

Privy Council Appeal No. 2 of 1991

**The Minister of Foreign Affairs, Trade
and Industry**

Appellant

v.

**Vehicles and Supplies Limited and
Northern Industrial Garage Limited**

Respondents

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
13TH MAY 1991

Present at the hearing:-

LORD KEITH OF KINKEL
LORD ACKNER
LORD OLIVER OF AYLERTON
LORD LOWRY
SIR EDWARD EVELEIGH

[Delivered by Lord Oliver of Aylerton]

This is an appeal from a judgment dated 16th June 1989 of the Court of Appeal of Jamaica (Rowe P., Carey and Forte JJ.A.), allowing with costs the respondents' appeal from an order made by Ellis J. in the Supreme Court of Jamaica on 2nd February 1989 and restoring a previous order of Clarke J. dated 11th January 1989.

Although events occurring subsequent to the order of Ellis J. have rendered the litigation entirely academic so far as the respondents are concerned and they have not appeared to argue before their Lordships' Board, it was considered by the appellant that the order of the Court of Appeal raised questions of general public importance in Jamaica which it was desirable should be considered by their Lordships.

The background to the litigation lies in the Trade Act of Jamaica, section 8 of which enables the Minister (in this case the Minister of Foreign Affairs, Trade and Industry) to prohibit the importation of goods and to regulate the distribution, purchase or sale of goods or any class of goods. In pursuance of this power there was made the Motor Vehicle (Sale and Distribution) Order 1985, the effect of which was that approved motor vehicles were permitted to be imported into

Jamaica only by specified importers for distribution to dealers whose business is to purchase motor vehicles for resale. An "approved" motor vehicle is defined as one imported under credit facilities which are guaranteed by the Government of Jamaica. In fact there was at the material time only one specified importer. This was the Jamaica Commodity Trading Company Limited ("JCTC") which their Lordships have been given to understand is a registered limited company the issued share capital of which is owned or controlled by the Jamaican Government but which is managed by a board of directors in the ordinary way. It is under Government control in the sense that the directors can be removed and replaced by the Government by virtue of its shareholding, but it is not in any relevant sense an agent or organ of the Government. In practice, the way in which the system works is that JCTC issues annual invitations to car retailers to indicate within specified categories and subject to certain specified maxima the number of vehicles which they require for the year. Once the retailers' requests for allocations are received, they are forwarded to the Minister for him to make the allocation. The retailers are subsequently informed, through JCTC, of the allocation made to them and JCTC is instructed to contract with the foreign suppliers for the supply of the vehicles allocated.

Regulations 3, 4 and 5 of the Order provide as follows:-

- "3. All approved motor vehicles shall be allocated among dealers in such manner and in such numbers and subject to such terms and conditions as the Minister may, in his absolute discretion, determine.
- 4. (1) The Minister shall notify in writing each specified importer of the determination made pursuant to paragraph 3.
- (2) The specified importer shall notify in writing all dealers affected by the determination communicated to him by the Minister.
- 5. Every specified importer shall give effect to the determination by the Minister and upon receipt of payment from the dealer of the price of the approved motor vehicle, forthwith deliver or cause to be delivered to the dealer, such motor vehicle."

It will thus be seen that in making the determination the Minister, though no doubt acting within a discretion which must be properly exercised, performs a purely executive function which is exhausted once the determination has been made. The responsibility for implementing the determination then devolves upon the specified importer to whom the communication has been issued.

The respondents are motor dealers carrying on retail businesses in Jamaica. Both applied for allocations of vehicles for the year 1988/89. Allocations were made and on 25th November 1988 JCTC was instructed to place orders for vehicles of the types and in the quantities allocated. On 7th December 1988 JCTC notified the respondents of their allocations, which were for quantities substantially less than in the previous year. They protested but without result and on 4th January 1989 they issued an *ex parte* summons for leave to apply for an order of *certiorari* to quash the allocations, alternatively for an order of prohibition directed to the Minister prohibiting him from implementing the allocation, alternatively for an order of *mandamus* directing the Minister to make a fair allocation. Paragraph (ii) of the summons asked "That all allocations of quotas and/or proceedings consequent on the said allocations be stayed pending a final determination of this matter". On 11th January 1989 Clarke J. in chambers made an *ex parte* order granting the relief sought by the summons, including the stay sought by paragraph (ii). That order was served on the Minister on 13th January 1989 and on 17th January the respondents' attorneys wrote threatening proceedings for contempt if a contract was concluded by JCTC for the importation of motor vehicles. The response to this threat - which, for reasons which appear hereafter, their Lordships consider to be entirely misconceived - was a summons by the appellant for the *ex parte* order to be set aside either in whole or in part, the summons being supported by an affidavit deposing to the fact that the allocation had already been made and that instructions had, well prior to the order, been given for JCTC to order the vehicles concerned and also adverting to the irreparable damage to the economy which would be caused if the importation were to be delayed and to the escalation of prices consequent upon any further delay.

