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**JAMAICA**

**IN THE COURT OF APPEAL**

**SUPREME COURT CIVIL APPEAL NO. 51/ 2002**

**BEFORE: THE HON. MR. JUSTICE HARRISON, P. (Ag.)  
THE HON. MR. JUSTICE PANTON, J.A.  
THE HON. MR. JUSTICE COOKE, (AG.)**

**BETWEEN: UNIVERSAL MERCHANTS LIMITED APPELLANT**

**A N D THE FINANCIAL SECRETARY OF  
THE GOVERNMENT OF JAMAICA  
(SHIRLEY TYNDALL) 1<sup>ST</sup> RESPONDENT**

**A N D THE ACCOUNTANT GENERAL  
OF THE GOVERNMENT OF JAMAICA  
(LORRAINE WINSTON DIAZ) 2<sup>ND</sup> RESPONDENT**

**A N D THE REGISTRAR OF COMPANIES  
(CLAUDETTE MORGAN-GREAVES) 3<sup>RD</sup> RESPONDENT**

**A N D THE ATTORNEY GENERAL FOR  
JAMAICA 4<sup>TH</sup> RESPONDENT**

**Mr. Oswald James instructed by Oswald James & Company  
for appellant**

**Michael Hylton, Q.C., Solicitor-General with Nicole Foster-Pusey and  
Annaliesa Lindsay instructed by Director of State Proceedings  
for the Respondents**

**June 4<sup>th</sup> & 5<sup>th</sup> June and 19<sup>th</sup> December, 2003**

**HARRISON, P.(Ag.)**

I have read the judgments of my brothers Panton, J.A., and Cooke, J.A.  
(Ag). I agree with their reasoning why the appeal was dismissed. I have nothing  
to add.

**PANTON, J.A.**

1. At the completion of the hearing of this appeal I agreed that it should be dismissed. I wish to say a few words on why I came to that decision. The facts have been stated in the judgment of Cooke, J.A. (Ag.) where he quotes from the judgment of Algernon Smith, J. (as he then was).

2. The reasons for judgment delivered in the Supreme Court are, in my view, faultless. It was no surprise therefore that grounds 3, 5, and 6 were abandoned at the commencement of the hearing before us. The real surprise was that the appellant thought there was good reason to pursue the remaining three grounds. Soon, however, reality dawned and, in respect of ground 1, it was conceded that the second respondent (the Accountant General) did indeed have the power to hold property. Consequently, it was recognized that the said office holder would also have the power to form a company to hold such property.

3. So far as ground 4 is concerned, there is no factual basis for saying that there has been a breach of either section 18 or 19 of the Constitution. Further, the appellant conceded that a creditor may assign a debt. It follows that such a creditor would be entitled to receive information relating to that debt. In addition, I am of the view that the business history of the debtor would be of importance to the creditor seeing that both are now in a business relationship. It does not matter that the appellant regards such information as confidential. The

new creditor ought not to be kept in the dark considering that he has made an investment by taking on the liabilities of the appellant.

**COOKE, J.A. (Ag.)**

This is an appeal against the judgment of the Full Court (Wolfe, C.J. Algernon Smith, Gloria Smith, JJ). On the 5<sup>th</sup> June, 2003, the appeal was dismissed with costs awarded to the respondents to be agreed or taxed.

Six grounds of appeal were filed. Of these, grounds 3, 5 and 6 were abandoned so no mention need be made of them. Of the remaining three grounds, after unavailing submissions, counsel for the Appellant in respect of grounds 1 and 2, correctly conceded that he had an insuperable task. Ground 4 pertained to breaches of sections 18 and 19 of the Constitution of Jamaica. In due course these three grounds will be set out, but first it is necessary to advert to the background to appreciate the interest of the applicant/appellant in these proceedings. As regards this I will content myself with reproducing an extract of the judgment of Algernon Smith, J (as he then was) which comprehensively deals with this aspect. It is hereunder:

"During the last decade of the 20<sup>th</sup> century the Government of Jamaica moved to rescue the collapsing financial sector by assisting several financial institutions, which had liquidity problems. Part of this assistance was to purchase various bad debts from some of these institutions for face value. In furtherance of this assistance Finsac Ltd. a private company limited by shares was incorporated in January, 1997. Finsac is not a bank or a licensed financial institution; it is governed by a Board of

Directors appointed by the Minister of Finance. Its Memorandum of Association was subscribed to by the 2<sup>nd</sup> Respondent the Accountant General and the 1<sup>st</sup> Respondent the Financial Secretary. Consequently a Certificate of Incorporation was issued by the 3<sup>rd</sup> Respondent.

