managed by the Directors...."

15. By applying the law as I understand it, and as I have expressed it above, I find that the TPDCo is not entitled to the privileges and immunities of the Crown.

Here, as with the JTB, the Minister controls certain important aspects of management of the TPDCo but its duties are exercised without reference to the Minister.

There would be no need to seek leave to enter judgment against it.

The preliminary point therefore fails.