

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 16/79

BEFORE: The Hon. Mr. Justice Zacca, J.A.  
The Hon. Mr. Justice Kerr, J.A.  
The Hon. Mr. Justice Rowe, J.A.

BETWEEN ALCOA MINERALS OF JAMAICA INC. - APPELLANT

A N D WINSTON V. JONES  
THE HON. MINISTER OF SOCIAL SECURITY - RESPONDENT

Mrs. Angella Hudson-Phillips, instructed by Mr. W.K. Chin See  
of Messrs Dunn Cox & Orrett for Appellant

Mr. Lloyd Ellis, Senior Assistant Attorney General instructed  
by the Director of State Proceedings for the Respondent.

February 4,5,6, July 25, 1980

ROWE J.A.

On November 7, 1978, the Minister of Social Security on the application of Alcoa Minerals of Jamaica Inc. determined that under Section 29 (3) of the National Insurance (Determination of Claims and Questions) Regulations 1966 and the National Insurance (Classification) Regulations 1966, Earl William Volding is a self-employed person within the meaning of the National Insurance Act and consequently liable to make contributions under the Act.

This determination did not meet with the approval of the appellant and the Minister was required to State a Case pursuant to Rule 3 of the National Insurance Appeal Rules 1968.

The appellant's company is a subsidiary of Aluminum

Company of America with offices in Pittsburgh, Pennsylvania, U.S.A. By an arrangement with the parent company, employees of the parent company are seconded to the subsidiary company in circumstances where the employees remain the servants of the parent company while on secondment. Mr. Earl William Volding was such a seconded officer and the terms of his secondment are that he should remain in Jamaica for two years "as manager of finance and development with objectives to train and educate Jamaican Nationals ultimately to take over management positions in such fields". Such ex-patriate officers are paid by the parent company and it was reported to the Minister on December 4, 1978 that "none of the expatriates salaries are remitted to the expatriates in Jamaica." I pause, only to comment, that such employees must receive extremely generous expense accounts. The appellant supplied a list of twenty-five other persons whose positions are similar to that of Mr. Volding and who are consequently interested in the outcome of this appeal.

In his Case Stated the Minister found that Mr. Volding was resident in Jamaica but was not domiciled in this country.

Four grounds of appeal were filed but in effect grounds 1 - 3 were embraced in ground 4 which reads:

Ground 4 "The Honourable Minister of Social Security is required by the said Act to prescribe conditions as to domicile or residence in Jamaica which must be satisfied before a person can become an insured person for the purposes of the said Act and of Regulations made pursuant thereto. The Honourable Minister of Social Security having failed to prescribe any such conditions as required by the said Act, the said Earl W. Volding is and was unable

to satisfy the said condition precedent, and consequently cannot be classified as a self-employed person for the purposes of the aforementioned Regulations 3 (2) of the said Act."

There was no debate on the questions of fact set out in the Case Stated. The important point of law raised in ground 4 above, put more shortly can be stated thus:

"On a true construction of section 3 (1) of the National Insurance Act 1966, is it a condition precedent to the coming into effect of that Act for the Minister of Security to prescribe conditions for domicile or residence of persons who are to become insured under that Act."

More than 14 years ago, to wit on April 4, 1966. The National Insurance Act came into operation. The objects of the Act were clearly set out in the Long Title:

"An Act to Establish a system of National Insurance providing pecuniary payments by way of old age pension, invalidity pension, widows' and widowers' benefit, orphans' benefit, special children's benefit, funeral grants, grants for old age, invalidity and orphanhood, and benefit in relation to incapacity, disablement or death arising from injury in employment and to provide for matters connected with or incidental thereto."

Mrs. Hudson-Phillips argued that this Act has never really come into operation. She cautioned the Court not to take into account any inconvenience, any hardship, any massive dislocation, in short any adverse consequence whatever, that will inevitably flow immediately if her argument were to be upheld. In asking for a true interpretation of Section 3 (1) (2) of the Act she reminded the court of Parliament's power to pass retroactive legislation. We will heed the caution.

Under the Act a person must first be classified as an "Insured person" before he becomes liable to make contributions as provided by the Act. This situation arises from the interpretation of sections 3 and 4 of the Act. Who then, is, for purposes of the Act, an "insured person"? Section 3 (1) provides:

"Subject to the provisions of this Act, every person who, on or after the appointed day, being over the age of 18 and under retirement age and having fulfilled such conditions as may be prescribed as to domicile or residence in Jamaica, is gainfully occupied in Jamaica, or in such employment outside Jamaica as is specified in paragraphs 2 and 4 of the First Schedule or as is referred to in paragraph (c) of subsection (1) of Section 7, shall become insured under this Act and remain so insured until he reaches retirement age."

The appellant's attorney submitted that there are four conditions precedent contained in Section 3 (1), that they are cumulative, and that unless a person is capable of satisfying and does satisfy all the four cumulative conditions precedent, he does not become an insured person under the Act. On any view of the matter Mr. Volding satisfies the first condition in that having been born as the records show on March 8, 1926 he was above the age of 18 years in November 1978. On any view too, he also satisfies the second condition of being a person under retirement age as by Section 10 (2) of the Act "retirement age" means:

"(a) the age reached by a person who, having attained the age of 65 in the case of a man.....has retired from regular employment; or  
(b) the age of 70 in the case of a man  
.....whichever first occur."

Mrs. Hudson-Phillips conceded that the fourth condition is satisfied in that Mr. Volding is gainfully employed in Jamaica. It is irrelevant for the purposes of the Act whether for the services which he performs in Jamaica his remuneration is paid here or any where else. The question as to the level of contributions which Mr. Volding ought to pay if he is an insured person did not arise on this appeal.

