[2017] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 76/2014

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**SHIPPING ASSOCIATION OF JAMAICA**	**APPELLANT**
AND	**G S TRUCKING COMPANY LIMITED**	**RESPONDENT**

Kevin Powell instructed by Hylton Powell for the appellant

Oswest Senior-Smith, Mrs Denise Senior-Smith and Ms Olivia Derrett instructed by Oswest Senior-Smith and Company for the respondent

16, 17 May and 10 November 2017

BROOKS JA

[1] On 5 June 2008, a truck belonging to G S Trucking Limited (GST) was prevented from entering seaport premises operated by Kingston Wharves Limited (KW). That was an unusual event as GST's vehicles had been able, for some three years prior to that date, to enter the premises and collect shipping containers for GST's customers. It was a representative of Shipping Association of Jamaica (SAJ), Mr James Levy, who had issued the instruction preventing GST's entry. There was a dispute between GST and SAJ as to the terms of the instruction. GST stated that the ban was unconditional. SAJ claimed that Mr Levy had stipulated that GST was only barred from transporting equipment belonging to SAJ's members. SAJ is an association comprised of various

entities in the shipping industry. KW is a member of SAJ. Another seaport company, APM Terminals (APM), was also a member of SAJ. GST alleged that SAJ had also barred it from entering APM's premises.

[2] On 3 February 2014, a judge of the Supreme Court granted judgment for GST against both SAJ and Mr Levy. The judgment, among other things, directed that GST was entitled to access the respective premises of KW and APM. It also prohibited any infringement on that entitlement.

[3] SAJ has appealed from the judgment. In its appeal, SAJ contends that the learned trial judge was wrong in finding: (a) that GST was entitled to access to KW's and APM's respective premises and (b) that it was SAJ that barred GST from KW's premises. SAJ also argues that the learned trial judge erred when he made an order adversely affecting KW and APM, without their being represented before the court.

Background to the dispute

[4] The equipment that was relevant to this case comprised mainly of shipping containers and the various chassis on which the respective containers were transported. SAJ caused KW to bar GST because there was an outstanding payment for a chassis that had been stolen. At the time of the loss, the chassis had been leased to GST by Marine Management Services Limited (MMS). MMS was not a member of SAJ.

[5] There was general acceptance that GST was liable to MMS for the loss of the chassis. GST, however, left it to Poly Pet Limited (Poly Pet), from whose premises the container and chassis had been stolen, to negotiate and settle compensation with MMS.

Poly Pet was not opposed to providing compensation and negotiations commenced between it and MMS. It seems, however, that the negotiation process proved too slow or unrewarding to MMS and it sought to force GST to pay. It did so by asking SAJ, through Seaboard Freight and Shipping Limited, a connection of MMS that was a member of SAJ, to bar GST from hauling equipment belonging to SAJ's members until GST paid for the chassis. SAJ acted on this request. This led to KW's denial of entry to GST on 5 June 2008.

[6] GST continued to be denied entry to KW's premises, despite its entreaties to both KW and to Mr Levy. GST made another attempt in October 2008 to enter KW'S premises. This was after a new regime was established for regulating the transportation of shipping containers and their contents. GST's truck was again denied entry.

[7] In order to satisfy its customers' needs, GST was obliged to contract with other hauliers to transport the containers that GST should have transported. GST incurred expense and loss as a result of that situation.

The claim

[8] On 15 February 2009, GST filed a claim in the Supreme Court against SAJ and Mr Levy, seeking a declaration that it was entitled to entry to KW's premises as well as premises operated by APM. GST also sought an injunction against the denial of entry and an award of damages for the loss it had suffered during the time that it had been denied entry.

[9] The claim came on for trial in the Supreme Court, but Mr Levy did not participate in the trial. In fact, there was evidence that Mr Levy had died in May 2012 (page 514 of the record). His death was after the trial had started (September 2011), but before the taking of the evidence was completed in September 2012. There was, however, no step taken to either remove him or install a substitute for him as a party to the litigation.

[10] The orders made by the learned trial judge were as follows:

> "1. Judgment for [GST] against both [SAJ and Mr Levy] with damages to be assessed.
>
> 2. The trucks of [GST], its servants and/or agents are entitled to have access to the premises of Kingston Wharves Limited and APM Terminals.
>
> 3. [SAJ and Mr Levy] whether by themselves, their servants and/or agents or otherwise are restrained from obstructing the entrance to or otherwise preventing the trucks of [GST] from gaining access to the premises of Kingston Wharves Limited and APM Terminals.
>
> 4. Costs to [GST] to be agreed or taxed."

