CP 1

Copy

Law of Association

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL

MOTION NO. 21/2000

SUIT NO. E127/2000

BEFORE: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A.

BETWEEN	THE JUNIOR DOCTORS ASSOCIATION	APPLICANTS\ DEFENDANTS
AND	THE CENTRAL EXECUTIVE OF THE JUNIOR DOCTORS ASSOCIATION (being sued in a representative capacity on behalf of themselves and all other members of the Junior Doctors Association)	
AND	THE ATTORNEY GENERAL FOR JAMAICA	RESPONDENT/ PLAINTIFF

Richard Small and Norman Davis for Appellants

Cheryl Lewis instructed by Director of State Proceedings for Respondent

June 19, & July 12, 2000

FORTE, P.

These proceedings commenced as a notice of motion for leave to appeal the order of the Court below, refusing to set asice an ex parte

injunction against the applicants made on the 1st April 2000, leave having been refused below. Having heard arguments from both sides, the appeal was allowed and the order below set aside.

On the 1st April, 2000, an ex parte summons coming before the learned Chief Justice, he made the following orders:

1. "That the Respondents are restrained from commencing or continuing any industrial action, and or taking any step or doing any act likely to endanger the lives of substantial number of persons or expose a substantial number of persons to serious risk or disease or personal injury, or create a serious risk of public disorder in the Jamaican society.

2. That the Respondents be restrained from causing or attempting to cause or doing any act calculated to induce any Junior Doctor from withholding his/her services.

3. That the Respondents be retrained (sic) from causing or attempting to cause or doing any act calculated to cause disaffection among the Junior Doctors.

4. That the publication of the Order herein (either by broadcasting same on at least two separate occasions over a commercial broadcasting system operating in Jamaica, or, in at least one newspaper circulating in Jamaica) be deemed Service of Notice of the Order of the Respondents.

5. That the Respondents be restrained until the Matter has been determined by the Industrial Disputes Tribunal."

On the 9th of June 2000 the applicants by summons applied inter partes for an order discharging the injunction on the basis that the applicants were not legal entities capable of suing or being sued in a representative capacity or otherwise, and that the proceedings be "set aside/struck out" as a nullity. This summons was dismissed, and the applicants ordered to pay the costs. Leave to appeal was refused.

The applicants have before us maintained the same arguments that were canvassed below i.e. that the applicants are not legal entities and consequently the proceedings against them are a nullity. For this proposition they relied on the case of ***London Association for Protection of Trade & Another v. Greenlands Ltd*** (1916) 2 A.C. 15. In that case an unincorporated body called the ***London Association for Protection of Trade*** was sued. In the House of Lords, the plaintiff company consented to the judgment obtained by them against the association being set aside.

Though Mr. Richard Small for the appellants cited many passages from the speeches of the Learned Law Lords, I need only refer in full to the following dicta from the speech of Lord Parker of Waddington:

> "The London Association for the Protection of Trade is not a corporate body, nor is it a partnership, nor again is it a creation of statute. The plaintiffs were wrong in making it a defendant to the action. It

> appears, however, that the officials of the association were not anxious to raise what might be considered a technical point, and an appearance was therefore entered by Sir Samuel Scott, an official and member, on behalf of himself and all other members of the association. This, too, was wrong. Sir Samuel Scott could not properly defend on behalf of himself and all other members of the association without an order of the Court authorizing him so to do. It may be said that this, too, was a technical matter. In my opinion, however, it was a matter of substance. Had Sir Samuel Scott applied to the Court for leave to defend on behalf of himself and all other members of the association, the court would have had to inquire whether the case was within Order XVI., r. 9, of the Rules of the Supreme Court; in other words, whether the members of the association have a common interest within the meaning of that rule."

Having adumbrated that any such inquiry would necessitate an examination of the nature and constitution of the association, the Learned Law Lord made reference to the 8th Edition of Lindley on Partnership p. 14 dealing with associations such as the applicants who do not carry on business for gain. The cited passage states:

> " 'If liabilites are to be fastened on' any members of such an association 'it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association."

