

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 129/05

BEFORE: THE HON. MR. JUSTICE SMITH, J.A.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN LOWELL S. LAWRENCE APPELLANT
A N D FINANCIAL SERVICES COMMISSION RESPONDENT

Gordon Robinson instructed by Palmer & Walters for the Appellant

Patrick Foster, Deputy Solicitor General **and Ms. Thalia Francis** instructed by the Director of State Proceedings for the Respondent

PRELIMINARY POINT

January 31, February 2 and March 29, 2007

SMITH, J.A.:

The Appellant is an insurance sales representative who was employed to MONY Life Insurance Co. Ltd. (MONY). The Respondent is a statutory body established under the Financial Services Commission Act. (the FSC Act). Its function under the said Act is to supervise and regulate non-deposit taking financial institutions including insurance businesses.

The FSC Act, which was enacted in May 2001, came into force in August 2001 by virtue of an "Appointed Day Notice". However, the provisions relating to the insurance services were omitted from the Notice as these provisions could not become operative until the then Insurance

provisions relating to the insurance industry. The amendments to the existing Insurance Act were completed and the Insurance Act 2001 came into operation on December 21, 2001. Through inadvertence, the Minister did not issue the required notice to bring into operation those provisions of the FSC Act relating to the insurance industry. Unaware of this omission, the FSC started in December 2001, to regulate and supervise the insurance industry under the mistaken belief that it had the authority so to do.

In February 2002, MONY submitted an application to the Respondent to carry out business of insurance in Jamaica. The application was not approved. On June 20, 2002, MONY submitted applications for 22 sales representatives whom it had employed, including the Appellant. The Respondent did not issue any certificate of registration for the Appellant or for any of the other sales representatives of MONY.

In 2003, the Respondent received reports that MONY was doing insurance business in Jamaica. The Respondent investigated the reports and discovered that MONY was engaged in insurance business in Jamaica although it was not registered. The investigations also revealed that MONY had employed sales representatives, including the Appellant, who were involved in the insurance business without having been registered under the Insurance Act, 2001.

In April 2004, the Respondent brought the breaches of the Insurance Act to the attention of the Appellant. The Appellant was given the opportunity by the Director of Public Prosecutions to discharge his liability by paying a fixed penalty in lieu of prosecution. The Respondent sent a fixed penalty notice to the Appellant on July 1, 2004.

The Appellant did not pay the penalty and instead sought judicial review of the decision of the Respondent. On October 28, 2005, the Full Court dismissed the Appellant's application for judicial redress. By Notice and Grounds of Appeal filed on December 9, 2005, the Appellant appealed the decision of the Full Court.

In August 2006, while the appeal was pending, the Financial Services Commission (Insurance Services Validation and Indemnity) Act, 2006 was enacted (the Validating Statute). Section 2 of the Act reads:

"2. Notwithstanding anything to the contrary in any enactment, all acts done in good faith between the 21st day of December, 2001 and the commencement of this Act, by –

- (a) the Financial Services Commission, its officers and staff, in the purported exercise of the powers conferred upon the Financial Services Commission in relation to the insurance industry by the Financial Services Commission Act and the Insurance Act, 2001 and by all other persons acting in connection with or in support of such acts;
- (b) any other persons having an official duty or being employed in the administration of

the Financial Services Commission Act in relation to the Insurance industry,

are hereby declared to have been validly, properly and lawfully done and are hereby confirmed; and the Financial Services Commission, its officers and staff and the other persons specified are hereby freed, acquitted discharged and indemnified as well against The Queen's Most Gracious Majesty, Her Heirs and Successors as against all persons whatever from all legal proceedings of any kind, whether civil or criminal,"

Before us, both parties are at one that at the time when the FSC purported to act in this matter, it had absolutely no authority to do so because, due to neglect by the legislature, those provisions of the FSC Act giving the Commission authority to supervise the insurance industry had not been passed into law.

This Court has been asked to determine, as a preliminary issue, the effect of the Validating Act of 2006. The question is whether the Validating Act has retrospective effect so as to deprive the Appellant of his right.

Mr. Robinson for the Appellant submitted that to properly construe a Validating Statute two separate and distinct "effects" must be evaluated. They are –

- (1) whether the types of actions intended to be validated by the statute include the actions being reviewed by the Court. If the answer is no, then, there is no need to go on.

(2) If the answer is yes, the next question is – As of what date are these actions validated?