Clarke J. was absent from Kingston on Circuit at the return date for the hearing of the summons and the matter was heard in chambers by Ellis J. who, after hearing both parties, set aside that part of the order of Clarke J. which granted a stay but gave leave to the respondents to appeal. On 16th June 1989 the Court of Appeal reversed the decision of Ellis J. and restored the stay contained in the order of Clarke J., although the court appears to have accepted that the relief was now academic since, in the interim, the vehicles had been ordered and the allocations effected. The court also dismissed the cross-appeal by the appellant seeking to have the order of Clarke J. granting leave to apply set aside in its entirety.

It was the appellant's contention before the Court of Appeal that an application for leave to apply for an order of *certiorari* or prohibition in respect of a

Ministerial decision was a proceeding against the Crown to which the only proper party was the Attorney-General so that the proceedings before Clarke J. were, in any event, misconceived. This argument rested upon the provisions of the Crown Proceedings Act of Jamaica, section 13 of which expressly provides that civil proceedings against the Crown shall be instituted against the Attorney-General. The Act, however, contains, in section 18, a restrictive definition of "civil proceedings" and the court was unanimous in holding that the proceedings from which the appeal arises were not civil proceedings within the Act. There was thus no statutory requirement rendering the Attorney-General either a necessary or a proper party. The appellant's primary ground of attack on the order of 11th January 1989, however, was that the stay granted by paragraph (2) of the Order was in fact in the nature of an injunction and that no injunction could be granted against the Crown. Carey J.A. and Forte J.A. were at one in concluding that in Jamaica an interim injunction could not be granted against the Crown but that the grant of a stay (which they seem to have assumed would have the same effect) was permissible by virtue of section 564B(4) of the Civil Procedure Code. Rowe P. felt it unnecessary to consider whether injunctive relief could be granted against the Crown in civil proceedings since this remedy was irrelevant to proceedings on the Crown side for prerogative remedies. There, in his view, "interim relief was always obtainable in Crown side proceedings in that the order *nisi* acted as a stay in Crown side proceedings".

The principal ground, however, upon which the court concluded that the appeal must be allowed and the stay restored was that Ellis J. had no jurisdiction to discharge an *ex parte* order made by another judge.

Leave to appeal to Her Majesty in Council was granted by an order made on 21st July 1989 in which it was certified that four questions ought, by reason of their general or public importance, to be submitted to Her Majesty in Council. These were:-

1. Whether the stay of proceedings granted pursuant to section 564B(4) of the Judicature (Civil Procedure Code) Law is in the circumstances of the case in the nature of an injunctive relief?
2. If the answer to question 1 is yes, then whether any relief which is in the nature of an injunctive relief can be granted against the Crown and/or its officers in these proceedings having regard to the provisions of the Crown Proceedings Act and the unavailability of such relief on the Crown side of the Queen's Bench Division or otherwise?

3. Whether or in what circumstances a high court judge can review and set aside the *ex parte* order of another high court judge made on an application for leave to issue a prerogative order?
4. Should the Attorney General be named as the Respondent in these proceedings instead of the Minister of Foreign Affairs, Trade and Industry?

As regards the last of these questions, their Lordships entertain no doubt whatever that the Court of Appeal was correct in concluding that the proceedings were not "civil proceedings", as defined by the Crown Proceedings Act, and that the appellant and not the Attorney General was the proper party to proceedings instituted for the purpose of reviewing the exercise of his statutory powers.

On the principal ground upon which the decision of Ellis J. was reversed, however, their Lordships take an entirely contrary view to that taken by the Court of Appeal. Although the three members of the court were unanimous in their conclusion on this point, they reached it by rather different routes. Rowe P., whilst acknowledging that in civil proceedings commenced by writ the *ex parte* interim order of a judge is reviewable and may be varied or discharged either by the judge who made the order or, in an appropriate case, by another judge, nevertheless held that in proceedings under section 564B of the Civil Procedure Code the only method of varying or revoking an *ex parte* order was by way of appeal to the Court of Appeal except in the case where the order itself gives a liberty to apply to vary or discharge. Carey J.A., with whom Forte J.A. agreed, accepted that a judge of the Supreme Court has an inherent jurisdiction to set aside or vary an order made *ex parte* and even to revoke leave given *ex parte*, but that this only applied where "new matters are brought to his attention either with respect to the facts or the law". In his view Ellis J. did not have before him any material which enabled him to exercise the jurisdiction.

An *ex parte* order is, in its nature, provisional only and Carey J.A. was plainly right in following and adopting what was said to this effect by Sir John Donaldson M.R. in *W.E.A. Records Ltd. v. Visions Channel 4 Ltd. and Others* [1983] 2 All E.R. 589, 593 and by Lord Denning M.R. in *Becker v. Noel and Another* [1971] 1 W.L.R. 803. Rowe P. considered that section 564B, in providing for an appeal to the Full Court against a refusal of leave, impliedly ousted any reconsideration of the matter either by the same judge or by another judge. This, with respect, is a *non sequitur* and it would, if correct, produce the absurd result that, even in a case where an order had been obtained by deliberate concealment of material facts and misleading evidence, the judge who had been wrongly

persuaded to make the order would be incapable of revoking it. All other considerations apart, it is provided (section 686) that:-

"Where no other provision is expressly made by Law or by Rules of Court the procedure and practice for the time being of the Supreme Court of Judicature in England shall, so far as applicable, be followed ..."