Lord Parker concluded on this issue:

> "My Lords, it is obvious that these difficulties were questions of substance, and not mere technical matters which could be waived if the parties so elected. Indeed, during the hearing before your Lordships the plaintiffs were so oppressed by them

> that they consented to have the judgment, so far as the association was concerned, entirely set aside, and to proceed upon the footing that the association had never been made a defendant."

It is clear that no action might be brought by or lie against an Association which is not a legal entity except by virtue of Section 97 of the Civil Procedure Code which is pari materia with the English Order XVI r. 9 of the Rules of the Supreme Court. Section 97 reads as follows:

> **"97.** – Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may be authorized by the Court or a Judge to defend, in such cause or matter, on behalf of or for the benefit of all persons so interested."

In order then to sue the members of the appellant Association, it was necessary for the respondent to bring the action against named members of the Association in a representative capacity. This was not done. Ms. Lewis for the respondent in an excellent attempt at preserving the order of the Learned Chief Justice, contended that the naming of the Central Executive of the Association was sufficient as it described an identifiable body of persons. In my view this was not sufficient, as the members of the Executive were not described by name in the suit. The provisions of Section 97 of the Civil Procedure Code were therefore not adhered to and consequently there was no proper defendant in the action. As a result, I had no option but to conclude that the process was

a nullity. In the event, the appeal was allowed, and the order for injunction set aside.

Before leaving this appeal I should add that Ms. Lewis for the respondent also contended that the learned Chief Justice was at the time the application for the discharge of the injunction was made, functus officio and could not correctly hear the application. This contention in my view had no merit. Where it is sought to have an ex parte order of a judge discharged, it is the correct process to apply to the judge for such an order before appealing to this Court. This view is endorsed by Sir John Donaldson, M.R. in the case of ***WEA Ltd v. Visions Channel 4 Ltd and Others*** [1983] 1 W.L.R. 721 at 727 when he stated as follows at page 727:

> "As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.
> This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an

> opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party: see R.S.C. Ord. 35. r. 2 (1) and ***Vint v. Hudspith*** (1885) 29 Ch.D. 322 to which Mr. Tager very helpfully referred us this morning."

On allowing the appeal it was also ordered that the appellants should have their costs, both here and below.

BINGHAM, J.A.:

The applicants, two unincorporated bodies unknown to law, by a notice of motion dated June14, 2000 sought the leave of this court to appeal from an order made in Chambers by the Honourable Chief Justice on June 9, 2000. At this hearing, the applicants, by way of summons, sought to discharge a previous order made ex parte by the Honourable Chief Justice on April 1, 2000. By that order, an injunction was granted in favour of the respondent restraining the applicants from carrying out certain acts embodied in the said order.

At the hearing on June 9, 2000, the learned Chief Justice refused to discharge his previous order on the ground that he was functus officio. He dismissed the summons and ordered costs to the respondent. An application for leave to appeal was refused.

On June 19, 2000, we heard arguments from counsel in respect of the application for leave to appeal. At the end of their submissions, we treated the hearing of the application as the hearing of the appeal, allowed the appeal and set aside the order of the Honourable Chief Justice. The court also ordered costs to the appellants here and below. Such costs to be taxed or agreed.

The factual background and the order made by the learned Chief Justice on April 1, 2000, as well as the submissions made by counsel before us, are fully set out in the judgments of the learned President and Langrin, J.A., and so do not require repetition on my part. Before us, two main questions fell for our determination, namely:

1. Could the learned Chief Justice lawfully make the orders sought before him by the respondents?

2. Irrespective as to whether the orders were within his jurisdiction, were they reviewable by him?

In dealing with the questions posed, it may be convenient to consider the second question first.

It is now a well-established principle of law that ex parte orders which by their very description are interlocutory in nature are oper to review by judges of coordinate jurisdiction. In practice, it is desirable that the application (as in this case for a discharge of the order) ought properly to be made to the judge who granted the order. If that judge is not available then it can be made to any other judge who is available to hear it.