In May, 1998 Refin Trust Ltd. a private company limited by shares and a wholly owned subsidiary of Finsac Ltd. was incorporated. Refin like Finsac is neither a bank nor a licensed financial institution. The subscribers to its Memorandum of Association are Finsac Ltd. and Mr. Dennis Boothe, a chartered accountant. A certificate of Incorporation was issued by the 3<sup>rd</sup> Respondent. Refin Trust Ltd. purchased various bad debts from the troubled financial institutions. Although these debts are owned by Refin they are administered by Finsac's personnel.

Also incorporated was Recon Trust Ltd. a subsidiary of Finsac. However, the debts purchased by Recon were transferred to and are now owned by Refin. Recon, too, is not a bank or financial institution.

The applicant, Universal Merchants Ltd. was a customer of the National Commercial Bank Ltd. (NCB) and the Union Bank of Jamaica Ltd. (UBJ). The applicant had several accounts at these banks and was indebted to the banks.

Sometime in September 1998, NCB advised the applicant that its loan accounts with the bank were transferred to Refin Trust Ltd. Subsequently several discussions and meetings between the applicant and Refin and Finsac took place with a view to establishing a repayment arrangement.

In March, 1999 the applicant was indebted to Refin in the sums of J\$23,636,499.00 and US\$310,828.00. A formal demand for payment was made accompanied by a threat in the event of failure to dispose of the securities held and to sue for the shortfall. The applicant submitted further proposals for the settling of the debts. The applicant applied to the

UBJ for credit facility and on the 22<sup>nd</sup> of August, 2000, was granted an Amortised Demand Loan of \$2.5m. By letter dated the 31<sup>st</sup> of August, 2000, UBJ advised the applicant that Finsac Ltd had agreed to purchase a part of the bank's credit portfolio and assume direct responsibility for the management of these accounts. The applicant was not in default of loan repayment to UBJ. According to Mr. Patrick Hylton the Managing Director, Finsac now intends to wind up and complete its role in rehabilitating the financial sector. To that end it was decided that the Bad Debt portfolio would be sold."

In this court as in the Full Court a declaration was sought to the effect:

"That the Memorandum of Association signed on the 29<sup>th</sup> day of January, 1997, by the First and Second Respondents, delivered to the Third Respondent for the Third Respondent to issue a Certificate of Incorporation, incorporating a company to be named Finsac Limited as No. 56, 160 be declared void, on the ground that the First and Second Respondents acted in excess of the powers conferred on them by section 93 of the Constitution and by the Jamaican Parliament under section 15 of the Financial Administration and Audit Act."

It is the refusal of the Full Court to grant this declaration that occasioned the two grounds pertaining to which, as already noted, there was a concession.

The grounds which were put forward together were:

- "1. The learned Chief Justice and trial Judges erred in law and facts in finding that the First and Second Respondents did not act ultra vires.
2. The learned Chief Justice and trial Judges erred in law in finding that the certificate of incorporation is conclusive."

In refusing to grant the declaration sought the Full Court considered section 17(1) of the Companies Act, section 15 of the Financial Administration and Audit Act, section 6(1) of the Crown Property (Vesting) Act and section 93 of the Constitution of Jamaica.

Section 17(1) of the Companies Act states:

**"17. – (1)** A certificate of incorporation given by the Registrar in respect of any association shall be conclusive evidence that all the requirements of this Act in respect of registration and of matters precedent and incidental thereto have been complied with, and that the association is a company authorized to be registered and duly registered under this Act."

**Bowman v Secular Society Ltd.** [1917] AC. 406 was referred to with approval by the three judges of the Full Court. This was a case in which the House of Lords had to consider the effect of the equivalent English provision. Lord Dunedin at page 435 said:

"The certificate of incorporation in terms of the section quoted of the Companies Act 1900 prevents anyone alleging that the company does not exist."

Once there is a certificate of incorporation an aggrieved party who seeks to challenge the existence of a company will have to have recourse to winding up proceedings. See **Princess of Reuss v. Bos.** (1871) L.R. 5 HL 176.