[11] The damages that were ordered to have been assessed were restricted to the consequences of a denial of access to KW's premises. The learned trial judge found that there was insufficient evidence of any denial of access to APM's premises. Based on that finding, the analysis which follows, will, unless the context requires it, exclude, for convenience, reference to APM and its premises.

The appeal

[12] SAJ's grounds of appeal are as follows:

"a. The learned judge erred in concluding that [GST], its servants and/or agents are entitled to have access to the Premises.

b. The learned judge erred in failing to find that at most, [GST] was a bare licensee and would therefore have no entitlement to damages.

c. The learned judge failed to take into account that the owners of the Premises were not given notice of the proceedings or an opportunity to be heard.

d. The learned judge erred in finding that [SAJ] agreed or accepted that [GST] had an unrestricted right to enter on to the Premises subject only to the terms of the Memoranda of Understanding and the Standard Equipment Interchange Agreement.

e. The learned judge erred in concluding that the Memoranda of Understanding were not binding agreements capable of construction.

f. The learned judge erred in refusing and/or failing to construe or properly construe the provisions of the Memoranda of Understanding to determine the nature and extent of [SAJ's] powers and duties as the 'central monitoring and verification body.'

g. The learned judge erred in failing to find that on the evidence before him [GST] acted in accordance with the provisions of the Memoranda of Understanding and was bound by the terms of the Standard Equipment Interchange Agreement.

h. The learned judge erred in finding that [SAJ] or its servants or agents barred [GST] from entering on to the Premises.

i. Having accepted the evidence of the expert witness the learned judge erred in failing to consider it as part of the accepted industry practice in construing the provisions of the Memoranda of Understanding."

[13] GST filed a counter-notice of appeal. It contended that the learned trial judge's findings could be supported on the additional basis that GST had a contractual licence to enter KW's premises. The learned trial judge had found that GST did not have a contractual licence. Set out below are GST's grounds on which it asserts that the judgment could also be supported:

> "(a) That Evidence was provided to demonstrate that the Memoranda of Agreement executed between the Shipping Association of Jamaica and the Port Trailer Haulage Association (of which [GST] was a member) saw [GST] as a haulier being the one providing the consideration under the said Agreements and not the Association, which is enough to imply a collateral contract upon which [GST] was entitled to sue for any breach thereof;
>
> (b) That it is clear from the evidence that the Port Trailer Haulage Association as the other signatory to the Memoranda of Agreement was acting on behalf of its members, in this case [GST] and consequently [GST] having provided the consideration required under the Agreements was entitled to benefit under the said Agreements and would acquire a right of action against [SAJ] for any breach thereof;
>
> (c) That there is sufficient evidence to conclude that at all times [GST] acted on the faith of the terms agreed to by [SAJ] and the Port Trailer Haulage Association and provided the necessary consideration to operate on the premises of the Kingston Wharves Limited.
>
> (d) That the evidence elicited illustrates that there was a contractual license arising from the terms and conditions provided within the Memoranda of Agreement to which [GST] was bound in order to enter the premises of the Kingston Wharves Limited."

[14] The first issue raised by the appeal and counter-notice of appeal requires a determination as to the basis on which GST was entitled to enter the premises of KW

and APM before the incident on 5 June 2008. This first issue requires analysis of whether GST had a licence to enter those premises and if so, the nature of that licence. The second issue is whether SAJ was entitled to take the step that it did to prevent GST from being able to transport equipment belonging to SAJ's members. The third issue is whether the learned trial judge could have properly made the orders that he did, without first having given KW and APM an opportunity to be heard. These issues will be discussed in turn.

The first issue- the basis on which GST was entitled to enter the respective ports

[15] Mr Powell, on behalf of SAJ, submitted that GST had no contract with either SAJ or KW, which entitled it to enter KW's premises. Nor did GST, Mr Powell submitted, have any arrangement with either KW or SAJ that would prevent KW from barring GST from KW's premises. He argued that GST was therefore a bare licensee, and as a result it could have been prevented from entering KW's property at any time, without liability on either KW's or SAJ's part.