The appellants submitted that the learned Chief Justice was in error in coming to the conclusion that he was functus officio and so unable to review his decision to grant the ex parte order. Mr. Small relied in support on ***W.E.A. Records Ltd. v. Visions Channel 4 Ltd. and others*** [1983] 1 W.L.R. 721 at 727, where Sir John Donaldson, M.R., said:

> "Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte and is reflected in R.S.C., Ord. 32, r. 6. Whilst on the subject of jurisdiction, it should also be said that there is no power enabling a judge of the High Court to adjourn a dispute to the Court of Appeal, which, in effect, is what Peter Gibson J. seems to have done. The Court of Appeal hears appeals from orders and judgments. It does not hear original applications save to the extent that these are ancillary to an appeal, and save in respect of an entirely anomalous form of

> proceeding in relation to the grant of leave to apply to the Divisional Court for judicial review.
>
> As I have said, ex parte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.
>
> This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party."

As the statement of the learned Master of the Rolls indicates, for a review by the learned judge below of his own ex parte order being by its very nature interpartes, in my opinion, would in such circumstances allow for the judge with the assistance of full arguments from both sides the benefit of a wider ambit of the learning in the particular question at hand. This, in the instant case, would have been an opportunity that in the particular circumstances of this case ought to have been welcomed by the learned Chief Justice. It would have allowed him to review, and if the situation so

dictated, correct his own error. Regrettably, however, it was not made use of.

Turning to the main question as to the validity of the order, it is clear that directed as it was against these two bodies who were not known to law, the order was bad on the face of it. Both these named bodies, although known to the society at large, were not identifiable as having a legal personality capable of suing and being sued. The law allows for such unincorporated body of persons to proceed at law as a party to legal proceedings by virtue of a named person being authorised by the court to act in a representative capacity for and on behalf of himself and the particular association or body with the same interest. In this regard, section 97 of the Judicature (Civil Procedure Code) Law provides that:

> "**97.** Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may be authorized by the Court or a Judge to defend, in such cause or matter, on behalf of or for the benefit of all persons so interested." [Emphasis supplied]

In the matter of the ex parte order before the learned Chief Justice, no individual person having an interest in either of the two bodies named in the summons was proceeded against.

Learned counsel for the appellants submitted that as there was therefore no single individual who could be identified as having the capacity to answer to the summons on behalf of himself and the named bodies, there was no legal foundation upon which the proceedings could lawfully be brought. This situation in the absence of someone fitting the description of

being an interested party associated with the particular body and authorised by the court to act on their behalf and that of the unincorporated body was not a matter that could be waived. The procedure as set out in section 97 of the Judicature (Civil Procedure Code) Law (supra) has to be followed. There being no such authorisation, the proceedings before the learned Chief Justice was irregular and his subsequent order was therefore void. Being an order of a superior court, nevertheless, the order stood until it was subsequently set aside by a judge in reviewing the matter and discharging the order. The learned Chief Justice, having declined jurisdiction to do so, the matter now fell for this court to review it.

In ***London Association for Protection of Trade and another v. Greenlands Ltd.*** [1916] 2 A.C. 15, the speeches of the Law Lords in that appeal spelt out with extreme clarity the effect of a suit brought against such a body as in the instant case. The dicta of all their Lordships are of the same view and have been cited with approval in the judgments of the learned President and Langrin, J.A. It does not, therefore, call for further repetition by me.

It is for these reasons I agreed with my brethren that the appeal be allowed in terms of the order as previously set out above.

LANGRIN, J.A:

On the 19th June, 2000 the Court of Appeal heard an application by the applicants, the Junior Doctors' Association and the Central Executive of the Junior Doctors Association for leave to appeal a refusal of the Learned Chief Justice to discharge an order of injunction and a refusal to grant leave to appeal against the said refusal made in Chambers on April 1, 2000. The order was as follows:

- Summons dismissed;
- Costs to the respondent;
- Leave to appeal refused.