Section 15 of the Financial Administration and Audit Act provides as follows:

**"15. – (1) ...**

(2) The Accountant-General shall be the custodian of the Consolidated Fund and shall perform such functions as are conferred upon him by this or any other enactment.

(3) The Accountant-General shall be responsible for ensuring that –

- (a) such balances are kept in the Consolidated Fund as may be required by law and as may be necessary for the conduct of Government business;
- (b) no disbursement is made from the assets of the Consolidated Fund except in accordance with law.

(4) The Accountant-General shall submit to the Minister such statements of account on the financial position of the Consolidated Fund, at such times and in such form as the Minister may require."

The Appellant would limit the capacity of the Accountant-General only to those functions set out in this section. As such, it was submitted that the holder of that office was incapable of subscribing to any Memorandum of Association in respect of the formation of a company. This reliance is misplaced. There is section 6(1) of the Crown Property (Vesting) Act which is as follows:

**"6. – (1) The Accountant-General for the time being shall be a corporation sole by the name of the Accountant-General and shall have power to hold and dispose of land and other property of whatever kind."**

The Full Court found that the empowerment of the Accountant-General to hold property, as is given by this section, necessarily gives him the capacity to subscribe to a Memorandum of Association. This finding cannot be faulted.

Section 93 of the Constitution of Jamaica is in these terms:

**"93. –** (1) Where any Minister has been charged with the responsibility for a subject or department of government, he shall exercise general direction and control over the work relating to that subject and over that department; and, subject as aforesaid and to such direction and control, the aforesaid work and the department shall be under the supervision of a Permanent Secretary appointed in accordance with the provisions of section 126 of this Constitution.

(2) A person may be a Permanent Secretary in respect of more than one department of government.

(3) The office of Financial Secretary is hereby constituted and, for the purposes of this section, he shall be deemed to be a Permanent Secretary."

Before the Full Court it was submitted that this section so circumscribed the scope of the responsibility of the Financial Secretary as to preclude such officer from subscribing to the Memorandum of Association incorporating Finsac Limited. The duties of the Financial Secretary, it was argued, were limited to the supervision of the subject of department of government over which the minister exercised general direction and control. This submission found no favour in the Full Court.

In the view of Wolfe, C.J. at page 11:

"The Financial Secretary who is deemed to be a Permanent Secretary by virtue of section 93(3) of the Constitution and who is charged with the responsibility of supervising the work and department may perform any act which may be regarded as incidental or consequential to the statutory authority."



Algeron Smith, J. expressed himself thus:

"Section 93(3) of the Constitution establishes the office of the Financial Secretary (1<sup>st</sup> Respondent) and provides that the office holder shall be deemed to be a Permanent Secretary. Section 93(1) states that the Permanent Secretary shall supervise the work and department to which the Minister is assigned. There is nothing in this section or as far as I am aware in any other section of the Constitution or any Act which prohibits the Financial Secretary from subscribing to a Memorandum of Association under the authority of the Minister. The submission of Counsel for the applicant that the Minister of Finance cannot delegate his functions is without authority."

Gloria Smith, J. said:

"In the functioning of Government, the Minister is the person who is recognized as the policy maker. The civil servant (in this case the Financial Secretary) is the person responsible for the implementation of the policies handed down by the Political Directorate."

All the judges referred to a passage from the judgment of Lord Green

M.R. in **Carltona Ltd. v. Commissioner of Works and Others** 2 All E.R. 560

at 563:

"In the administration of government in this country the functions which are given to ministers (and constitutionally properly given to ministers because they are constitutionally responsible) are functions so multifarious that no minister could ever personally attend to them. To take the example of the present case no doubt there have been thousands of requisitions in this country by individual ministries. It cannot be supposed that this regulation meant that, in each case, the minister in person should direct his mind to the matter. The duties imposed upon ministers and the powers given to ministers are normally exercised under the authority of the ministers by responsible

officials of the department. Public business could not be carried on if that were not the case. Constitutionally, the decision of such an official is, of course, the decision of the minister. The minister is responsible. It is he who must answer before Parliament for anything that his officials have done under his authority, and, if for an important matter he selected an official of such junior standing that he could not be expected competently to perform the work, the minister would have to answer that in Parliament. The whole system of departmental organization and administration is based on the view that ministers being responsible to Parliament, will see that important duties are committed to experienced officials. If they do not do that, Parliament is the place where complaint must be made against them."