The simple question for this Court now, he submitted, is: Has the Statute validated the past actions as of the date of the passage of the Statute, or has it done so effective as of some prior date, so as to give the Statute retrospective effect? Mr. Robinson submitted that in approaching its task the Court should begin with the presumption that the Statute has no retrospective effect. The past actions, he contended, should be presumed to have been validated only as of the date of the passage of the statute and not before. He submitted that, unless the Validating Statute contains clear words to that effect, its provisions cannot be construed as having retrospective effect. His contention is that the Validating Statute, to the contrary, uses clear words to establish that the effective date of validation is in fact the date it came into force. Mr. Robinson further argued that the Court may not imply, insert or infer additional words in order to find a retrospective effect. He referred to ***Zainal bin Hashim v Government of Malaysia*** [1980] A.C. 734 at 745H-746A. In sum, the contention of Mr. Robinson is that in the instant case the Validating Act does not state the date as of when the acts done between December 21, 2000 and the commencement of the Act, are validated.

Mr. Foster, for the Respondent, submitted that the legislation clearly validates actions done by the FSC in good faith in the carrying out of its supervisory authority over the insurance industry in accordance with the FSC Act between December 21, 2001 and the commencement of the Validating Act. He referred to s. 2 of the Validating Act and submitted that the clear intention of the Act was to treat all acts of the FSC and its servants as validly done, as if the relevant sections of the FSC Act had been operational from December 21, 2001.

He contended that, although the Validating Act came into force on August 11, 2006, it clearly relates back to the conduct of the FSC from December 21, 2001 and validates all such conduct that preceded the passage of the Validating Act. This Act, he argues, retrospectively applies to the acts of the FSC in relation to the instant case even though a suit has been filed and an appeal is pending. He relied on **Zainal bin Hashim v Government of Malaysia** (supra); **Battat v the King** [1951] A.C. 519; *Bennion's Statutory Interpretation* 4th Edn. at p. 269 and **Hewitt v Lewis** [1986] 1 WLR 444 at 448 or [1986] 1 All ER 927 at 930.

In my view, in interpreting s. 2 of the Validating Act, it is essential to bear the statutory objective in mind. As Lord Hatherley said in **Pardo v Bingham** [1868-1869] L.R. 4 Ch. App. 735, 740:

“... we must look to the general scope and purview of the statute, and at the remedy sought to be applied, and consider what was the former

state of the law, and what it was that the Legislature contemplated”.

In this case the statutory objective was to make good the omission by the Minister to issue the Notice necessary to bring the provisions of the FSC Act relating to the insurance industry into effect. There can be no doubt that the legislature intended to validate all the acts of the FSC done in good faith between December 21, 2001 and the commencement of the Validating Act. The question is: As of when are these acts validated? Is it as of the commencement of the Validating Act, as Mr. Robinson for the Appellant contends? Or, is it as of December 21, 2001 as Mr. Foster for the respondent contends? If Mr. Robinson is correct then any claim made before the commencement of the Act against the FSC in relation to its purported exercise of authority would not be affected by the Validating Act. In such a case the FSC would have had no authority to supervise or regulate the insurance industry.

To determine the question as to when the acts done between December 21, 2001 and the commencement of the Validating Act are validated, one must construe s. 2 of the Act. In my view, the probable intention of the legislature was to treat the provisions of the FSC Act, which empower the FSC to supervise the insurance industry, as having been in force as of December 21, 2001. The question for this Court therefore is whether the legislature has sufficiently expressed that intention. The learned author of Craies **on Statute Law**, 7th Edn. at p.395 has this to say:

“Where a statute is passed for the purpose of supplying an obvious omission in a former statute, or... “to ‘explain’ a former statute,” the subsequent statute has relation back to the time when the prior Act was passed.”

This principle can be adapted and applied to the instant case. We have seen that on December 21 2001, the Insurance Act of 2001 came into operation. However, on that date and subsequently, the provisions of the FSC Act relating to the insurance industry were not brought into operation obviously through an oversight. Hence, the purported exercise of authority by the FSC over the insurance industry was unlawful.

Section 2 of the Validating Act states that all such acts done in good faith between the passing of the Insurance Act, 2001, that is December 21, 2001, and the passing of the Validating Act on August 11, 2006 “are hereby declared to have been validly, properly and lawfully done and are hereby confirmed.” Applying the principle stated in **Craies** (supra), the Validating Act of 2006 relates back to the time when the Insurance Act, 2001 was passed, that is, December 21, 2001.