The background facts before the Court are briefly stated as follows. An Ex parte Originating Summons was filed by the Attorney General against the applicants in the Supreme Court seeking an interlocutory injunction pursuant to Section 32 of the Labour Relations and Industrial Disputes Act. On the 1st April, 2000 this Summons came before the Learned Chief Justice in Chambers who granted the following orders:

> "(1) That the Respondents are retrained (sic) from commencing or continuing any industrial action, and or taking any step or doing any act likely to endanger the lives of substantial number of persons or expose a substantial number of persons to serious risk or disease or personal injury, or create a serious risk of public disorder in the Jamaican society.
>
> (2) That the Respondents be restrained from causing or attempting to cause or doing any

act calculated to induce any Junior Doctor from withholding his/her services.

(3) The Respondents be restrained from causing or attempting to cause or doing any act calculated to cause disaffection among the Junior Doctors.

(4) That a publication of the Order herein (either by broadcasting same on at least two separate occasions over a commercial broadcasting system operating in Jamaica, or, in at least one newspaper circulating in Jamaica) be deemed Service of Notice of the Order of the Respondents.

(5) That the Respondents be restrained until the Matter has been determined by the Industrial Disputes Tribunal".

On June 9,2000 the learned Chief Justice heard an application by the applicants to discharge the April 1, 2000 Ex parte Order for injunction on the basis that the Respondents were not legal entities capable of suing or being sued in a representative capacity or otherwise.

The questions which arose before us are as under:

(1) Was there any power or jurisdiction to issue injunction against any unincorporated body or the executive of such a body?

(2) Can such a body or executive be sued in a representative capacity?

Before dealing with the questions posed, I would like to briefly deal with the procedure to be adopted when there is an appeal against an Ex parte Order. Ex parte Orders are essentially provisional in nature as they are made by the judge on the basis of submissions and evidence coming

from one side only. It would therefore be proper before appealing to this Court against an Ex parte Order to give to the judge who made the order if available, or if he was not, another Supreme Court judge an opportunity of reviewing it in the light of argument for the defendant and reach a decision. In ***WEA Records Ltd. v Visions Channel 4 Ltd. and Others*** [1983] 1 WLR 721. Sir John Donaldson MR in dealing with an appeal against an ex parte Order said at p. 727:

> "... It is difficult; if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the judge who made it or, if he was not available, another High Court judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party".

I now turn to an examination of the questions. Mr. Richard Small, Learned Counsel for the applicant submitted with some force that the applicants being unincorporated bodies could not be sued and the proceedings against them are a nullity. Reference was made to Section 97 of the Judicature (Civil Procedure Code) Law as well as other authorities.

Section 97 of the Civil Procedure Code states:

> "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued or may be authorised by the Court or a Judge to defend in such cause or matter, on behalf of or for the benefit of all persons so interested."

The stated defendants are unincorporated associations and since they have no separate legal personality they cannot sue or be sued in their own names. Where all the members of an unincorporated association such as a members club are involved in a dispute, one or more of the members may bring a representative action on behalf of all the members or be sued in a representative capacity.

In ***London Association for Protection of Trade v Greenlands Ltd.***[1916] 2A.C15 an unincorporated association called the London Association for Protection of Trade was one of three defendants sued. The plaintiff obtained judgment against the association and the other defendants. On appeal to the House of Lords, Lord Parker of Waddington said at page 38:

> "The London Association for the Protection of Trade is not a corporate body, nor is it a partnership, nor again is it a creation of statute. The plaintiffs were wrong in making it a defendant to the action. It appears however, that the officials of the association were not anxious to raise what might be considered a technical point, and appearance was therefore entered by Sir Samuel Scott, an official and member, on behalf of himself and other members of the association. This, too, was wrong. Sir Samuel Scott could not properly defend on behalf of himself and other members of the association without an order of the court authorising him so to do. It may be said that this too was a technical matter. In my opinion, however, it was a matter of substance..."