The approach and the conclusion of the Full Court, as counsel, even if somewhat belatedly recognized, was correct. Grounds 1 and 2 are entirely without merit.

Ground 4 of the appeal was couched thus –

"The learned Chief Justice and trial Judges erred in law in finding that the transfer of the Appellant's/Applicant's accounts did not breach sections 18 and 19 of the Constitution."

This was in response to the refusal of the Full Court to grant the declaration sought,

"... that the provisions of section 18 and 19 of the Constitution are being or are likely to be contravened in relation to the Applicant by the Company Finsac Ltd. incorporated by the First and Second Respondents and Refin Trust Limited incorporated by the said Finsac Limited."

Section 18 of the Constitution in so far as it is relevant states:

**"18. – (1)** No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be

compulsorily acquired except by or under the provisions of a law that –

(a) ....."

The alleged breach of section 18 can be disposed of in a peremptory manner. No property was compulsorily taken. In dealing with this aspect Wolfe, C.J. in his judgment at page 14 said:

"The Affidavit of Mario Hernandez, a director of the applicant company, discloses that in 1998, its loan portfolio with National Commercial Bank Jamaica Limited was assigned to Refin Trust Limited.

In August 2000, the applicant was also advised by Union Bank Jamaica Limited that Finsac Limited had agreed to purchase a part of its credit portfolio and would assume direct responsibility for management of those accounts. The accounts included the credit facility given by Union Bank Jamaica Limited to the applicant.

The applicant concedes that both National Commercial Bank Jamaica Limited and Union Bank Jamaica Limited were in law entitled to assign the debts.

This concession makes any complaint under section 18 of the Constitution non-meritorious. Section 18 speaks to the compulsory acquisition of property. Assignment of a debt is not the acquisition of property. In an assignment of a debt the securities guaranteeing the payment of the debt remain the property of the debtor. Only the right to be paid the debt is acquired. It is a mere substitution of creditor."

Algernon Smith and Gloria Smith, J.J. were both of similar opinions. In this regard the full court was correct.

Section 19 of the Constitution in so far as is relevant states:

**"19. (1)** Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises."

In essence, what the appellant is complaining about is that there was a breach of section 45(1) of the Banking Act which deals with the confidentiality which is to exist between a banker and its customers as regards the banking transactions of the latter. It is said that in execution of the assignment of the debt the appellant/applicant's bankers, National Commercial Bank, and Union Bank of Jamaica Limited contravened the prohibition as to confidentiality by disclosing the appellant/applicant's particulars of its account and the sending and the receipt of that information amounted to "a search". It is obvious that the legal relationship between a banker and its customers lies in contract. Accordingly if the appellant/applicant felt aggrieved by what it considers a breach of contract then a suit could be instituted to that effect. However, by some sort of legal legerdemain the appellant/applicant would seek to invoke section 19 of the Constitution. This is an inappropriate and misconceived approach. It is correct that by s.25(1) of the Constitution any person who alleges that there is a contravention or likely contravention of section 19 of the Constitution "may apply to the Supreme Court for redress".

There is section 25(2) of the Constitution which states:

**"25. (2)** The Supreme Court shall have original jurisdiction to hear and determine any applications made by any person in pursuance of subsection(1) of this section and may make such orders, issue such

writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of the said sections 14 to 24 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law."(emphasis added)

It is obvious that since this complaint issues from a contractual nexus, as stated, earlier, there was adequate means of redress in the civil law. This was the correct stance of the Full Court. See the relevant authorities cited in the judgments of the Full Court – **Harrikissoon v Attorney General of Trinidad and Tobago** [1980] A.C. 205; **Director of Public Prosecutions for Jamaica v. Fuertado** (1979) 30 W.I.R. 206 and **Jaroo v Attorney General of Trinidad**, a decision of the Judicial Committee of the Privy Council reported in the Times, February 6, 2002.

It perhaps should be noted that neither National Commercial Bank nor Union Bank of Jamaica Limited was party to this action – as they should have been since the complaint was against them. Further the respondents were all strangers to this complaint. There is no merit in this ground of appeal.