[16] Mr Senior-Smith, on behalf of GST, submitted that prior to January 2008, GST enjoyed the benefit of unrestricted entry to KW's premises. He argued that GST was entitled to rely on that course of dealing. He also sought to draw a distinction between the role of SAJ, in governing access to the seaports, and KW's ability to grant permission to enter its premises. He submitted that by virtue of two documents signed by the Port Trailer Haulage Association of Jamaica (PTHA) and SAJ, SAJ was entrusted with the role of regulating access to the ports, and that that role was separate and

distinct from the right of each proprietor of the respective ports, KW and APM, from granting access to its premises.

[17] The first of those documents was executed on 30 January 2008. It was a memorandum of agreement (the January MOA). The document also had annexed to it, an Equipment Interchange Agreement (EIA). The purpose of the EIA was to regulate the use of containers, chassis and other equipment by the various players in the industry. It was expected that there would be a Standard Equipment Interchange Agreement (SEIA), which would be used by the respective players in their dealings with each other and used by the hauliers in dealing with their respective customers.

[18] The second document was also a memorandum of agreement (the October MOA). It was executed on 24 October 2008 and heralded a new era in ground transportation for goods leaving and entering the seaports. The October MOA was in similar terms to the January MOA, but featured additional provisions. Arising from the October MOA was a system whereby only truckers or hauliers who had signed the SEIA would be issued with a SAJ approved sticker. The October MOA also stipulated that only trucks bearing a sticker issued by SAJ would be allowed to transport equipment belonging to members of SAJ. The January MOA and the October MOA will collectively be referred to below as "the MOA's".

[19] Mr Senior-Smith submitted that there was evidence that GST incurred expense in order to comply with the requirements imposed by the MOA's. The steps taken in compliance, learned counsel submitted, meant that GST had more than a bare licence to enter the ports and, based on the January MOA, also had a contractual licence from

SAJ. Mr Senior-Smith relied, in part, on the authority of **Shipping Association of Georgetown and Others v Ivan Bentinck** (1969) 14 WIR 243, for support for these submissions.

[20] The learned trial judge, in addressing this point, found that there was uncontroverted evidence of KW's custom of allowing GST onto its premises "without let or hindrance in order to haul containers in keeping with [GST's] business or trade" (paragraph [42] of the judgment). Although he found that this was not as a result of a contractual licence granted by KW to GST, he concluded that "without a doubt, a licence of some sort seems to have existed" (paragraph [39]).

[21] He was correct in finding that there was no contractual licence between KW and GST. It is indisputable that prior to January 2008, there was no contractual agreement between GST and KW, whereby GST's vehicles were allowed to enter KW's premises.

[22] The learned trial judge was also correct in his analysis that neither of the MOA's created any contractual relations between GST and SAJ. Neither document was executed by GST. Each MOA was between SAJ and PTHA. Further, neither of the MOA's conferred specific contractual obligations on either SAJ or PTHA, from which GST could benefit.

[23] The clauses in the MOA's which placed obligations on SAJ and PTHA were not capable of creating a binding contract. In the January MOA, these were:

> "**4. Commitment.** The PTHA and the SAJ will work toward the speedy, full and effective execution of the [SEIA] in the common interest of both associations.

5. Specific Areas of Agreement.

a. The [SEIA] will be adopted by all the SAJ and PTHA members.
b. ...
c. The SAJ will be the central monitoring and verification body of trailer haulage on behalf of the shipping and trucking industry.

    i. The SAJ will establish a register of trucking companies, ensuring compliance with all regulations concerning equipment interchange.

    ii. The PTHA agrees that it will ensure that its members participate in the scheme of registration established by the SAJ and encourage other truckers to join.

    iii. The PTHA will ensure that its members comply with all laws and regulations governing the safe haulage of equipment owned by Lines and the members of the SAJ.

d. ...
e. Only truckers who sign the shipping industry [SEIA] and who satisfy insurance requirements under the [SEIA] and who meet the terms and conditions established for the members of the PTHA will be allowed to draw equipment belonging to members of the SAJ.
f. The PTHA and the SAJ will convene meetings with relevant public and private sector agencies and organizations and other stakeholders to apprise them of the terms agreed under this Memorandum of Understanding [sic].
g. The SAJ and the PTHA agree to the [timely] sharing of information relevant to the [SEIA] and the good and safe haulage of Lines and Agents' equipment."

