Privy Council Appeal No. 38 of 1990

Smithfield Foods Ltd. *Appellant*

v.

The Attorney General of Barbados *Respondent*

FROM

THE COURT OF APPEAL OF BARBADOS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 20TH JANUARY 1992

Present at the hearing:-

LORD TEMPLEMAN
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD LOWRY
SIR MAURICE CASEY

*[Delivered by **Lord Ackner**]*

This is an appeal by leave of the Court of Appeal of Barbados granted on 4th November 1990 from an order of that Court (Williams C.J., Husbands and Belgrave JJ.) dated 26th February 1990. By this order the Court of Appeal dismissed with costs the appellant's appeal against an order dated 8th December 1988 made by John Husbands J. in the High Court of Barbados, whereby he dismissed the appellant's application for redress under the Constitution of Barbados. In this application the appellant had alleged that its constitutional rights had been infringed by an order of the High Court dated 26th May 1987 in the case of *Smithfield Foods Limited v. Caribbean Home Insurance Limited* (1986) No. 401. This order (the "Order") stayed the action pending the provision by the appellant, who was the plaintiff in the action, of security for the costs of the defendant in that action.

The facts can be stated quite shortly. At all material times the appellant carried on business in Bridgetown, Barbados in foodstuffs, including in particular refrigerated food, which the appellant kept in cold storage facilities on its premises. In May 1985 the appellant had effected with the Caribbean Home Insurance Company Limited ("the insurance company") a policy of insurance in respect, *inter alia*, of its stock, against loss or damage caused by change of temperature

resulting from the total or partial disablement of the refrigerating plant by any of the perils insured against.

In November 1985 the appellant suffered the loss of a quantity of langoustine, which loss, it maintained, was covered by the terms of this insurance. The insurance company repudiated liability, and on 8th April 1986 the appellant issued a writ endorsed with a statement of claim in order to enforce recovery under the policy. The defence was in due course entered and the action was fixed for hearing in the High Court for 3rd and 4th June 1987. On 16th May 1987 the insurance company applied by summons to stay the proceedings until security for costs was given by the appellant, on the ground that the appellant was in serious financial difficulties and would therefore be unable to pay the defendant's costs if the appellant failed in its claim. By an order dated 26th May 1987 Rocheford J. ordered the appellant to provide security for the costs of the defendant in the amount determined by the Registrar and ordered that, in the meantime, all proceedings in the action should be stayed until the amount of such security be paid into court. On 3rd June 1987 the amount of security for costs was fixed by the Registrar in the sum of $20,000.00.

Rocheford J. did not provide any reasons for his decision. This would be in no way surprising if the hearing of the summons proceeded on the basis that the judge had jurisdiction to make the order he did, the issue then being solely, whether in the exercise of his discretion he should make such an order. Until 1st January 1985 the hearing of such summons would have proceeded on that basis. Section 225 of the Companies Act in force in Barbados provided that a company which was a plaintiff in an action, might be ordered to provide security for the costs of the defendant to the action if there was reason to believe that the company would be unable to pay the costs of the defendant if the defence was successful. However this provision was repealed on 1st January 1985 and accordingly it is common ground that Rocheford J. had no statutory power to make the order he did.

It is nowhere apparent in their Lordships' papers, either by reference to the subsequent proceedings in the High Court or in the Court of Appeal, whether or not Rocheford J. was told that he lacked the statutory power to make the order. Nor does the appellant's case shed any light on this issue. Indeed, until Dr. Ramsahoye, appearing for the appellant, opened the appeal, their Lordships were under the impression that Rocheford J. had proceeded on the basis that section 225 was still in existence. However, their Lordships were informed that the learned judge and the advocates appearing before him were all fully aware of the demise of this section. The judge, so their Lordships were informed, had made the order on the basis that he was

of the opinion that he had inherent jurisdiction so to do. Their Lordships are bound to say that they find such a proposition surprising since, if such jurisdiction existed, the enactment and the subsequent repeal of section 225 of the Companies Act would appear each to have been a pointless operation.

It is common ground that, subject to obtaining the leave of Rocheford J. or in the event of his refusal, the leave of the Court of Appeal, the appellant was entitled to appeal the order. True enough, it is also common ground that the Court of Appeal may, in special circumstances, order security to be given for the costs of an appeal. However, it would seem to their Lordships highly improbable, where the jurisdiction of the judge to make the order the subject matter of the appeal was in issue, that security would be ordered or, if ordered, it would have been in a sum that the appellant could not have afforded. It would certainly have been a far smaller sum than the sum ordered and provided by the appellant in order to bring this appeal before their Lordships.

The appellant did not appeal Rocheford J.'s order. Instead, by Notice of Motion dated 26th June 1987, the appellant sought a declaration that the order of Rocheford J. was a contravention by the judicial arm of the state of sections 11(c) and 18(8) of the Constitution of Barbados, and also an order that the said order be set aside together with damages and/or compensation. The Attorney General of Barbados was made a respondent to the application and the proceedings against the insurance company were, to use an idiom closely associated with the action, put into cold storage where they have remained ever since.

Section 24(1) of the Constitution provides that:-

> "... if any person alleges that any of the provisions of sections 12 to 23 has been ... contravened ..., then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress."

The section which it is alleged has been contravened is essentially section 18(8) which provides:-

> "Any Court or other tribunal prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such court or other tribunal, the case shall be given a fair hearing within a reasonable time."

The appellant's complaint is that, as a result of the order which Rocheford J. had no jurisdiction to make,

it is and remains unable to achieve a hearing of it's action. There is however a proviso to section 24(2) which is in these terms:-

> "Provided that the High Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."

It is the respondent's contention, which has been accepted both by Husbands J. and the Court of Appeal, that the wrong which the appellant contends it has suffered as a result of the order for security of costs, could have been put right by the exercise of its rights of appeal to the Court of Appeal. Thus adequate means of redress have been available to the appellant. It is apparent from the leading judgment of the Court of Appeal, given by Williams C.J., that the reasons given to that court why the appellant "did not follow the normal system of appeals laid down for the adjudication of disputes" was "that appeal to the Court of Appeal was by leave and the Court could require security to be given for costs of appeal". But it cannot lie in the mouth of the appellant to say that, although a successful appeal would provide "adequate means of redress", it might not have been given leave to appeal, or it might have been ordered to give security for the costs of such an appeal which was beyond it's resources. It must first seek to avail itself of the means of redress before it can be in a position to contend, if at all, that the means are inadequate. It is also apparent from the judgment of the Court of Appeal that they were quite unable to accept that the appellant was entitled to assume that if it had applied for leave, it would not have been granted, or granted on terms with which it could not comply.

Before their Lordships it was contended that the error of Rocheford J. in making the order he did, provided the appellant with a claim for compensation against the state, a claim which, it was accepted, could not lie against the insurance company. It was therefore said that to follow the ordinary course of appealing the order could not provide "adequate means of redress". All that could be obtained as a result of the delay caused by the stay of the proceedings, and then only on the assumption that the appellant ultimately won the action, was interest on the sum recovered. In their Lordships' judgment the claim against the state for compensation for damages of some wholly unspecified kind alleged to have been caused by a judicial error, is wholly misconceived. No such claim exists.

Their Lordships are in full agreement with the High Court and the Court of Appeal that the proviso to section 24(2) of the Constitution is designed, *inter alia*, to remove from the ambit of the section, cases in

which relief by way of an appeal to a higher court is available. Their Lordships will accordingly humbly advise Her Majesty that the appeal ought to be dismissed. The appellant must pay the respondent's costs.