Further, Lord Parker went on to say at page 39:

> "It is obvious that these difficulties were questions of substance, and not mere technical matters which could be waived if the parties so elected. Indeed, during the hearing before your Lordships the plaintiffs were so oppressed by them that they consented to have the judgment, so far as the association was concerned, entirely set aside, and to proceed upon the footing that the association had never been made a defendant." (emphasis supplied).

The underlined words expressed by Lord Parker appears to have some limited impact on Miss Cheryl Lewis, learned Counsel for the respondent. She conceded that the Junior Doctors Association does not exist in law but the Central Executive of that body is identifiable in law. However, according to her there is a particular difficulty with the Order.

Miss Lewis then referred us to ***Grafton Isaacs v Emery Robertson*** [1984] 3WLR 700 (Privy Council) on which she placed great reliance. The headnote of the case reads:

> "By writ dated 23rd July, 1997 the plaintiff commenced an action in the High Court of Saint Vincent against the defendant and two others claiming, inter alia, an injunction to restrain the defendant from trespassing on certain land. On 25th July the plaintiff applied for an interlocutory injunction in the same terms and the application was adjourned on 13th September to a date to be fixed. Thereafter no proceedings were taken until on 31st May, 1979 Glasgow J. granted the interlocutory injunction. No application for it to be set aside by reason of Ord. 34, r. 11(1) (a) was made by the defendant. The plaintiff subsequently sought the committal of the defendant to prison for his contempt in failing to obey that court order, but the judge dismissed the

> motion holding that the order was a nullity having been made at a time when the action was deemed to have been abandoned under Ord. 34, r. 11 (1) (a). The Court of Appeal, allowing the plaintiff's appeal, held that although the order ought not to have been made, and the defendant would have been entitled to succeed if he had applied to have it set aside, he was in contempt in disobeying it.
>
> On the defendant's appeal to the Judicial Committee: -
> **Held**, dismissing the appeal, that an order made by a court of unlimited jurisdiction, such as the High Court of Saint Vincent, had to be obeyed by the person against whom it was made unless and until it had been set aside by the court; and that Ord. 34, r. 11(1) (a) did not operate to render the interlocutory injunction an order which the court was obliged upon its own initiative to treat as having never been made but merely entitled the defendant to apply for an order setting aside the interlocutory injunction if he elected to make such application and, accordingly the defendant was in contempt of court in disobeying the interlocutory injunction".

Lord Diplock who delivered the judgment of the court said at page 709:

> " The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies".

Section 678 of the Civil Procedure Code deals with the effect of non-compliance. It reads:

> "678 - Non-compliance with any of the provisions of this law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit".

A distinction must now be made between an irregularity and a nullity. When a proceeding is done in the wrong manner and without the proper formalities it is said to be irregular as opposed to a proceeding which is **illegal** or **ultra vires**. An irregularity maybe waived by the consent or acquiescence of the opposite party in the case of judicial proceedings and will generally be allowed to be set right upon payment of costs occasioned by it.

A proceeding as in the instant case which is **illegal** or **ultra vires** is a nullity and not a mere irregularity. It is not only bad but incurably bad. There has been a fundamental failure to comply with the requirements of the law relating to the issue of the proceedings.

Miss Lewis submitted that the procedure adopted by the applicants in going before the Learned Chief Justice to have the judgment set aside was unnecessary and an abuse of the process of the court. According to her argument the judge was **functus officio** at the time and therefore any review of the ex parte Interlocutory Orders ought to be made before the Court of Appeal where an appeal is pending.

We feel ourselves bound to disagree with this latter submission. Once the proceedings is a nullity and it is brought before the Court for a

declaration as to its nullity or otherwise we feel constrained in the interest of justice and time to deal with it.

In the circumstances neither of the respondents could be sued in a representative capacity and therefore after hearing the application for leave to appeal we treated it as an appeal and such appeal was allowed with costs to the appellants both here and below to be taxed if not agreed.