[24] In addition to those in the January MOA, the October MOA contained the following obligations:

"5. Specific Areas of Agreement.

a. - b. [As in the January MOA]

c. The SAJ will be the central ... trucking industry.

i. The SAJ will establish ... equipment interchange.

ii. The PTHA will support the efforts of the SAJ to be approved as the delegated authority to establish the scheme of registration for truckers under the Port Authority (Port Management and Security) by-Laws 2007.

iii. The PTHA agrees ... other truckers to join.

iv. There will be formed an Advisory Committee to monitor the scheme of registration of truckers and the Interchange Agreement, and this committee shall comprise relevant shipping and trucking industry stakeholders including representatives of the SAJ and PTHA.

v. The PTHA will ensure ... and the members of the SAJ.

vi. The parties will ensure that all reasonable steps are taken to establish the scheme of registration in the shortest possible time, but also recognise that the role of registrar is based on the approval of the Port Authority of Jamaica and the relevant statute. As such, the parties agree that the Interchange Agreement will be implemented as of 1 November 2008; while efforts will continue to work with the Port Authority of Jamaica to move speedily to appoint the registrar.

d. – e. [Almost identical to the January MOA.]

f. Approved trucks will bear a sticker to be displayed on their windshield to indicate their approval on the scheme of registration for truckers.

g. – h. [Identical to clauses f. – g. in the January MOA.]"

[25] As the learned trial judge observed, there was no effective contract between SAJ and PTHA. There was, consequently, no binding agreement between SAJ and GST or between GST and KW. Mr Senior-Smith's submission that GST and SAJ became bound by a contract, which was subsidiary to the MOA's, cannot therefore be accepted.

[26] The case of **Shipping Association of Georgetown and Others v Ivan Bentinck** does not assist Mr Senior-Smith's submissions. That case concerned a claim by a portworker for the recovery of money deducted from his earnings consequent on an agreement between the union representing portworkers and the organisation representing various shipping interests who employ the workers. The case is entirely distinguishable on the facts.

[27] In his judgment in that case, Crane JA held that, although the individual portworker was not a member of the union, there was a contract between him on the one hand and the organisation on the other. That contract was based on the fact that that portworker had offered his services to a particular shipping interest on the terms of a schedule annexed to the overall agreement. In addition to that, Crane JA held, the manager of the particular shipping interest which actually employed the portworker, in effect said to the portworker, "These are our terms of employment, you may accept or reject them as you please" (page 254). The learned judge of appeal held that in

providing his labour in response to that position, the portworker had entered into a contract with the organisation.

[28] The court found that the deductions were in breach of the relevant legislation and confirmed the decision of the court below that the monies should have been refunded to the portworker.

[29] In this case, there is no provision of any service by GST to SAJ, KW or APM, which placed it on the footing of having a contractual licence to enter KW's premises. The SEIA which the MOA's contemplated would have been the equivalent of the contract between the portworker and the individual shipping interest in **Shipping Association of Georgetown and Others v Ivan Bentinck**. GST did not provide any service to SAJ or KW under any SEIA.

[30] In this case, the learned trial judge was, however, not entirely correct. In using the approach that "a licence of some sort seems to have existed", the learned trial judge fell into error. In determining the rights, if any, that GST held, and by whom they were to be observed, it was incumbent on the learned trial judge to have ascertained that GST had more than a bare licence.

[31] In attempting to determine whether GST had a right to enter KW's premises, the learned trial judge approached the matter from the aspect of whether SAJ had a right to exclude GST. Based on that analysis, in the course of which he found that the MOA's were not contractual, he decided that SAJ had no contractual right to bar GST.

Respectfully, however, his decision on that point did not determine GST's right to enter KW's premises.

[32] Mr Powell's submissions that SGT was neither a contractual licensee nor a licensee by estoppel, but rather a bare licensee, are correct. Both KW and APM, in the absence of any contractual arrangement with GST or any promise not to insist on any legal rights, in respect of GST, were entitled to deny GST unrestricted access to their respective premises.