The Minister has not prescribed any conditions as to domicile or residence in Jamaica and it is the contention of the appellant's attorney that until this is done no one can satisfy the conditions precedent so as to become an insured person. She submitted that notwithstanding the use of the words "as may be prescribed" the Minister is not merely given a discretion, but a duty is imposed upon him to prescribe the necessary conditions because account must be taken of the person upon whom the enabling power is conferred, the subject matter of the Act, the general objects of the Act and the persons for whose benefit the powers were intended to be conferred. If, said she, the object of the National Insurance Act is to confer a range of benefits on persons by virtue of their relationship with this country either because they are domiciled or resident here, the Minister must be obliged to prescribe relevant conditions as to domicile or residence so that the persons upon whom the Act was intended to benefit, can be ascertained and can obtain the relevant benefits. The only discretion which she says the Minister has is as to the particular kind of condition which he can prescribe.

For the respondent it was argued that the words "as may be prescribed", in Section 3 (1) are directory and discretionary and ought to be given their primary meaning of being permissive only. The Act was said to be an inclusionary one and it was the obligation of a person classified to bring some fact to show that he was excluded from the ambit of the Act. This, Mr. Ellis said, the appellant could not do as he was clearly resident in Jamaica and "residence" not being a term of art, it was not obligatory on the Minister to prescribe any conditions as to residence in respect of the appellant.

We were referred by both sides to Julius v. Lord Bishop of Oxford (1880) All E.R. Reprint 43 and Padfield and others v. Minister of Agriculture, Fisheries and Food and others (1968) 1 All E.R. 694.

In the case of Julius v. Lord Bishop of Oxford, Dr. Julius brought a complaint against the Rector of his parish under the Church Discipline Act of 1840. The Bishop refused to issue a commission to inquire into the charge and on an application for mandamus, it was contended that the words "it shall be lawful" in Section 3 of the Church Discipline Act were mandatory. The House of Lords unanimously held that the words "it shall be lawful" in a statute are, plainly and unambiguously merely permissive, empowering and conferring on the person named a right to do a specified thing, but where the object of the enactment is to effectuate a legal right, whether public or private, they are to be construed as compulsory. This is equally the case when the enabling

power is given by the word 'may'.

At page 57 of the Report, Lord Blackburn said:

"I do not think the words "it shall be lawful" are in themselves ambiguous at all. They are apt words to express that a power is given; and as prima facie the donee of a power may either exercise it or leave it unused, it is not inaccurate to say that prima facie they are equivalent to saying that the donee may do it; but if the object for which the power is conferred be for the purpose of enforcing a right, there may be a duty cast on the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. Where there is such a duty it is not inaccurate to say that the words conferring the power are equivalent to saying that the donee must exercise it. It by no means follows that, because there is a duty cast on the donee of a power to exercise it, a mandamus lies to enforce it; that depends on the nature of the duty and the position of the donee.

At page 47 Lord Cairns said:

"The words "it shall be lawful" being according to their natural meaning permissive or enabling words only, it lies upon those, as it seems to me who contend that an obligation exists to exercise this power to show in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation"

And at page 51 Lord Penzance said:

"The words "it shall be lawful" are distinctly words of permission only, they are enabling and empowering words. They confer a legislative right and power on the individual named to do a particular thing, and the true question is, not whether they mean something different, but whether, regard being had to the person so enabled, to the subject matter, to the general objects of the statute, and to the person or class of persons, for whose benefit the power may be intended to have been conferred, they do or do not create a duty on the person whom it is conferred to exercise it".

The primary purpose of the National Insurance Act is to provide pensions and benefits of the very wide variety set out in

in the Long Title to Act 38/65 for persons who are gainfully employed in Jamaica. The Statute employs an arbitrary commencement point of age 18 and presumably an actuarial age of 65 to 70 in the case of men as the age of retirement. Section 3 of the Act speaks of "every person" clearly indicating that the legislature intended that as many persons as possible should be covered by the Act. A residual power, however, was given to the Minister to prescribe conditions as to domicile or residence which could only have the effect of excluding persons who would otherwise be entitled to become insured persons under the Act.

All the Law Lords in Julius vs. Bishop of Oxford, (supra), were at pains to show that if persons stand to benefit from the exercise of the power having regard to the purposes and objects of the statute then the permission is coupled with a duty. Can it be argued that it was one of the objects of the National Insurance Act that persons who do not wish to fall within the provisions of the Act, could take mandamus proceedings against the Minister to compel him to make regulations to exclude them. A person who is classified as an insured person is entitled to all the benefits which the Act permits and we do not think that mandamus proceedings to compel the Minister to do something which would achieve exactly the same result as now exists could be entertained.

It seems to us to be a fallacy to speak of four conditions precedent each of which in the context of Section 3 (1) of the Act must be independently complied with before a person can be said to be an insured person. The simple interpretation to be given to the Section is that a person who is gainfully employed in Jamaica and is between the ages of 18 and retirement age, and if any



conditions as to domicile or residence are prescribed by the Minister, who also satisfies those conditions, automatically becomes an insured person.

The Minister is not obliged by section 3 of the Act to prescribe conditions as to domicile or residence and since he has not exercised his discretion to prescribe any such conditions there is in fact no fourth condition which Mr. Volding or anyone else is called upon to satisfy before he or she can become an insured person under section 3 of the National Insurance Act. Accordingly the appeal is dismissed.

There shall be no order as to costs.