To hold otherwise would, in my view, make nonsense of the Validating Act and would certainly defeat the intention of the legislature. I can see no reason why the Validating Act should be interpreted as validating the acts of the FSC and its officers and staff as of August 11, 2006 and not as of December 21, 2001. I am of the opinion that the words “are hereby declared to have been validly and properly done and are

hereby confirmed" clearly indicate an intention to give validity to the acts done between the said dates from the date when each act was done. As Mr. Foster submitted, correctly, in my view, the whole purpose of the Validating Act is to give validity to acts which might otherwise have been illegal and to afford protection to those whose acts might otherwise have been made liable to the process of law. And as was said by their Lordships' Board in **Baffat v The King** (supra) at p. 530:

"Such being its purpose it requires, if need be, to be given a liberal interpretation so as to achieve that which its language shows to have been its object."

The case of **Zainal bin Hashim** (supra) to which both counsel made reference, is instructive. Hashim was a member of the Royal Malaysian Police Force. In August, 1971 the Police Force Commission delegated its powers of appointing constables to the Inspector General of Police and its power of dismissal to a senior police officer or a Chief Police Officer. In December, 1971 Hashim was convicted of a criminal offence. The Chief Police Officer dismissed him from the force. He appealed to the Inspector General of Police who dismissed his appeal. In August, 1972 Hashim brought an action against the Government of Malaysia claiming a declaration that his dismissal was void and an order that an account be taken of the salary and emoluments due to him from the date of his purported dismissal.

In March 1975, the High Court gave judgment for Hashim on the ground that his dismissal by the Chief Police Officer (C.P.O) was unconstitutional since the C.P.O. had no power to appoint constables and his dismissal of Hashim contravened article 135(1) of the Constitution. The government gave notice of appeal.

In August, 1976 the legislature amended article 135 (1) of the Constitution by adding the following proviso:

“And provided further that this Clause shall not apply to a case where a member of any of the services mentioned in this Clause is dismissed or reduced in rank by an authority in pursuance of a power delegated to it by a Commission to which this Part applies, and this provision shall be deemed to have been an integral part of this clause as from Merdeka Day.”

The Federal Court held that the amendment operated to validate Hashim's dismissal and allowed the government's appeal. Hashim's appeal to the Judicial Committee was dismissed. Their Lordships' Board held, *inter alia*, that Hashim's dismissal by the C.P.O. at the time of the dismissal contravened article 135(1) of the Constitution but that the 1976 proviso to article 135(1) was by its express terms retrospective in effect. The Board held also that it was a necessary interpretation of its terms that no pending proceedings which had started after Merdeka Day should succeed on the ground pleaded.

In their Lordships' view, “for pending actions to be affected by retrospective legislation the language of the enactment must be such

that no other conclusion is possible than that that was the intention of the legislature". (p. 742c).

In my view, the words "...are hereby freed, acquitted, discharged and indemnified...from all legal proceedings of any kind...", clearly indicate that the legislature intended that the Validating Act should apply to pending actions. The learned author of **Bennion's Statutory Interpretation** 4th Edn. at p. 269 states:

"Pending actions - Where an amending enactment is intended to be retrospective it will apply to pending actions, including appeals from decisions taken before the passing of the amending Act."

In **Hewitt v Lewis** (supra) a section of an Act, which provided that the Act applied to tenancies granted and to notices served before as well as after the commencement of the Act, was construed as applying the operation of the Act retrospectively to pending actions for recovery of possession. The section did not state that the Act would take effect from a specific date. It merely stated that the Act shall "apply to tenancies granted and notices given before as well as after the commencement of this Act." Fox L.J. in his judgment at p. 930 said:

"I appreciate that a statute may be intended to have some retrospective effect without necessarily being intended to affect pending actions. But in my view the only realistic interpretation of the 1985 Act is that Parliament did intend it to have such effect."

The authorities establish that although the rights of litigants are generally to be determined according to the law in force at the time the matter arose, the legislature may pass an Act to affect retrospectively pending actions. Such an Act must contain clear words to that effect or deal with matters of procedure only.

As I have stated before, in my judgment, s. 2 of the Validating Act is retrospective both in purpose and effect. The words used clearly indicate the legislature's intention to validate the acts of the FSC done within the stated period as of when each act was done.

Accordingly, the Court finds for the Respondent on the preliminary point. The question of costs is reserved for the substantive appeal. Appeal adjourned for date to be fixed for hearing.

COOKE, J.A:

I agree.

HARRIS, J.A:

I also agree.

SMITH, J.A:

ORDER

Court finds for the respondent on the preliminary point. Question to costs reserved for the substantive appeal. Adjourned for a date to be fixed for the appeal.