[33] Emma Godfrey and Adrian Davis, the learned authors of Claims to the Possession of Land, at paragraph [A1.3], correctly explain the nature of a licence and the three types of licence thus:

> "A licensee is a person whose entry on to the land has the express or implied permission of the landowner but who does not have a formal interest in the land such as a tenancy or a right of way.
>
> Licences divide into three main classes:
>
> > (i) ***the contractual licence***, where the licensee obtains his permission by providing consideration in accordance with a contractual agreement: a hotel guest is a typical example;
> >
> > (ii) ***the gratuitous or bare licence***, where the licensee provides no consideration for the permission that he has obtained. A prospective shopper who looks round a department store without making a purchase is a bare licensee. Although there is no express permission the circumstances give rise to an implied licence;
> >
> > (iii) ***the estoppel licence***, where the licensee is induced by the landowner to think that he has or will receive an interest in the land and in reliance upon

> the inducement spends money on the land or otherwise acts to his detriment." (Emphasis and italics as in original)

[34] The licence held by a bare licensee "may be revoked by the licensor at any time without giving a right to damages to the licensee" (Hill and Redman's Law of Landlord and Tenant chapter 1, paragraph [364]). Lord Ellenborough CJ said in **R v The Inhabitants of Horndon-On-The-Hill** (1816) 4 M & S 562, at page 565; 105 ER 942 at page 943, that a "licence is not a grant, but may be recalled immediately".

[35] It is accepted, however, that even in the case of a bare licence, there are circumstances when reasonable notice is required for termination of the licence. Such circumstances exist, for instance, when the licensee has brought property unto the land and time is required to vacate the property. If no such circumstances exist, no notice is required. Lord Russell of Killowen in **Canadian Pacific Railway Company v R** [1931] AC 414 at page 432 explained the difference this way:

> "Whether any and what restrictions exist on the power of a licensor to determine a revocable licence must, their Lordships think, depend upon the circumstances of each case. The general proposition would appear to be that a licensee whose licence is revocable is entitled to reasonable notice of revocation. For this reference may be made to *Cornish v. Stubbs* [(1870) LR 5 CP 334] and *Mellor v. Watkins* [(1874) LR 9 QB 400], in the latter of which cases Blackburn J. states that a person giving a revocable licence 'is bound to give the licensee reasonable notice.'
>
> When the exercise of the rights conferred by the licence involves nothing beyond, there can be no reason to urge against the existence of a power to determine the licence brevi manu [by the shortest course] at the will of the licensor."

It is to be noted that in the instant case, GST had no property on KW's premises

[36] The next type of licence is that of a licence by estoppel. The following explanation of estoppel by representation was approved by Evershed MR in **Hopgood v Brown** [1955] 1 All ER 550 at page 559:

> "…where one person ('the representor') has made a representation to another person ('the representee') in words, or by acts and conduct, or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive), and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto."

The principle still represents good law. GST cannot, however, benefit from that principle.

[37] In neither of the MOA's did SAJ undertake or promise PTHA's members unrestricted access to the premises of its members. The respective MOA's only stipulated, for these purposes, that "[o]nly truckers who sign the shipping industry [SEIA] and who satisfy the…terms and conditions established for the members of the PTHA will be allowed to draw equipment belonging to members of the SAJ". It is important to note that the language speaks to a trucker, being allowed, as opposed to, being entitled, to draw equipment belonging to members. That restriction to "equipment belonging to members" is also relevant to the discussion below, of the second issue.

[38] On the issue of whether GST had relied on the MOA's and had acted to its detriment, in securing insurance coverage for its use of leased equipment, the evidence of Mr Pinnock was that insurance was a required feature for such lease transactions. The point being that if the haulier had no insurance coverage for leased equipment it would be unlikely to have obtained use of that equipment. That certainly was an important part of the respective MOA's. There was no conclusive evidence that GST had incurred a cost that it would not normally have incurred as part of its business.

[39] Entirely as an aside, although there was no evidence to the contrary, it is strange that any party could be said to be entitled to access any seaport premises "without let or hindrance", as the learned trial judge had found. This is especially so in the face of evidence that there existed, at least between KW's and APM's respective premises, "both security and customs regulation" (page 523 of the record of appeal). One would have thought that only persons with documented general clearance, or based on specific documentation on each occasion, such as were required for clearing specific goods, could be allowed onto port premises. A general understanding concerning access, such as GST claims, would hardly be appropriate or consistent with premises that are subject to "both security and customs regulation". That observation, in the absence of evidence to support it, does not, however, form a part of this decision.