Neither the Code nor the Rules contain express provisions relating to the discharge of *ex parte* orders but Order 32 rule 6 of the Rules of the Supreme Court provides in terms that "the court may set aside an order made *ex parte*". Leave granted to institute proceedings for judicial review can, in an appropriate case, be revoked by a judge under this rule (see *R. v. The Secretary of State for the Home Department, Ex parte Herbage* (No. 2) [1987] 1 Q.B. 1077, 1092).

Their Lordships entertain no doubt that Ellis J. was acting within his jurisdiction in making the order which he made on the appellant's application and they have difficulty in understanding Carey J.A.'s assertion that the judge had before him no new material justifying his exercise of the jurisdiction. He had in fact most material evidence, adduced before the court for the first time, first as to the supposed effect of the stay which Clarke J. had purported to grant, and secondly that in fact the allocation had been made already and the instructions given to JCTC which, insofar as the "stay" could have had any effect, was not bound by the order and was not even a party to the proceedings. In their Lordships' judgment, Ellis J. was entitled, on an application properly made, in his discretion to vary or revoke the *ex parte* order which had been made by Clarke J. and no ground has been shown for any interference by an appellate court with his exercise of discretion, which seems to their Lordships perfectly proper on the supposition, which everybody connected with the court seems to have adopted, that the order for a stay had some inhibiting effect.

This by itself is sufficient to dispose of the appeal but it has to be remarked that, quite apart from the factual material adduced in support of the appellant's application for the variation of the order, and regardless of any question whether the evidence adduced in support of the respondents' application to Clarke J. provided even *prima facie* ground for the grant of the leave sought, there was every ground for challenging the order for a stay as a matter of law. It seems in fact to have been based upon a fundamental misunderstanding of the nature of a stay of proceedings. A stay of proceedings is an order which puts a stop to the further conduct of proceedings in court or before a tribunal at the stage which they have reached, the object being to avoid the hearing or

trial taking place. It is not an order enforceable by proceedings for contempt because it is not, in its nature, capable of being "breached" by a party to the proceedings or anyone else. It simply means that the relevant court or tribunal cannot, whilst the stay endures, effectively entertain any further proceedings except for the purpose of lifting the stay and that, in general, anything done prior to the lifting of the stay will be ineffective, although such an order would not, if imposed in order to enforce the performance of a condition by a plaintiff (e.g. to provide security for costs), prevent a defendant from applying to dismiss the action if the condition is not fulfilled (see *La Grange v. McAndrew* [1879] 4 Q.B.D. 210). Section 564B of the Code provides, in sub-section (4), that "the grant of leave under this section to apply for an order of prohibition or an order of *certiorari* shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application or until the court or judge otherwise orders". This makes perfectly good sense in the context of proceedings before an inferior court or tribunal, but it can have no possible application to an executive decision which has already been made. In the context of an allocation which had already been decided and was in the course of being implemented by a person who was not a party to the proceedings it was simply meaningless. If it was desired to inhibit JCTC from implementing the allocation which had been made and communicated to it or to compel the appellant, assuming this were possible, to revoke the allocation or issue counter-instructions, that was something which could be achieved only by an injunction, either mandatory or prohibitory, for which an appropriate application would have had to be made. The appellant's apprehension that that was what was intended by the order is readily understandable, but if that was what the judge intended by ordering a stay, it was an entirely inappropriate way of setting about it. He had not been asked for an injunction nor does it appear that he considered or was even invited to consider whether he had jurisdiction to grant one. Certainly none is conferred in terms by section 564B. An injunction cannot be granted, as it were, by a side-wind and if that was the judge's intention it should have been effected by an order specifying in terms what acts were prohibited or commanded. As it was there were no "proceedings" in being upon which the "stay" could take effect. One is left with only two possibilities. Either Clarke J. was granting relief which was entirely inappropriate and inapplicable to the circumstances before him or he was seeking to enjoin the activities of JCTC, which was not a party to the action, and to do so by wholly inappropriate machinery. In either event, the order was meaningless.

The answer to the first of the certified questions must, therefore, be in the negative and the second

question does not arise. Their Lordships do not feel called upon to answer what is now an entirely academic question upon the hypothesis that injunctive relief is what Clarke J. may have intended to grant. They can well understand the anxiety of the Solicitor-General for Jamaica to have an authoritative answer to an important question and they are greatly indebted to him for his clear and illuminating submissions. But the point is far from easy. Attention has been drawn to some of the difficulties in this area of the law in a note by Sir William Wade Q.C. in a recent issue of the Law Quarterly Review (Volume 107 pages 4-10) and there are, in addition, considerations regarding the status of Ministers of the Crown which are peculiar to Jamaica. Despite Dr. Rattray's most helpful address, their Lordships do not think it appropriate to express an opinion on what is, in any event, now a hypothetical as well as an academic question and without having the benefit of a full *inter partes* argument.

Their Lordships will, accordingly, humbly advise Her Majesty that the appeal should be allowed and the order for costs made in the Court of Appeal discharged.