[40] The resolution of this first issue, therefore, is that GST was not entitled to unrestricted entry to KW's or APM's premises, and the learned trial judge was in error to find to the contrary. It was a bare licensee, and, because it was not in occupation of

any part of KW's premises, there was no need for it to be given notice that it would be denied entry thereto.

The second issue - whether SAJ was entitled to take the step that it did to prevent GST from being able to transport equipment belonging to SAJ's members

[41] The contending positions of the respective parties was that whereas GST asserted that there was an unconditional bar to its trucks entering KW's premises, SAJ insisted that it only barred GST from access to equipment belonging to its members. Alternative methods of imposing a sanction on GST were therefore placed before the learned trial judge. He addressed this aspect of the dispute directly. He identified the evidence by each party in support of its particular contention and found that GST had been unconditionally barred. His reasoning was that such a bar would have been easier to achieve than a selective prohibition. He did so at paragraph [55] of his judgment:

> "One important consideration is this: How would [SAJ] have seen to the carrying out of Seaboard's request ['not to issue authorization for [GST] to haul any equipment on behalf of SAJ members']? Would they have allowed [GST's] trucks on the premises and then not allowed them to receive the equipment? Or, on the other hand, would it not likely have been through the more-practical method of barring the trucks of [GST] from entering the two premises or either of them? In the court's view, the latter is the method that [SAJ] would likely have used…."

He went on to note that the approved truck sticker system had not been contemplated in the January MOA and therefore could not have applied when GST was barred on 8 June 2008.

[42] It is to be noted that even SAJ's expert on shipping and the transportation of goods by leased equipment, Mr Fritz Pinnock, testified to the availability of both

methods of sanction. Mr Pinnock gave evidence of the system requiring specific agreements for the use of the equipment whereby goods, moving between shipper and consignee, were transported. He identified the difference between the transaction of the sale of the goods, which was between the shipper and the consignee, and the transaction for the use of the equipment transporting of the goods, which was between the owner of the equipment and the haulier. He testified that the system required the latter transactions, and stressed that the haulier was accountable to the equipment owner for the safe return of the equipment.

[43] Despite the existence of that system, which would have required documentation (whether general or specific) for each transaction involving the use of equipment, thereby allowing a pinpoint method of imposing a sanction, Mr Pinnock also testified that general bans were also used. He stated at paragraph 13 of his witness statement that he had experience in using general bans:

> "…in my experience, it is usual for industry players such as port operators, shipping lines and equipment owners to cooperate where breaches occur during the interchange period and to apply sanctions where breaches of the [SEIA] are not remedied. In my role as Chief Executive Officer with shipping companies with the responsibility of managing [SEIA's], I have personally applied sanctions for such breaches, such as writing to port operators and asking them not to permit particular trucking companies to access particular ports until breaches committed by them are resolved. Locally, I have taken this very action at both Kingston Container Terminals (formerly APM terminals) and Kingston Wharves Limited. Such action is consistent with standard and accepted international shipping practice."

[44] The learned trial judge therefore had a question of fact for his resolution. He saw and heard the witnesses and was better able to determine whom he would believe. It is

true that Mr Levy was not available to testify as to the instruction that he actually gave to KW, but the learned trial judge would have had to make his decision on the evidence that was before him. There is no reason to say that he was wrong in that decision.

[45] Despite that however, the present question is whether SAJ was entitled to take the step of applying a general bar. Mr Pinnock's evidence was that it was so entitled. He based his opinion on international as well as local practices. The learned trial judge found that there was no contractual basis for that action. He stated that the MOA's had not created binding agreements, which allowed for the imposition of such a sanction, and that there was no evidence of GST having entered into an SEIA which would have allowed SAJ to have the general right, based on a contract, to bar it.

[46] It may well be that the learned trial judge was correct in his ruling on that point. The absence of contractual authority in SAJ, did not, however, prevent KW from denying a bare licensee access to its premises. It is not seriously contested that the bar was effected by someone other than KW's personnel. The finding above, on the first issue, that GST was not entitled to unrestricted entry to KW's or APM's premises, is conclusive on the overall question of liability that was before the learned trial judge. As KW had the right to bar GST from entry to its premises, there can be no liability in SAJ in requesting KW to exercise that right. There could be no accusation of interfering with contractual rights as there was no contract between GST and KW; a finding that was confirmed by the learned trial judge.

[47] The decision on the second issue, therefore, is that although SAJ did, as found by the learned trial judge, request KW to unconditionally bar GST from entering KW's

premises, and that it had no contractual basis for doing so, it bore no liability to GST for its action. KW was entitled, in accordance with the industry practice, to unconditionally bar GST from its premises. GST was a bare licensee in terms of access to KW's premises, and could have been so barred, without liability on KW's part.

The third issue - whether the learned trial judge could have properly made the orders that he did without having given KW and APM an opportunity to be heard

[48] This was perhaps, Mr Senior-Smith's weakest point. He initially submitted, in effect, that SAJ represented KW and APM at the trial. In his written submissions, he argued that by virtue of KW and APM being members of SAJ, "the knowledge of [SAJ] was also the knowledge of" KW and APM. Learned counsel supplemented those submissions by advancing, orally, the argument that the orders made by the learned trial judge did not impinge on KW.

[49] Neither of these submissions can be accepted as being valid. Firstly, SAJ is a separate legal entity from KW and APM and there was no evidence or order that KW represented either in the litigation. Secondly, it is patent that the learned trial judge's decision directly affected both KW and APM. The orders that were made directly affected the rights of both entities to control access to their respective premises. Order 2, was a declaration of GST's entitlement that affected both KW and APM:

> "The trucks of [GST], its servants and/or agents are entitled to have access to the premises of Kingston Wharves Limited and APM Terminals."

[50] Order 3, similarly, had a direct impact on both. It said:

> "[SAJ and Mr Levy] whether by themselves, their servants and/or agents or otherwise are restrained from obstructing the entrance to or otherwise preventing the trucks of [GST] from gaining access to the premises of Kingston Wharves Limited and APM Terminals."

[51] A representative of GST, who produced a copy of that order at KW's entrance, would, not unreasonably, expect to obtain entry by virtue of the document. Further, any resistance by way of litigation would, undoubtedly, be met by strong reliance, by Mr Senior-Smith, or any of GST's other legal representatives, on the terms of the orders.

[52] These orders were, unfortunately, made without either KW or APM having an opportunity to make any representation to the court as to why their rights should not be so affected. Mr Powell, quite properly, submitted that the orders constituted a breach of natural justice. Learned counsel also relied on section 16(2) of the Jamaican Constitution which guarantees a fair hearing to every person. It states:

> "In the determination of a person's civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law."

[53] For those reasons, it must be held that the learned trial judge erred in making those orders without first allowing KW and APM an opportunity to show why they should not have been made.

Summary and conclusion

[54] The decision in this appeal, as it should have been in the court below, turned on the question of whether GST had a contractual or other enforceable right to enter either

of the premises controlled by KW or APM. The learned trial judge was in error in failing to determine the basis by which he deemed GST had the right of access. An analysis of the circumstances has shown that GST had only a bare licence to access those premises. That access could therefore have been denied at any time, without notice, by either KW or APM. In the event of a denial of access, as did in fact occur, at the instance of SAJ, neither KW nor, by extension, SAJ, would have been liable to GST. GST would, therefore, not have been entitled to any compensation from either.

The learned trial judge, therefore, erred when he decided the matter in favour of GST. Accordingly, I propose that the following orders be made:

1. The appeal is allowed.
2. The counter-notice of appeal is dismissed.
3. The judgment and orders made herein in the Supreme Court on 3 February 2014 are hereby set aside.
4. Judgment to be entered for the appellant herein.
5. Costs of the appeal, the counter-notice of appeal and in the court below, are awarded to the appellant. Such costs are to be agreed or taxed.

SINCLAIR-HAYNES JA

[55] I have read, in draft, the judgment of my brother Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

STRAW JA (AG)

[56] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

ORDER

1. The appeal is allowed.
2. The counter-notice of appeal is dismissed.
3. The judgment and orders made herein in the Supreme Court on 3 February 2014 are hereby set aside.
4. Judgment to be entered for the appellant herein.
5. Costs of the appeal, the counter-notice of appeal and in the court below, are awarded to the appellant. Such costs are to be agreed or taxed.